WORLD TRADE ORGANIZATION

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UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CERTAIN STEEL PRODUCTS

AB-2003-3

Report of the Appellate Body

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation of Case
US – Steel Safeguards	*Unites States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, 11 July 2003
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
India – Quantitative Restrictions	Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3

Short Title	Full Case Title and Citation of Case
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – Fur Felt Hats	Working Party Report, *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, adopted 22 October 1951, GATT/CP/106.
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Line Pipe	Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body Report, WT/DS202/AB/R
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001

TABLE OF ABBREVIATIONS IN THIS REPORT

"AUV"	average unit value
"CCFRS"	certain carbon flat-rolled steel
"COGS"	cost of goods sold
"cold-finished bar"	carbon and alloy cold-finished bar
"FFTJ"	carbon and alloy fittings, flanges and tool joints
"FTA"	free-trade area
"GSP"	Generalised System of Preferences
"hot-rolled bar"	carbon and alloy hot-rolled bar and light shapes
"NAFTA"	North American Free Trade Agreement
"Proclamation"	Proclamation 7529 of 5 March 2002 - To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products, United States Federal Register, 7 March 2002 (Volume 67, Number 45). (Exhibit CC-13 submitted by the Complaining Parties to the Panel)
"rebar"	carbon and alloy rebar
"welded pipe"	carbon and alloy welded pipe, other than oil country tubular goods (OCTG)
the "*Anti-Dumping Agreement*"	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
the "Complaining Parties"	Brazil, China, the European Communities, Japan, Korea, New Zealand, Norway, and Switzerland
the "DSB"	Dispute Settlement Body
the "DSU"	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
the "GATT 1994"	*General Agreement on Tariffs and Trade 1994*
the "Panel Reports"	Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*
the "USITC"	United States International Trade Commission

the "USTR"	United States Trade Representative
the "*Working Procedures*"	*Working Procedures for Appellate Review*
the "*WTO Agreement*"	*Marrakesh Agreement Establishing the World Trade Organization*
the "WTO"	World Trade Organization
"tin mill products"	carbon and alloy tin mill products
"USITC Report, Vol. I"	USITC, Certain Steel Products, Inv. No. TA-201-73, USITC Pub. 3479 (Dec. 2001): Volume I – Determinations and Views of the Commissioners. (Exhibit CC-6 submitted by the Complaining Parties to the Panel)
"USITC Second Supplementary Report"	USITC supplementary information on unforeseen developments and injury determination for imports from all sources other than Canada and/or Mexico, 4 February 2002. (Exhibit CC-11 submitted by the Complaining Parties to the Panel)

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

United States, *Appellant/Appellee*
Brazil, *Appellant/Appellee*
China, *Appellant/Appellee*
European Communities, *Appellant/Appellee*
Japan, *Appellant/Appellee*
Korea, *Appellant/Appellee*
New Zealand, *Appellant/Appellee*
Norway, *Appellant/Appellee*
Switzerland, *Appellant/Appellee*

Canada, *Third Participant*
Cuba, *Third Participant*
Mexico, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Third Participant*
Thailand, *Third Participant*
Turkey, *Third Participant*
Venezuela, *Third Participant*

AB-2003-3

Present:

Bacchus, Presiding Member
Abi-Saab, Member
Lockhart, Member

I. Introduction

1. The United States appeals certain issues of law and legal interpretations developed in the Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (the "Panel Reports").[1]

2. The Panel was established by the DSB on 3 June 2002, pursuant to a request by the European Communities, to examine the consistency of ten safeguard measures applied by the United States on

[1]WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R and Corr.1, 11 July 2003. China, the European Communities, New Zealand, Norway, Switzerland, as well as Brazil, Japan and Korea acting jointly, submit conditional appeals on certain issues not addressed by the Panel.

20 March 2002 on imports of certain steel products.[2] On 14 June 2002, pursuant to Article 9.1 of the DSU, the DSB referred to the Panel complaints on the same matter brought by Japan and Korea. On 24 June 2002, the DSB, pursuant to Article 9.1 of the DSU, also referred to this single Panel complaints on the same matter submitted by China, Norway, and Switzerland. On 8 July 2002, the DSB, pursuant to Article 9.1 of the DSU, also referred to this single Panel a complaint on the same matter submitted by New Zealand. On 29 July 2002, the DSB, pursuant to Article 9.1 of the DSU, also referred to this single Panel a complaint on the same matter submitted by Brazil.

3. In their requests for the establishment of a panel, the Complaining Parties claimed that the ten safeguard measures applied by the United States on imports of certain steel products were inconsistent with the obligations of the United States contained in Articles 2, 3, 4, 5, 7, 8, 9, and 12 of the *Agreement on Safeguards*, Articles I, II, X, XIII, and XIX of the GATT 1994, as well as Article XVI of the *WTO Agreement*.[3]

4. The Panel issued eight Panel Reports—in the form of one document—that were circulated to the Members of the WTO on 11 July 2003. The Panel concluded, in all of the Panel Reports, that all ten safeguard measures imposed by the United States were inconsistent with the *Agreement on Safeguards* and the GATT 1994.

5. In particular, the Panel found that:

(a) the application of safeguard measures by the United States on imports of CCFRS, hot-rolled bar, and stainless steel rod was inconsistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to 'increased imports'"[4];

(b) the application of safeguard measures by the United States on imports of CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar was inconsistent with Articles 2.1, 3.1, and 4.2(b) of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation that

[2]Safeguard measures were applied on imports of CCFRS; tin mill products; hot-rolled bar; cold-finished bar; rebar; welded pipe; FFTJ; stainless steel bar; stainless steel rod; and stainless steel wire.

[3]Panel Reports, paras. 3.1–3.8.

[4]*Ibid*., para. 11.2.

a 'causal link' existed between any increased imports and serious injury to the relevant domestic producers"[5];

(c) the application of safeguard measures by the United States on imports of tin mill products and stainless steel wire was inconsistent with Articles 2.1, 3.1, and 4.2(b) of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determinations with respect to 'increased imports'" and the existence of a "causal link" between any increased imports and serious injury, "since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance"[6]; and

(d) the application of safeguard measures by the United States on imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire was inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, because "the United States failed to comply with the requirement of 'parallelism' between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure".[7]

6. In addition, the Panel concluded, in the Panel Reports concerning the complaints of China, the European Communities, New Zealand, Norway, and Switzerland, that:

> the application of safeguard measures by the United States on imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire was inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation demonstrating that 'unforeseen developments' had resulted in increased imports causing serious injury to the relevant domestic producers".[8]

[5]Panel Reports, para. 11.2.

[6]*Ibid.*

[7]*Ibid.*

[8]*Ibid.*

7. The Panel concluded that, to the extent that the United States had acted inconsistently with the provisions of the *Agreement on Safeguards* and the GATT 1994 set out above, it had nullified or impaired the benefits accruing to the Complaining Parties under the *Agreement on Safeguards* and the GATT 1994.[9] The Panel recommended that the DSB request the United States to bring all the safeguard measures into conformity with its obligations under the *Agreement on Safeguards* and the GATT 1994.[10]

8. On 11 August 2003, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures*.[11] On 21 August 2003, the United States filed its appellant's submission.[12] On 26 August 2003, China, the European Communities, New Zealand, Norway, and Switzerland each filed an other appellant's submission.[13] Further, on the same day, Brazil, Japan and Korea filed a joint other appellants' submission.[14] On 5 September 2003, Brazil, China, the European Communities, Japan, Korea, New Zealand, Norway, Switzerland, and the United States each filed an appellee's submission.[15] On the same day, Canada filed a third participant's submission.[16] Cuba, Mexico, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Thailand, Turkey, and Venezuela notified the Appellate Body of their intention to appear at the oral hearing as third participants.[17]

9. On 16 September 2003, the Appellate Body received an *amicus curiae* brief from the American Institute for International Steel. The European Communities, in a letter dated 23 September 2003, requested the Appellate Body to inform the parties whether the Appellate Body intended to accept and take account of the *amicus curiae* brief. In a letter dated 24 September 2003, Brazil requested that the *amicus curiae* brief be disregarded.

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[9]Panel Reports, para. 11.3.

[10]*Ibid*., para. 11.4.

[11]WT/DS248/17, WT/DS249/11, WT/DS251/12, WT/DS252/10, WT/DS/253/10, WT/DS254/10, WT/DS258/14, WT/DS259/13, 14 August 2003, attached as Annex 1 to this Report.

[12]Pursuant to Rule 21(1) of the *Working Procedures*.

[13]Pursuant to Rule 23(1) of the *Working Procedures*.

[14]*Ibid.*

[15]Pursuant to Rules 22(1) and 23(3) of the *Working Procedures*.

[16]Pursuant to Rule 24(1) of the *Working Procedures*.

[17]Pursuant to Rule 24(2) of the *Working Procedures*.

10. The Appellate Body responded to the requests of the European Communities and Brazil on 24 September 2003, stating that a determination on whether it would accept the brief or take account of it would be made after the Division had considered all submissions to be made by the participants in this appeal, including submissions to be made at the oral hearing.[18]

11. The oral hearing was held on 29 and 30 September 2003.[19] The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Appellate Body Division hearing the appeal.

II. Factual Background

12. On 28 June 2001, the USITC initiated a safeguard investigation at the request of the USTR, in order to determine whether certain steel products were being imported into the United States in such increased quantities as to cause or threaten to cause serious injury to the domestic industry producing like or directly competitive products.[20] Pursuant to this investigation, the USITC made affirmative determinations of serious injury to the domestic industry with respect to imports of: CCFRS; hot-rolled bar; cold-finished bar; rebar; FFTJ; stainless steel bar; stainless steel rod; and a determination of threat of serious injury with respect to imports of welded pipe.[21] The USITC made divided determinations with respect to tin mill products; stainless steel wire; stainless steel fittings and flanges; and tool steel.[22] The USITC recommended that tariffs and tariff-rate quotas be imposed for the products for which it made affirmative determinations.[23] Subsequently, following a request from the USTR, the USITC issued supplementary information on the economic analysis of remedy options[24], on unforeseen developments, and an injury determination for imports from all sources other than Canada and Mexico.[25]

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[18]Letter dated 24 September 2003, from the Director of the Appellate Body Secretariat to the Ambassadors of the Permanent Mission of Brazil and the Permanent Delegation of the European Communities.

[19]Pursuant to Rule 27 of the *Working Procedures*.

[20]USITC, Investigation No. TA-201-73, Institution and Scheduling of an Investigation under Section 202 of the Trade Act of 1974, United States Federal Register, 3 July 2001 (Volume 66, Number 128), pp. 35267-35268. (Exhibit CC-2 submitted by the Complaining Parties to the Panel)

[21]USITC Report, Vol. I, p. 1 and footnote 1 thereto.

[22]*Ibid*.

[23]*Ibid*., pp. 2 and 3.

[24]USITC supplementary information on the economic analysis of remedy options, 9 January 2002. (Exhibit CC-10 submitted by the Complaining Parties to the Panel)

[25]USITC Second Supplementary Report.

13. Based on the USITC determination, the President of the United States imposed definitive safeguard measures on imports of certain steel products pursuant to Proclamation 7529 of 5 March 2002. The Proclamation imposed tariffs ranging from 30 percent to 8 percent on imports of certain carbon flat-rolled steel, hot-rolled bar, cold-finished bar, rebar, welded pipe, fittings, flanges and tool joints, stainless steel bar, stainless steel rod, tin mill products, and stainless steel wire.[26] The products subject to these safeguard measures were products for which the USITC had made affirmative determinations; with respect to tin mill products and stainless steel wire, for which the USITC had made divided determinations, the President decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to each of these products to be the determination of the USITC.[27] Imports from Canada, Israel, Jordan, and Mexico were excluded from the application of the measures.[28] The measures were imposed for a period of three years and one day[29], and became effective on 20 March 2002.[30]

III. Arguments of the Participants and the Third Participants

A. *Claims of Error by the United States – Appellant*

1. Unforeseen Developments, Article 3.1 of the *Agreement on Safeguards*, and Article 12.7 of the DSU

14. The United States requests that the Appellate Body reverse the Panel's findings that the USITC failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic industry.

15. According to the United States, in articulating the applicable standard of review, the Panel mistakenly reflected concerns relevant to Article 4.2 of the *Agreement on Safeguards*, and disregarded concerns relevant to the requirement of unforeseen developments, under Article XIX:1(a)

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[26]Proclamation, paras. 7 and 9. For a more detailed listing of the specific measures imposed, see Panel Reports, para. 1.34.

[27]*Ibid.*, para. 4.

[28]*Ibid.*, para. 11. Imports from developing Members of the WTO, whose shares of total imports were found not to exceed three percent individually, and nine percent collectively, were also exempted from the application of the measures. *Ibid*., para. 12. In addition, the USTR was authorized to exclude particular products pursuant to the procedure set out in the Proclamation. *Ibid.*, clauses (5) and (6). For information on the product specific exclusions granted until 22 August 2002, see Panel Reports, paras. 1.40–1.47.

[29]*Ibid.*, para. 9(b).

[30]*Ibid.*, clause (8).

of the GATT 1994. The United States submits that the appropriate standard of review is "not one derived from Article 4.2, but from Article XIX:1(a)".[31] According to the United States, "Article 4.2 indicates factors the competent authorities must evaluate and outlines the causation analysis. In contrast … 'Article XIX provides no express guidance' on when, where or how that demonstration [of unforeseen developments] should occur."[32] In response to questioning at the oral hearing, the United States clarified that it was not requesting a specific ruling from the Appellate Body under Article 11 of the DSU in respect of the Panel's findings on unforeseen developments.

16. The United States takes issue with the statement of the Panel that "[t]he timing of the explanation [relating to unforeseen developments], its extent and its quality are all factors that can affect whether [that] explanation is reasoned and adequate."[33] According to the United States, there is no basis in the *Agreement on Safeguards* for finding that "timing" and/or "extent" are relevant to determining whether the competent authorities' explanations are reasoned and adequate.[34] With regard to the term "explanation" and the term "adequate", the United States submits that because the *Agreement on Safeguards* does not explicitly require an "explanation" and does not employ the term "adequate", those terms can only be understood as a shorthand for the obligations that are in the Agreement. Those obligations are that the published report contain "reasoned conclusions" on "all pertinent issues" and "a detailed analysis of the case", including "a demonstration of the relevance of the factors examined".[35] The United States stresses that "the key consideration [under Article 3.1] is whether the authorities present a logical basis for their conclusion."[36]

17. The United States refers to the finding of the Appellate Body in *US - Line Pipe* which states that "to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports."[37] As it did for the terms "explanation" and "adequate", the United States emphasizes that the term "explicit" does not appear in the *Agreement on Safeguards*. As the *Agreement on Safeguards* "does not expressly require that the competent

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[31]United States' appellant's submission, para. 79.

[32]*Ibid.*

[33]The United States refers in paragraph 10 of its appellant's submission to paragraph 10.115 of the Panel Reports.

[34]United States' appellant's submission, para. 58.

[35]*Ibid.*, para. 59 and footnote 29 to para. 62, referring to the obligations set out in Articles 3.1 and 4.2(c) of the *Agreement on Safeguards.*

[36]United States' appellant's submission, para. 60.

[37]*Ibid.*, para. 63, referring to Appellate Body Report, *US – Line Pipe*, para. 217.

authorities' determination, findings, or conclusions be 'explicit,' that term can only be understood as a shorthand for the obligations that *are* in the Agreement – that the published report contain 'reasoned conclusions' on 'all pertinent issues' and 'a detailed analysis of the case,' including 'a demonstration of the relevance of the factors examined.'"[38]

18. The United States submits that, because "the Panel based many of its findings against the United States on its conclusions that the USITC report failed to provide a 'reasoned and adequate explanation' of certain findings"[39], it follows that there can only be a violation of Article 3.1 and not of Articles 2 and 4 of the *Agreement on Safeguards*. The United States argues that a failure to explain a finding does not automatically prove that the USITC had not performed the analysis necessary to make the finding.[40]

19. The United States contends that the Panel concluded that the USITC failed to distinguish the impact the alleged unforeseen developments had on the different product categories subject to the various safeguard measures. According to the United States, this conclusion of the Panel reflects two misconceptions. First, Article XIX of the GATT 1994 does not specify a particular type of analysis to demonstrate unforeseen developments, nor does it require the competent authorities to differentiate their respective impact on particular imports. Second, the Panel did not point to any facts suggesting that the USITC's general conclusions as to unforeseen developments were in any way unrepresentative of the specific steel industries and imports covered by the various measures. In addition, the United States contends that the Panel erred by requiring that the impact of various unforeseen developments be differentiated with respect to the individual industries, and even economies, of other countries.

20. The United States also argues that the Panel erred in finding that data and analysis contained in the USITC report, but outside the section of the report addressing unforeseen developments, were not relevant to an evaluation of the USITC's findings on unforeseen developments. Although the Panel, according to the United States, asserted that the USITC provided no data to support a conclusion that imports increased in the wake of the unforeseen developments, it nevertheless recognized that the USITC report cited to data tables showing imports into the United States for each country and for each product over the entire period of investigation. In the United States' view, the

[38]United States' appellant's submission, para. 64.

[39]*Ibid*., para. 73.

[40]*Ibid*., para. 74.

Panel was "required"[41] to consider this information. According to the United States, in *EC – Tube or Pipe Fittings*, the fact that the investigating authority had failed to mention one of the factors specifically listed in the *Anti-Dumping Agreement* did not prevent the Appellate Body from finding, after a close reading of the investigating authority's report, that the investigating authority had in fact considered the enumerated factor.[42]

21. The United States also contends that in some instances the Panel acted inconsistently with Article 12.7 of the DSU by failing to undertake the requisite analysis and failing to articulate why it considered that the USITC did not provide the requisite reasoned conclusions.[43] The United States submits that the Panel cited no evidence that contradicted the USITC's conclusions, did not find an explanation alternative to the one provided by the USITC, and failed to set forth explanations and reasons sufficient to justify its findings and recommendations.

2. Increased Imports

(a) General

22. The United States requests the Appellate Body to reverse the Panel's findings regarding increased imports with respect to the product categories CCFRS, tin mill products, hot-rolled bar, stainless steel wire and stainless steel rod.

23. The United States contends that the Panel's finding that a determination of increased imports can be made only when there is a "certain degree of recentness, suddenness, sharpness and significance" cannot be justified by the *Agreement on Safeguards* or Article XIX of the GATT 1994.[44] According to the United States, the phrase "in such increased quantities" "simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of the period of investigation must be higher than at some unspecified earlier point in time."[45] The United States submits that the text of Article 2.1 of the *Agreement on Safeguards* can support only an interpretation that an increase in imports must be "recent" in the sense of the ability of imports to cause or threaten to cause serious injury.

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[41]United States' appellant's submission, para. 92.

[42]*Ibid.*, para. 93, referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 161–163.

[43]In response to questioning at the oral hearing, the United States clarified that it was seeking a specific ruling on Article 12.7 of the DSU only with respect to the Panel's findings on "unforeseen developments".

[44]United States' appellant's submission, para. 100, referring to Panel Reports, para. 10.167.

[45]United States' appellant's submission, para. 102.

24. With regard to the requirement that the increase in imports must be "sudden", the United States notes that the Panel based this requirement on the reference to "unforeseen developments" in Article XIX of the GATT 1994. The United States contends that the Panel read into Article XIX a requirement that it does not contain, thus violating customary rules of treaty interpretation. The United States further argues that the "suddenness" requirement is in opposition with the manner in which serious injury often occurs. The United States finds support for this argument in the Appellate Body's observation in *US – Line Pipe* that "[s]erious injury does not generally occur suddenly".[46]

25. The United States submits that the Appellate Body's finding in *Argentina – Footwear (EC)* referred to by the Panel stands for the proposition that the "attributes of recentness, suddenness, sharpness and significance are inexorably linked to the ability of imports to cause or threaten to cause serious injury".[47] In the United States' view, because Article 2.1 of the *Agreement on Safeguards* encompasses the entire investigative authority of the competent authority, the issue of whether the increase was recent, sudden, sharp and significant enough should be considered as competent authorities proceed with the remainder of their investigation, that is, with their consideration of serious injury or threat of serious injury.

(b) Specific Arguments with respect to CCFRS

26. The United States maintains that the Panel erred in finding that the USITC did not provide a reasoned and adequate explanation of increased imports because it did not account for the decrease in imports from interim 2000 to interim 2001. The United States argues that there is no provision in the WTO Agreements requiring the USITC to address interim 2001 imports as part of its increased imports analysis, or to give the change in the levels of imports between interim periods dispositive weight. The Panel also erred in finding that the increase in imports until 1998 was no longer recent enough at the time of the determination to support a finding of increased imports. In the United States' view, the Panel failed to consider that the effects of the 1998 import surge were still occurring at the time of the determination and that the imports remained at significantly higher levels in 1999 and 2000 than in 1996.

[46]United States' appellant's submission, para. 105, referring to Appellate Body Report, *US – Line Pipe*, para. 168.

[47]United States' appellant's submission, para. 24.

(c) Specific Arguments with respect to Hot-Rolled Bar

27. The United States contends that the Panel erred in finding that this requirement was not met. According to the United States, the Panel focused almost exclusively on the decrease in imports in interim 2001, while improperly disregarding the increases in imports over the five preceding years of the investigation.

(d) Specific Arguments with respect to Stainless Steel Rod

28. The United States argues that the Panel erred in finding that the increased imports requirement was not met for stainless steel rod. According to the United States, the Panel placed too much weight on the decline in import volumes in interim 2001, and improperly rejected the USITC's analysis of this decline. The United States argues that the USITC acknowledged the decrease in imports in interim 2001, but explained that, despite this decrease, the market share of imports remained essentially stable in interim 2001. Thus, the United States argues that the USITC was correct in concluding that the decline in imports in interim 2001 was not so significant as to outweigh the increases of the previous years.

(e) Specific Arguments with respect to Tin Mill Products and Stainless Steel Wire[48]

29. The United States argues that the Panel erred in asserting that there is an inconsistency in the increased imports findings of those Commissioners who defined the like product in different ways. The United States argues that it is not necessary to reconcile the increased imports findings of each Commissioner or group of Commissioners. The United States also argues that there is "nothing intrinsically irreconcilable" about findings based on different product groupings and that the findings of the three Commissioners under each determination are not "mutually exclusive".[49] The United States contends that the issue of whether the USITC satisfied the increased imports requirement should be addressed by examining separately the findings of the individual Commissioners. In the United States' view, had the Panel done so, it would have found that each Commissioner separately satisfied the conditions of Article 2.1.

[48]The United States notes that the Panel cross-referenced its conclusions with respect to the increased imports requirement for tin mill products in its analysis of causation for both tin mill products and stainless steel wire. United States' appellant's submission, para. 46.

[49]United States' appellant's submission, paras. 372 and 374.

30. In the United States' view, neither the text of Articles 2.1 and 3.1, nor the object and purpose of the *Agreement on Safeguards*, supports the Panel's interpretation of a requirement of uniform like product definition among Commissioners making affirmative determinations. In addition, according to the United States, the Appellate Body Report in *US – Line Pipe* supports the USITC's practice of aggregating mixed votes of individual Commissioners. Finally, the United States argues that, by construing the *Agreement on Safeguards* to require uniformity in the like product definition by a multi-member competent authority, the Panel is infringing unnecessarily upon the manner in which a Member may structure the decision-making process of its competent authority.

3. Parallelism

31. The United States requests that the Appellate Body reverse the Panel's findings that the United States' safeguard measures are inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, because the United States did not, with respect to any of the product categories at issue, establish explicitly that imports from the sources included in the relevant safeguard measures satisfied, alone, the conditions for the application of a safeguard measure.

32. The United States argues that the Panel based its product-specific analysis on two general conclusions. First, the United States argues, the Panel rejected nine of the ten safeguard measures on the grounds that the USITC had failed to account for the effects of imports from excluded sources. The United States acknowledges that the Appellate Body has stated that parallelism requires authorities to focus separately on imports from sources that are not excluded from the safeguard measure. However, the United States argues that the Appellate Body has not set conditions on *how* an authority must conduct its parallelism analysis. According to the United States, the Panel required a separate analysis of imports from those sources not subject to the safeguards measure, a requirement without a textual basis in the *Agreement on Safeguards*.

33. Second, the United States contends that the Panel incorrectly interpreted the requirement that the competent authorities must establish "explicitly" that imports covered by the measure satisfy the conditions for the application of the measure. The United States points to what it considers to be low import levels from Israel and Jordan, as well as to the USITC's finding that "exclusion of imports from Israel and Jordan would not change the conclusion of the Commission or of individual Commissioners."[50] The United States believes that, in the context in which this statement appears, its meaning was that imports from Israel and Jordan were either non-existent or so small that the

[50]United States' appellant's submission, para. 338.

Commission's conclusions for imports from sources other than Canada and Mexico were also applicable to imports from sources other than Canada, Mexico, Israel, and Jordan. In the view of the United States, the Panel required that the USITC repeat its findings on non-NAFTA imports "word for word in a section specifically addressing non-FTA imports"[51]. In the United States' view, there is no basis in the *Agreement on Safeguards* for requiring an authority to make redundant or unnecessary findings.

34. The United States further contends that if the Appellate Body reverses the Panel's findings, the Appellate Body will not be able to complete the analysis, because there is insufficient factual basis in the Panel Reports. The United States argues that should the Appellate Body nevertheless decide to complete this analysis, it should find that the USITC's parallelism analysis was in compliance with Article 2.1 of the *Agreement on Safeguards*.

4. Causation

(a) General

35. The United States requests the Appellate Body to reverse the Panel's finding on causation for CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, and stainless steel wire. As a general matter, the United States emphasizes that, as recognized by the Panel, there is nothing in the "substantial cause" test applied by the USITC that would necessarily mean that the WTO obligation to separate and distinguish the effects of other causes of injury on the state of the industry cannot be fulfilled.

36. The United States next submits that the Panel incorrectly concluded that Article 4.2(b) requires the competent authorities to perform a collective assessment of the injurious effects of other factors. The United States argues that this interpretation is inconsistent with the text of Article 4.2(b) and with the Appellate Body's findings under the *Agreement on Safeguards* as well as in *EC – Tube or Pipe Fittings*; moreover, the United States argues that a collective analysis of the effects of "other" factors is not any more accurate than an individual analysis. A competent authority is furthermore, in the United States' view, not bound to assess whether the effects of all "other" factors "outweigh" the effects of imports.[52]

[51]United States' appellant's submission, para. 343.

[52]*Ibid*., para. 173.

(b) Specific Arguments with respect to CCFRS

37. The United States disagrees with the Panel's finding that the USITC did not establish a "coincidence in trends" between increases in imports and declines in the industry's condition. The Panel conducted an impermissible *de novo* review by not addressing the USITC's reasoned conclusions and instead "prepar[ing] its own data set"[53] so as to assess whether a coincidence of trends existed. This analysis of the Panel, moreover, did not address certain other factors which, according to the United States, "clearly had a bearing on the situation of the CCFRS industry [ ]."[54]

38. The United States further contends that the Panel misunderstood the USITC's underselling analysis. The fact that the USITC did not specifically discuss the price comparisons for the other constituent items of CCFRS does not mean that the USITC was "conveniently selective"[55] and failed to evaluate the data for these items. The Panel also incorrectly characterized the USITC's AUV analysis.

39. The United States disputes the Panel's finding that the USITC's definition of the CCFRS product category was so broad that it prevented the USITC from properly performing its pricing analysis. The United States relies on the panel report in *Argentina – Footwear (EC)*, as well as on the Appellate Body Report in *US – Lamb*, to argue that, when reviewing an authority's causation findings, a panel must assume that the authorities' findings on the definition of "like product" and "domestic industry" were proper.

40. The United States also submits that the USITC adequately distinguished the injurious effects of demand declines from those of imports. In the United States' view, the Panel appears to erroneously require a valid non-attribution analysis for "each and every moment" during the period of investigation.[56] The USITC, according to the United States, adequately distinguished the effects of capacity increases, as well as of the effects of minimill competition; the USITC reasonably concluded that there was no change in the minimills' relative cost advantage that would have caused them to drive prices down and, therefore, correctly rejected the cost advantage as a significant factor in domestic price decline. Finally, the United States argues that the USITC evaluated whether legacy costs had increased the industry's costs and correctly noted that the industry's legacy costs predated

[53]United States' appellant's submission, para. 187.

[54]*Ibid*., para. 192.

[55]United States' appellant's submission, para. 202, referring to the Panel Reports, para. 10.379.

[56]United States' appellant's submission, para. 227.

the period of investigation. The USITC, therefore, did not find that legacy costs were a source of injury during the period of investigation.

(c) Specific Arguments with respect to Hot-Rolled Bar

41. The United States argues that the Panel erred in rejecting the USITC's finding—that increases in the industry's COGS had not been a source of serious injury to the industry during the period of investigation—as not being reasoned and adequate. The USITC evaluated all the record evidence and correctly concluded that the evidence showed that COGS increases in 2000 were not a cause of injury to the industry. In the United States' view, the Panel's conclusion is based on the mistaken assumption that the USITC did not examine whether the industry's profitability and pricing declines coincided with increases in its costs.

(d) Specific Arguments with respect to Cold-Finished Bar

42. The United States contends that the Panel erred in rejecting the USITC's finding that aggressive underselling by imports caused the industry to lose market share in 2000 and 2001 and to suffer corresponding declines in its production, shipment, and sales revenue levels. In the United States' view, the Panel failed to recognize that the declines in 2000 and 2001 were caused by separate events, namely demand declines in 1999, and a surge in import volume in 2000.

43. Furthermore, the United States argues that the Panel mistakenly rejected the USITC's finding of aggressive underselling by imports in 1999 and 2000 because of the USITC's reliance on quarterly price comparison data, rather than annual AUV data. The Panel's findings are an improper attempt to question the USITC's choice of methodology. Further, the USITC, contrary to the Panel's finding, separated and distinguished the effects of demand declines from those of imports by examining whether the industry's profitability and revenue declines correlated with demand declines during 1999 and 2000.

(e) Specific Arguments with respect to Rebar

44. The United States argues that the USITC adequately distinguished the injurious effects of changes in the industry's COGS. Contrary to the Panel's findings, the USITC provided a detailed and reasoned assessment of the manner in which changes in the industry's costs had an impact on the industry's price and profitability levels in 1999 and 2000. Moreover, the United States submits, the USITC's analysis showed clearly that rising input costs were not a cause of injury to the industry.

(f) Specific Arguments with respect to Welded Pipe

45. In the United States' view, the USITC was not obliged to distinguish and separate the effects of the industry's capacity increases because the USITC found that the effects of these increases were minimal. According to the United States, the Appellate Body findings in *EC – Tube or Pipe Fittings* support the view that a competent authority is not required to distinguish the effects of an "other" factor if that factor is found to contribute to injury in a "minimal", "minor" or "not significant" way. The USITC, furthermore, adequately explained why it found the allegedly "aberrant" performance of one member of the welded pipe industry not to be a source of injury for the industry during the period. According to the United States, Article 4.2(b) does not preclude a competent authority from making "subjective" judgements about the meaning of that evidence or from describing its assessment of that evidence in a "subjective" way.

(g) Specific Arguments with respect to FFTJ

46. The United States submits that the USITC bore no obligation to assess the nature and extent of capacity increases on the industry because the USITC found that capacity increases by the FFTJ industry would not place substantial pressure on domestic prices. The United States relies on the Appellate Body Report in *EC – Tube or Pipe Fittings* in arguing that an authority need not "separate and distinguish" the effects of an "other" known factor, if the factor contributes only "minimally" to the injury being suffered by an industry.[57] With respect to the factor "purchaser consolidation", the United States submits that the USITC properly assessed the nature and extent of any injury caused by this factor by correctly noting that the serious injury was associated with factors not directly affected by declines in price.

(h) Specific Arguments with respect to Stainless Steel Bar

47. The United States argues that the USITC adequately distinguished the injurious effects of late period demand declines by evaluating whether declines in the industry's condition correlated more closely with imports than demand declines during the period. The USITC thereby performed the very analysis by which, according to the Panel itself, the USITC could have satisfied the non-attribution requirement. The United States also argues that the USITC also separated and distinguished, in a reasoned and adequate manner, the effects of increased energy costs from those of increased imports

[57]United States' appellant's submission, para. 297.

by evaluating whether declines in the industry's condition correlated more closely with imports than energy cost increases.

B. *Arguments of Brazil – Appellee*

1. Article 3.1 of the *Agreement on Safeguards* and Article 12.7 of the DSU

48. Brazil submits that the articulation by the Panel of the applicable standard of review is consistent with the *Agreement on Safeguards* and previous findings of the Appellate Body.

49. Referring to the phrase "reasoned and adequate explanation", Brazil notes that although, as the United States pointed out, "adequate" and "explanation", are not explicitly found in the text of the *Agreement on Safeguards*, both terms "are easily discerned"[58] from what is in the Agreement, and particularly the language found in Article 3.1 and Article 4.2(c) of the *Agreement on Safeguards* (that is, "reasoned conclusions" and "detailed analysis" and "demonstration of the relevance of factors").

50. With respect to the United States' argument that explanations do not need to be "explicit," Brazil stresses that the need for an explicit determination "is clearly embedded in the requirement under Article 3.1 that an authority 'set forth' its findings and reasoned conclusions reached on all pertinent issues of fact and law."[59]

51. Brazil also does not agree with the United States that the Panel "improperly merged" the substantive requirements for establishing the right to take a safeguard measure with the procedural requirements set out in Articles 3.1 and 4.2(c) of the *Agreement on Safeguards* by presuming that a failure to explain a finding automatically proved that the USITC Commissioners had not performed the analysis necessary to make a finding.[60] Brazil argues that the position of the United States that the substantive obligations of Articles 2.1, 4.1 and 4.2 "do not require that the reasoning supporting [the determinations of competent authorities] expressly appear in [their] written report"[61], is "tantamount to relieving authorities of their substantive obligations".[62] According to Brazil, the United States is

[58]Brazil's appellee's submission, paras. 11 and 13.

[59]*Ibid*., para. 17.

[60]*Ibid*., para. 22, referring to the United States' appellant's submission, paras. 73–76.

[61]Brazil's appellee's submission, para. 22, referring to the United States' appellant's submission, para. 76.

[62]Brazil's appellee's submission, para. 22.

"essentially arguing that we should trust that the USITC performed the appropriate analyses even if there is no clear basis for discerning what it did."[63] Under this rationale, Brazil asserts, "one could never move beyond arguments centered on a failure to provide a reasoned and adequate explanation, since arguments attacking the underlying analyses almost always rely on whatever explanation the authority actually did provide."[64]

52. Finally, according to Brazil, the Panel complied with Article 12.7 of the DSU, as it performed the requisite factual and legal analyses of the parties' competing claims, set out numerous factual findings, and provided extensive explanation of how and why it reached its factual and legal conclusions. Brazil argues that the fact that the United States may not agree with the Panel's rationale does not imply that the Panel did not comply with Article 12.7.

2. Increased Imports

(a) General

53. Brazil requests that the Appellate Body dismiss the United States' appeal from the Panel's conclusions concerning increased imports. Brazil submits that the Panel correctly interpreted and applied the increased imports requirement. Brazil notes that the Panel correctly found that the increased imports requirement represents both a quantitative and qualitative standard, independent of the causation analysis. According to Brazil, the requirement is that increased imports must be recent enough, sudden enough, sharp enough and significant enough to cause injury, based on an examination of trends over the entire period of investigation, with an emphasis on the most recent period.

54. Brazil agrees with the Panel's conclusion that a finding that imports have increased pursuant to Article 2.1 can be made when the increase evidences a certain degree of recentness, suddenness, sharpness and significance, and believes that this conclusion is fully supported by the Appellate Body jurisprudence. Specifically, Brazil alleges that the requirement of "recentness" has been construed by the Appellate Body based on a sound understanding of the relationship between Article 2.1 and Article 4.2(a) of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, and that the Panel was correct in adopting this interpretation. Moreover, Brazil submits that the element of suddenness was recognized as inherent in Article XIX of the GATT 1994 by the Panel and,

[63]Brazil's appellee's submission, para. 23.

[64]*Ibid.*

previously, the Appellate Body. In addition, Brazil argues that the increase in imports cannot be confirmed by an analysis of end points since, in *Argentina – Footwear (EC)*, the Appellate Body specifically repudiated such an approach.

(b) Specific Arguments with respect to CCFRS

55. Brazil further contends that the Panel correctly found that the USITC did not meet the increased imports requirement with respect to CCFRS. In Brazil's view, the USITC performed the same type of analysis that the Appellate Body rejected in *Argentina – Footwear (EC)*—an end-point-to-end-point analysis—without considering trends, and mentioned the decline at the end of the investigation period "only in passing", adopting a "any increase will do" approach.[65]

3. Parallelism

56. Brazil submits that the Panel's findings on parallelism are fully consistent with the Appellate Body jurisprudence, as set out in *US – Wheat Gluten* and *US – Line Pipe*, and requests that the Appellate Body dismiss the United States' appeal on parallelism.

57. Brazil agrees with the Panel's conclusion that the USITC failed to account for the different effects of non-FTA imports of CCFRS as compared to the effects of all imports of CCFRS. In Brazil's view, the USITC's parallelism analysis in its Second Supplementary Report was based on its finding that the statements made on all imports as regards AUVs could also be made with respect to non-NAFTA imports. The Panel did not read into the *Agreement on Safeguards* a new requirement that the effects of NAFTA imports be considered on their own or as an alternative cause, or that an authority must specifically analyze the effects of excluded products; rather, the Panel, in Brazil's view, stated what was necessary to ensure a proper assessment of the effects of included products.

58. As regards the exclusion of imports from Israel and Jordan, Brazil is of the view that the United States essentially argues that because imports from these countries were so small, they need not be part of a parallelism analysis. However, in Brazil's view, in order to establish that imports from sources covered by the measure satisfy all the conditions for imposing a safeguard measure, a Member must determine whether its conclusions on causation would change if imports from excluded sources, taken together, were removed from the equation. In Brazil's view, there is no second standard for excluded sources of small volumes of imports.

[65]Brazil's appellee's submission, para. 49.

4. Causation

59. Brazil requests the Appellate Body to uphold the Panel's finding on causation. Brazil claims that there was no coincidence between import trends and domestic industry performance. The Panel neither ignored the USITC's report, nor engaged in a *de novo* review; rather, the Panel "did little more than compile and republish information that was before the USITC."[66] Brazil also disagrees with the United States that the Panel did not analyze relevant factors and failed to include an analysis of import pricing in its coincidence analysis.

60. Brazil next submits that the USITC's treatment of import underselling failed to meet the requirement to provide a "compelling analysis". Brazil agrees with the Panel that the existence of underselling does not, by itself, demonstrate that imports were driving prices down and cannot demonstrate even the presence of competition between imports and domestic products. In Brazil's view, underselling by imports, combined with a declining import market share and the absence of coincidence between import trends and industry performance, does not provide a compelling explanation of a causal link between increased imports and serious injury.

61. Further, according to Brazil, the Panel did not misunderstand the USITC's analysis, but rather identified a "serious problem" often inherent in the use of AUVs. Brazil submits that, contrary to the United States' assertion, the USITC did not fully consider the reliability of aggregate AUVs for CCFRS. Brazil also points out that United States courts have on occasions reversed the USITC's findings for "excessive reliance" on AUVs.[67] The USITC, in Brazil's view, did not establish why it considered the aggregate AUV data to be reliable.

62. According to Brazil, the Panel was also correct to address the CCFRS like product definition in the context of its causation analysis. Brazil submits that like products must be defined in such a way as to permit the analysis required by the *Agreement on Safeguards*. A like product that is too broadly defined will yield data that is too aggregated to offer an accurate depiction of the market. The reliance of the United States on the panel report in *Argentina – Footwear (EC)* in this respect is, in Brazil's opinion, incorrect. The panel in that dispute stated that "statistics for the industry and imports as a whole will only show averages, and therefore will not … provide sufficiently specific

[66]Brazil's appellee's submission, para. 62.

[67]*Ibid*., para. 72.

information on the locus of competition in the market."[68] That panel did not subsequently explore this issue further, because no party had challenged the like product definition.

63. Brazil contends that the Panel in the present case was not required to make specific findings on the like product definition for CCFRS before discussing the "analytical problems" with respect to causation inherent in the USITC's CCFRS definition.[69] However, in the event that the Appellate Body should find fault with this aspect of the Panel's causation analysis, Brazil refers to its conditional appeal, contained in its other appellant's submission.

64. Furthermore, Brazil submits that the Panel correctly concluded that the United States failed to ensure that it did not attribute to imports of CCFRS the injurious effects of other factors. Brazil emphasizes that panels need not accept the conclusions of authorities if those conclusions are demonstrably wrong or insufficient in the light of the facts. With respect to capacity increases, Brazil submits that the Panel correctly found that the USITC failed to perform an adequate non-attribution analysis. Brazil contends that the USITC itself found that capacity increases had an effect on pricing, but subsequently failed to distinguish the effect of capacity increases from the effect of imports.

65. Brazil argues further that the USITC acknowledged that declining demand played a role in the injury suffered by the industry, but then dismissed the role of declining demand on the grounds that this decline manifested itself late in the period of investigation. Brazil submits that such analysis does not actually separate and distinguish the effect of declining demand during the period for which the USITC "found the condition of the domestic industry [to be] most dire".[70] Brazil submits further that the operating performance of the CCFRS industry deteriorated most sharply in 2000 and 2001, thereby showing correlation only with declining demand, and not also with increased imports.

66. Brazil submits that the Panel also correctly found that the USITC failed to distinguish the effects of intra-industry competition from the effects of imports. The USITC, according to Brazil, acknowledged that a greater volume of lower-cost minimill capacity and output did have an effect on prices, but subsequently dismissed this factor "without any serious analysis".[71] With respect to the USITC's pricing analysis, Brazil submits that the relevant question is not the existence or the extent of underselling, but rather whether there is a correlation between underselling and injury to the domestic

[68]Brazil's appellee's submission, para. 80, referring to Panel Report, *Argentina – Footwear (EC)*, para. 8.261 and footnote 557 thereto.

[69]Brazil's appellee's submission, para. 81.

[70]*Ibid*., para. 93.

[71]*Ibid*., para. 96.

industry; the USITC never examined this question. Moreover, Brazil points out that, even as the prices for minimills' products fell, these minimills nevertheless enjoyed stronger financial performance than the integrated producers. In the light of this fact, according to Brazil, the USITC could not satisfy the non-attribution requirement by means of "a few cursory comments on relative costs of production and import pricing".[72]

67. With respect to legacy costs, Brazil argues that the USITC did acknowledge that this factor was a source of injury, but subsequently dismissed legacy costs on the basis that they predated the injury and did not increase during the period of investigation; Brazil considers this explanation insufficient and contends that in circumstances where an increasing portion of production is undertaken by companies without legacy costs, companies with legacy costs will be at a competitive disadvantage, which will ultimately affect their performance.

68. Finally, Brazil agrees with the Panel that Article 4.2(b) requires an overall assessment of "other factors". Brazil submits that, for instance, declining demand cannot be evaluated in isolation from the fact that capacity was increasing at the same time. The USITC never analyzed the relationship of various non-import factors and did not enquire how one of these factors might "compound the effect of the other".[73] In Brazil's view, the Appellate Body in *US – Line Pipe* recognized that a proper non-attribution analysis must include an "overall assessment", and in *EC – Tube or Pipe Fittings* "recognized that circumstances may require an assessment of how factors interact".[74] In Brazil's view, the facts of this case require such an assessment. In any event, in Brazil's view, since the USITC failed to separate and distinguish other facts even on an individual basis, the USITC's report does not meet the requirements of the *Agreement on Safeguards*.

C. *Arguments of China – Appellee*

1. Unforeseen Developments, Article 3.1 of the *Agreement on Safeguards*, and Article 12.7 of the DSU

69. China requests that the Appellate Body reject the United States' appeal of the Panel's conclusions concerning unforeseen developments. China argues that the Panel applied the correct standard in requiring that a report must contain a coherent and logical explanation with respect to unforeseen developments. The Panel did not apply the standard set out in relation to Article 4.2;

[72]Brazil's appellee's submission, para. 102.

[73]*Ibid*., para. 111.

[74]*Ibid*., para. 113.

rather, China argues, the Panel referred to the standard derived by the Appellate Body from an interpretation of Article 3.1 of the *Agreement on Safeguards* in the context of claims arising under Articles 2 and 4 of that Agreement. In China's view, this standard uses a "general formula" that "stems" from Article 3.1[75] and that can be applied to all relevant conditions for applying safeguard measures.

70. China argues that, pursuant to Article XIX of the GATT 1994 and the Appellate Body decision in *US – Lamb*, safeguard measures are imposed on imports of "particular" products. Contrary to the United States' arguments, the Panel did not suggest that the USITC was required to determine to what extent each unforeseen development affected each product and each country. Rather, the Panel correctly applied the requirement that the USITC demonstrate a logical connection between unforeseen developments and increased imports for each safeguard measure. In China's view, this requirement ensures that such measures are not applied to products having no connection to the unforeseen developments.

71. China submits that the Panel did not act inconsistently with Article 12.7 of the DSU. That provision requires the Panel to provide a basic rationale behind its findings; China notes in this respect that the Panel identified the legal standard, specified its approach for the application of this standard, examined all relevant facts and assessed them in the light of the standard as well as the applicable provisions, and, finally, provided reasons for its conclusions. In China's view, this is sufficient, in the light of the Appellate Body's standard, to satisfy the requirements under Article 12.7 of the DSU.

2. Increased Imports

(a) General

72. China argues that the Panel was correct in finding that the United States acted inconsistently with Articles 2.1 and 3.1 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports". China considers that, in order to satisfy the "increased imports" requirement, the rate and amount of the increase in imports must be evaluated; a comparison of the end points of the period of investigation is not sufficient. The competent authorities must furthermore examine recent imports, and recent data should not be considered in isolation from the data pertaining to the entire period of

[75]China's appellee's submission, para. 37.

investigation. China further submits that the increase in imports must, furthermore, be sudden and recent. The increase in imports must also have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury". Moreover, since safeguard measures are of an extraordinary nature, the increase cannot have been steady and gradual. China adds that, if there is a decrease in imports during the period of investigation, the competent authority must explain in a reasoned and adequate manner why such a decrease does—or does not—invalidate a finding on increased imports.

73. Finally, China disagrees with what it sees as the United States' claim that the analysis of increased imports is not distinct from the analysis of serious injury and causation. In China's view, the United States' arguments in this respect are contrary to previous findings of the Appellate Body.

(b) Specific Arguments with respect to CCFRS

74. China believes that the USITC "failed to provide any explanation as to why the decrease in imports occurring since 1998 could not offset the previous increase occurring three years ago."[76] In China's view, such a "gap" cannot be "completed" by a "re-explanation" of the facts by the United States before the Appellate Body.[77] China considers that to follow the United States' arguments with respect to CCFRS would mean that a simple end-point to end-point comparison would be sufficient to fulfil the "increased imports" requirement of the *Agreement on Safeguards*, an interpretation clearly rejected by the Appellate Body in *Argentina – Footwear (EC)*. China submits that the Panel did not give undue weight to interim 2001 imports, but rather applied the findings of the Appellate Body which require the competent authority to focus specifically on the most recent imports. Finally, China argues that the finding that the 1998 surge in imports "was no longer recent enough at the time of the determination" is "fully in line" with the requirements of the *Agreement on Safeguards* and their interpretation by the Appellate Body.[78]

(c) Specific Arguments with respect to Hot-Rolled Bar

75. China agrees with the Panel that the USITC failed to provide a reasoned and adequate explanation as to why the most recent decrease in imports in interim 2001 had no impact on the USITC's conclusion that hot-rolled bar was being imported in "increased quantities". China asserts that it was for the USITC to explain why that decrease had no impact on its final conclusion.

[76]China's appellee's submission, para. 117.

[77]*Ibid*.

[78]*Ibid*., para. 125.

Furthermore, China disagrees with the United States that the Panel failed to place the data for the end of the investigation period in the context of the data from the earlier part of the period of investigation.

(d) Specific Arguments with respect to Stainless Steel Rod

76. China agrees with the Panel's findings on stainless steel rod. The USITC, in China's view, failed to provide a reasoned and adequate explanation of why the most recent decrease in imports in interim 2001 had no impact on the USITC's conclusion that stainless steel rod was being imported in "increased quantities". China believes that, contrary to the United States' arguments, the Panel appropriately placed the data for the end of the investigation period in the context of the data from the earlier part of the period of investigation. In any event, the USITC failed to explain why it found an increase in imports in absolute numbers, while the decrease between interim 2000 and interim 2001 was 31.3 percent.

(e) Specific Arguments with respect to Tin Mill Products and Stainless Steel Wire

77. China argues that decisions of the Appellate Body demonstrate that the USITC was free to rely on the findings made by three Commissioners and that the findings of those Commissioners may constitute the determination required under Article 2.1 of the *Agreement on Safeguards*. However, these findings must be reconcilable in order to provide a reasoned and adequate explanation as to how the facts support the determination on increased imports. There is no such explanation in the present case, because the Commissioners' findings departed from each other and were based on different product groupings. Although findings based on these different groupings might sometimes be reconcilable, this would merely be by coincidence and is certainly not always the case. China also believes that the Appellate Body's decision in *US – Line Pipe* addressed the correct interpretation of Article 2.1; the present case, however, concerns the number of Commissioners making determinations or the differences between such determinations. Moreover, China argues that in *US – Line Pipe*, unlike in the present case, the Commissioners at issue had made affirmative injury determinations. China submits that the United States was free to decide that a singular act results from decisions by six Commissioners; however, according to China, the United States is not free to rely on these decisions when the decisions by these Commissioners cannot be reconciled one with another as a matter of substance.[79]

[79]China's appellee's submission, para. 409.

3. Parallelism

78. China argues that the Panel was correct in finding that the United States acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* by failing to establish that imports from sources not excluded from the scope of the measures alone satisfy the conditions required for the application of the measures.

79. China contends that Articles 2.1 and 4.2 of the *Agreement on Safeguards*, as interpreted by panels and the Appellate Body, require authorities to justify explicitly any gap between imports covered by the investigation and imports falling within the scope of the measure. The competent authority must provide a reasoned and adequate explanation as to why imports falling within the scope of the safeguard measure alone satisfy the conditions of Article 2.1, as elaborated in Article 4.2. In doing so, according to China, the USITC was required to "establish explicitly that non-FTA imports are able to cause serious injury distinctively from injury possibly caused, at the same time, by other sources of imports."[80]

80. China also claims that the United States made only implicit findings with respect to imports from sources other than Canada and Mexico. Moreover, according to China, the United States is incorrect in arguing that, "when the volume of FTA imports is extremely small, the authority's conclusions with respect to all imports are applicable to imports from all sources other than FTA sources, with no need for additional explanation."[81] China argues that, even if imports from Israel and Jordan were small—or sometimes even "quasi-inexistent"—this fact does not "release" the United States from conducting a proper parallelism analysis.[82] China believes that there "cannot be a double standard", depending on the level of imports.[83] According to China, although a small volume of imports from FTA sources may make it easier to explain why non-FTA imports satisfy the conditions of Article 2.1, the authorities must still provide such an explanation.

[80]China's appellee's submission, para. 357.

[81]*Ibid*.., para. 335.

[82]*Ibid*., para. 359.

[83]*Ibid*., para. 373.

4. Causation

81. China argues that the Panel was correct in finding that the United States acted inconsistently with Articles 2.1, 3.1 and 4.2(b) of the *Agreement on Safeguards* by failing to demonstrate a causal link between increased imports and serious injury.

82. China maintains that the Panel found, with respect to two specific products, that the USITC should have assessed the cumulative effect of factors other than increased imports. Contrary to the United States' arguments, the Panel did not suggest that authorities must conduct such an assessment in all cases and its interpretation of the non-attribution requirement is supported by previous decisions of the Appellate Body. In particular, the Appellate Body in *EC – Tube or Pipe Fittings* recognized that an authority may need to conduct a collective analysis in certain factual circumstances. Although the USITC's approach to non-attribution was not inherently flawed, the USITC failed to complete its non-attribution analysis because it disregarded other factors once it had established that they did not individually cause injury equal to or greater than that caused by increased imports. The United States is incorrect in suggesting that the USITC need not conduct a non-attribution analysis regarding factors making only a "minor" contribution to injury. Furthermore, even if this were correct, the Panel correctly found that the USITC had not provided a reasoned and adequate explanation that these factors made only a minor contribution. In any case, China maintains that most of the United States' arguments regarding the Panel's findings on causation relate to the Panel's consideration of facts.

(a) Specific Arguments with respect to CCFRS

83. China notes that the United States challenges the Panel's finding that the USITC failed to explain why it relied on annual AUV data. However, this finding is consistent with the USITC's own acknowledgement that some combined data may involve double counting. The Panel did not specifically conclude that the CCFRS product grouping was improper. However, the Panel did make an independent determination that the USITC's pricing analysis was not reasoned and adequate due to flaws in the data and the USITC's selective reliance on the data. On the question of non-attribution, the Panel did not require the USITC to distinguish the effects of imports from those of other factors at every moment during the investigation. Rather, it required an explanation of why injury caused by other factors was not attributed to increased imports. The need for such an explanation was particularly important given that the USITC itself acknowledged the potential injurious impact of declining demand, increased capacity, intra-industry competition, and legacy costs.

(b) Specific Arguments with respect to Cold-Finished Bar

84. According to China, the United States is improperly challenging on appeal the Panel's findings of fact. China states that the Panel determined that the USITC could not simply dismiss declining demand as a possible injury factor, because the Panel found that another plausible interpretation of the data was that this factor could contribute significantly to injury.

(c) Specific Arguments with respect to Rebar

85. China claims that the United States is improperly challenging, on appeal, the Panel's findings of fact. In particular, the United States challenges the Panel's finding that the USITC had not provided a reasoned and adequate explanation that capacity increases and the aberrant performance of one domestic producer were insignificant causes of serious injury. China also maintains that the United States is improperly disputing the Panel's choice of the relevant facts on which to base its analysis.

(d) Specific Arguments with respect to Welded Pipe

86. China argues that, despite the USITC's view that capacity increases or the aberrant performance of one domestic producers were minor factors, the USITC was nevertheless required to explain this view and provide evidence to support it. However, the USITC made only a subjective assertion that did not satisfy the non-attribution test. The Panel did not find that subjective judgements are prohibited under Article 4.2(b) of the *Agreement on Safeguards*. However, China maintains that the Panel considered that a subjective judgement without further explanation, of the kind made by the USITC, did not constitute a reasoned conclusion.

(e) Specific Arguments with respect to FFTJ

87. China asserts that the Panel did not confirm the factual findings underlying the USITC's determination that capacity increases did not have a substantial injurious impact. The United States' arguments distort the Panel Reports in suggesting otherwise. In addition, the USITC itself recognized that purchaser consolidation played a role in causing injury, but then dismissed this factor without further explanation. In any case, China maintains that the United States' arguments improperly challenge factual findings of the Panel.

(f) Specific Arguments with respect to Stainless Steel Bar

88. China argues that the United States is improperly challenging the Panel's findings of fact regarding the factors of declining demand and increases in energy costs. In particular, the Panel found that the USITC dismissed declining demand as an injury factor despite acknowledging that this factor did play a role in causing injury. Contrary to the United States' arguments, the Panel did not enunciate any standard regarding the second sentence of Article 4.2(b). According to China, the Panel simply provided an example of what could have been a reasoned and adequate explanation that this factor was not causing injury to the domestic industry.

D. *Arguments of European Communities – Appellee*

1. Unforeseen Developments, Article 3.1 of the *Agreement on Safeguards*, and Article 12.7 of the DSU

89. The European Communities requests that the Appellate Body reject the United States' appeal of the Panel's conclusions concerning unforeseen developments. The European Communities recalls that, as the Appellate Body found in *US – Lamb*, the existence of unforeseen developments is a "pertinent issue of fact and law" within the meaning of Article 3.1 of the *Agreement on Safeguards* and, therefore, the "report of the competent authorities, … must contain a 'finding' or 'reasoned conclusion' on 'unforeseen developments'."[84]

90. The European Communities further recalls that Article XIX:1(a) of the GATT 1994 requires that increased imports must result from unforeseen developments. The relevant "unforeseen developments" must, therefore, be linked to increased imports of each specific product that may be subject to a safeguard measure. According to the European Communities, the USITC failed to make that link for each product.

91. The European Communities also submits that data not used by the USITC in its unforeseen developments analysis, but used elsewhere in the USITC's report, is not relevant for the Panel's analysis. A reasoned conclusion is one that links the pertinent facts to the conclusion reached, not one where "key elements of the analysis are left to guess work and supposition".[85] It was not for the

[84]European Communities' appellee's submission, para. 87, referring to Appellate Body Report, *US – Lamb*, para. 76.

[85]European Communities' appellee's submission, para. 100.

Panel, as the United States suggests, to undertake a *de novo* review of the USITC record and provide the analysis and reasoning that the USITC failed to disclose.

92. The European Communities argues that the United States' challenge to the Panel's finding that "[t]he timing of the explanation, its extent and its quality are all factors that can affect whether an explanation is reasoned and adequate" is unsupported. According to the European Communities, the United States misconstrues the word "extent" as signifying "length". The European Communities considers that the Panel did not demand that the USITC report be longer, but that it contain a more reasoned and adequate explanation of the findings.

93. The European Communities argues that the United States wrongly focuses only on the word "reasoned" in Article 3.1 of the *Agreement on Safeguards* to question the obligation to provide an "explanation" for the conclusions reached in the investigation. In the European Communities' view, the meaning of Article 3.1 must be established taking into consideration all the terms used; the two terms "setting forth" and "reasoned" suggest the same meaning, that is, that a reasoned and adequate explanation must be contained in the report. The European Communities contends that the United States' interpretation of the term "reasoned conclusion"—that the report need only provide a "logical basis" for a conclusion—would fail to give meaning and effect to all the terms of the treaty.

94. As for the United States' argument that the word "explicit" is not contained in Article 3.1 of the *Agreement on Safeguards*, the European Communities refers to the term "set forth" in that Article and argues that it would be "difficult to conceive of how an account can be given *distinctly* or *in detail* in an implicit manner or how an *exposition*, a *narrative*, or a *description* can be other than explicit."[86]

95. The European Communities agrees with the United States' argument that competent authorities may choose any structure, any order of analysis, and any format for explanation that they see fit, as long as the report complies with Articles 3.1 and 4.2(c). However, the European Communities argues, Members imposing safeguard measures are still required to set forth a reasoned and adequate explanation and not leave it to the Panel or other Members to deduce it from the raw data.

96. With respect to the United States' contention that the Panel's findings on the lack of a reasoned and adequate explanation should be restricted to Article 3.1 of the *Agreement on*

[86]European Communities' appellee's submission, para. 57. (original emphasis)

Safeguards, the European Communities submits that the Appellate Body has explained in previous safeguards cases that the failure to provide a reasoned and adequate explanation is not only a violation of Article 3.1, but also of the substantive obligations of the *Agreement on Safeguards*.

97. With respect to Article 12.7 of the DSU, the European Communities considers that the United States is in fact reproaching the Panel for making more findings than were needed. The European Communities submits that, in stating that a certain explanation provided by the USITC was "plausible", the Panel had engaged in a speculation that went "beyond its mandate"[87] and that, had the Panel developed alternative explanations, it would have conducted a *de novo* examination.

2. Increased Imports

(a) General

98. The European Communities requests that the Appellate Body dismiss the United States' appeal of the Panel's conclusions concerning increased imports. According to the European Communities, the United States' challenge to the standard applied by the Panel is based on an attempt to collapse the increased import requirement with the causation analysis. This argument is contrary to the ordinary meaning of Article 2.1 of the *Agreement on Safeguards* and the Appellate Body jurisprudence. In the European Communities' view, the condition relating to increased imports is separate from the question of causation and injury. Moreover, the European Communities submits that the use of the present tense in the phrase "is being imported" explicitly limits the right to adopt a safeguard measure to situations where increased imports continue and can still be found to cause or threaten to cause injury. The European Communities further contends that the United States' assertion that the analysis of increased imports must take account of long-term effects of previous increases cannot be justified by the *Agreement on Safeguards*, because the safeguard measures are not intended to provide compensation for effects of previous increases.

99. In addition, the European Communities argues that the requirement to analyze trends over the entire period of investigation and to focus particularly on the most recent data is derived directly from the phrase "is being imported". This requirement has been clarified in *Argentina – Footwear (EC)*, where, according to the European Communities, the Appellate Body found that the relevant investigation period must be the "recent past", and also that it must "end in the very recent past".[88]

[87]European Communities' appellee's submission, para. 106.

[88]*Ibid*., para. 123, referring to Appellate Body Report, *Argentina – Footwear (EC)*, footnote 130 to para. 130.

The European Communities argues that in the event of a more than very slight and brief decrease at the end of the period of investigation, the competent authorities must establish why, despite that decrease, the facts of the case support the determination that the product continues to be imported at increased levels.

100. The European Communities agrees with the Panel's finding that increased imports must exhibit a "certain degree of recentness, suddenness, sharpness and significance".[89] This interpretation is fully supported by the Appellate Body's finding in *Argentina – Footwear (EC)*, which, in turn, is based on a contextual reading of Article XIX of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*.

(b) Specific Arguments with respect to CCFRS

101. According to the European Communities, the United States criticizes the Panel for not carrying out a concrete evaluation of the USITC's explanations of the long-term effects of the 1998 import increases. The European Communities contends that this argument is an attempt by the United States to collapse the analysis of the effects of the imports with the requirement of increased imports.

(c) Specific Arguments with respect to Hot-Rolled Bar

102. The European Communities considers that the Panel, contrary to the United States' arguments, did not fail to analyze interim 2001 data in context and did not fail to consider the alleged "limited" duration of the decrease in interim 2001, but rather found that the USITC had failed to address and explain the interim 2001 data.

(d) Specific Arguments with respect to Stainless Steel Rod

103. The European Communities submits that the Panel did not, as alleged by the United States, fail to consider duration and magnitude of the respective increases and decreases in imports. Rather, the Panel found that the USITC did not explain why it found, despite the decline between interim 2000 and interim 2001, that there was an increase of imports in absolute numbers. In the European Communities' view, the Panel also correctly found that the market share of imports was not pertinent for the determination that absolute imports increased. Finally, the European Communities submits that even if the Appellate Body were to reverse the Panel's finding on this product category,

[89]European Communities' appellee's submission, paras. 133 and 137, referring to Panel Reports, para. 10.167.

the Appellate Body should still uphold the Panel's ultimate conclusion that the USITC had not demonstrated the existence of increased imports. The European Communities refers, for this purpose, to its arguments before the Panel and the relevant arguments in China's appellee's submission.

(e) Specific Arguments with respect to Tin Mill Products and Stainless Steel Wire

104. The European Communities submits that the Panel did not create a new requirement that the internal opinions of individual Commissioners must be based on the same product groupings. Rather, the Panel's reasoning was based on the requirement that a safeguard measure must be based on the determination and the underlying investigation, as published in the report. The European Communities agrees with the Panel that different product definitions lead to findings which are impossible to reconcile, because, for instance, import numbers of differently defined products are not the same, and will lead to different evaluations of trends, different explanations, and different conclusions.

105. In the European Communities' view, in *US – Line Pipe*, the Appellate Body addressed a situation where three affirmative votes, considered as the determination of the USITC, found different forms of injury which are written as alternatives into the *Agreement on Safeguards*; however, there is no alternative requirement concerning a "product" or "group of products that include the product" written into the *Agreement on Safeguards*. The Panel also did not improperly infringe upon a Member's right to structure the decision-making process of its competent authority, but rather tried to review all three individual determinations together, because the United States "insisted" that these three findings together formed the USITC's determination.[90] Should the Appellate Body nevertheless consider that the Panel erred in law and choose to complete the legal analysis, the European Communities submits that none of the individual findings separately fulfils the requirements of the *Agreement on Safeguards*, and refers to its arguments before the Panel on this matter.

3. Parallelism

106. The European Communities submits that there is no reason for the Appellate Body to disturb the Panel's findings on parallelism. The European Communities disagrees with the United States' assertion that the Panel created a new requirement of a separate analysis of imports from sources not subject to the safeguard measures. Article 2.1 of the *Agreement on Safeguards* has been interpreted as limiting the product basis of the determination to imports covered by the measures. According to

[90]European Communities' appellee's submission, para. 415.

the European Communities, the phrase in Article 4 "factor other than imports" must be read as "factors other than covered imports". Therefore, in the view of the European Communities, in requiring that the effects of imports not covered by the measure be accounted for and not be attributed to covered imports, the Panel was simply applying Article 4.2(b), second sentence, to the proper product scope. Moreover, Article 4.2(b), by referring to "other factors", does not establish a closed list and the competent authorities have a duty to investigate even beyond the listed injury factors.

107. The European Communities disagrees with the United States' contention that, because imports from Israel and Jordan were non-existent or infinitesimal, the discussion of non-NAFTA imports also provides the requisite explicit findings with respect to imports from all sources other than Canada, Mexico, Israel, and Jordan. The United States is, in effect, invoking a non-existent *de minimis* exception. Finally, the European Communities submits that, in the event the Appellate Body reverses the Panel's findings, there is sufficient factual basis for the Appellate Body to complete the analysis.

4. Causation

(a) General Statements

108. The European Communities requests that the Appellate Body uphold the Panel's findings on causation with respect to all product categories subject to appeal. The Panel did not suggest that a causation methodology needs to provide for a non-attribution analysis of the cumulative effects of other factors in each and every case; rather, the cases requiring a cumulative assessment are where an assessment on an individual relative basis is insufficient to ensure that the injurious effects of other factors are not attributed to increased imports. The European Communities finds support for its reasoning in the Appellate Body's findings in *US – Lamb* and *US – Line Pipe*.

109. Further, in the European Communities' view, the Appellate Body found in *EC – Tube or Pipe Fittings* that a factor which has *no injurious effect*, rather than *minimal effects*, does not have to be subject to a non-attribution analysis. Permitting a competent authority to ignore causal factors considered to have only "minimal" effects would create a *de minimis* exception to the non-attribution requirement not contemplated in Article 4.2(b). Accordingly, the European Communities requests the Appellate Body to uphold the Panel's finding for welded pipe and FFTJ with respect to this matter.

(b) Specific Arguments with respect to CCFRS [91]

110. The European Communities submits that the Panel did not conduct a *de novo* review. The Panel's detailed analysis permitted the Panel to verify whether the USITC's conclusions were reasoned and adequate; the Panel did not have to examine other factors. Similarly, the Panel was correct in concluding that the finding of underselling by imports did not represent a "compelling explanation" by the USITC. There is no discussion in the USITC's report of the AUV for CCFRS as a whole.

111. The European Communities further submits that, in the context of declining demand, a factor can be a cause of serious injury even if its effects appear late in the period of investigation. The Panel also correctly concluded that the USITC's analysis of capacity increases was "simplistic", and that the statement that minimill cost advantages did not change during the period of investigation did not amount to a proper non-attribution analysis. According to the European Communities, the USITC also failed to examine legacy costs in the light of the operating margin of the industry.

(c) Specific Arguments with respect to Hot-Rolled Bar

112. The European Communities argues that the USITC dismissed cost increases as an other causal factor on the basis of the "unsubstantiated claim" [92] that the domestic industry should have been able to increase its prices to cover increased costs. The European Communities submits that had the domestic industry kept its costs constant, it would have actually had a higher operating margin, even with the decrease in sales prices.

(d) Specific Arguments with respect to Cold-Finished Bar

113. The European Communities agrees with the Panel that the USITC had not explained how increased imports could be linked to declines in certain factors, if these declines had been apparent for some time before there were any increased imports. Furthermore, the Panel was correct in finding that the USITC had not provided adequate justification for its use of quarterly, rather than yearly,

[91]The European Communities incorporates, by reference, the submissions of the other Complaining Parties, "some of whom have provided more detailed arguments in respect of certain product bundles". (European Communities' appellee's submission, para. 235)

For all of its product-specific arguments, the European Communities submits that, in the event the Appellate Body should reverse the Panel's findings on any of the product categories, the Panel's ultimate conclusion should nevertheless be upheld; the European Communities refers, for this purpose, to arguments it made before the Panel.

[92]European Communities' appellee's submission, para. 256.

data. The European Communities argues that the USITC, furthermore, performed its analysis on a sub-product, without providing information on whether this product was representative.

(e) Specific Arguments with respect to Rebar

114. The European Communities disagrees with the United States' argument that the Panel failed to take account of the USITC's entire analysis of increased costs. The United States' position is moreover premised on the assertion that a domestic industry must be able to increase prices to cover its costs, which does not represent a reasoned and adequate explanation.

(f) Specific Arguments with respect to Welded Pipe

115. The European Communities agrees with the Panel that the USITC's analysis of domestic capacity increases was deficient. The European Communities also agrees that the USITC's analysis of the non-import related poor performance of a significant domestic producer was deficient. The Panel did not find that the USITC was "subjective", but rather found that the USITC had failed to properly examine the effects of certain factors. The Panel also did not suggest that the USITC must perform a complete causation analysis for one producer, but rather reviewed the USITC's causation analysis relying on the USITC's own description of this producer as a "significant domestic producer".

(g) Specific Arguments with respect to FFTJ

116. In the European Communities' view, the Panel properly determined that the USITC had not ensured that it had not attributed the effects of increased capacity to increased imports. The Panel also properly determined that the USITC had not ensured that it had not attributed the effects of purchaser consolidation to increased imports; the United States' argument is premised on the notion that the USITC determined that the FFTJ industry was affected only via declines in market share and other indicators, and that purchaser consolidation was unrelated to this and rather affected prices. The European Communities states that the USITC's report itself suggests that price was an important element in the USITC's analysis in this respect.

(h) Specific Arguments with respect to Stainless Steel Bar

117. According to the European Communities, the USITC did not ensure non-attribution with respect to decline in demand. The United States' arguments alleging complexity of the USITC's analysis with respect to energy cost increases are identical to those the United States submits with

respect to demand declines. Moreover, the European Communities believes that the Panel was correct in finding that the USITC should have undertaken a collective analysis of other causal factors.

E. *Arguments of Japan – Appellee*

1. Article 3.1 of the *Agreement on Safeguards* and Article 12.7 of the DSU

118. Japan considers that the Panel was correct in finding that the United States acted inconsistently with Article 3.1 of the *Agreement on Safeguards*, because the USITC did not provide a "reasoned and adequate explanation" for its findings. According to Japan, whether an explanation is "reasoned and adequate" depends on a number of factors, including the complexity of the issue and the timing, extent and quality of the explanation. In any case, Japan contends that a reasoned and adequate explanation must be organized, logical, and explicit in the sense of being "set forth" in the report; the explanation must also be substantiated by evidence. Although the *Agreement on Safeguards* does not dictate the structure of an authority's report, the *Agreement on Safeguards* also does not exempt an authority from the need to provide a reasoned and adequate explanation. According to Japan, the USITC's determination did not meet these requirements.

119. Japan also does not agree with the United States' claim that the Panel "incorrectly merged" obligations under Articles 3.1 and 4.2 of the *Agreement on Safeguards* in addressing the USITC report. Japan submits that "[t]he obligation to explain is textually and inherently intertwined with the obligation to perform."[93] Hence, the substantive and procedural obligations of the *Agreement on Safeguards* "exist side-by-side"[94], and the violation of one may lead to a violation of another. Japan further asserts that the text of the *Agreement on Safeguards* "reflects the reality that the only basis on which to evaluate what the authority did is to review what the authority said [in its report]. Otherwise, any meaningful review of the actions of the competent authority would become impossible."[95]

120. With respect to Article 12.7 of the DSU, Japan considers that the Panel fully complied with Article 12.7 as the Panel "applied the law to the facts while also ensuring that it did not replace reasonable conclusions reached by the USITC with its own conclusions".[96]

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[93]Japan's appellee's submission, para. 28.

[94]*Ibid*.

[95]*Ibid*. (original underlining)

[96]Japan's appellee's submission, para. 23.

2. Increased Imports

(a) General

121. In Japan's view, the Panel correctly found that the United States failed to meet the increased imports requirement. The Panel correctly found that the increased imports requirement represents both a quantitative and qualitative standard, independent of the causation analysis required by Article 4.2 of the *Agreement on Safeguards*. The Panel's articulation of the standard for "increased imports" and its analysis "echo the Appellate Body's own careful review of the relevant provisions."[97] In Japan's view, the Panel's finding that the increase in imports must be "recent" is based on the phrase "is being imported" in both Article 2.1 of the *Agreement on Safeguards*, as well as Article XIX:1(a) of the GATT 1994, and on the Appellate Body's findings in *Argentina – Footwear (EC)*. The requirement in Article 4.2(a) that the competent authority consider the rate and amount of the increase in imports in absolute and relative terms means that, as correctly recognized by the Panel, the competent authorities must consider trends in imports over the period of investigation. Japan submits that the United States is "attempt[ing] to resurrect its simplistic end points analysis", an approach that was expressly rejected by the Appellate Body in *Argentina – Footwear (EC)*.[98]

122. Japan furthermore agrees with the Panel that the increase in imports must be "sudden". The Panel's approach rests upon the Appellate Body's ruling in *Argentina – Footwear (EC)* and is, moreover, derived from Article XIX:1(a) of the GATT 1994, which is entitled "Emergency Action" and requires safeguard measures to be imposed only in response to unforeseen developments. Japan further believes that, in its arguments, the United States continues to "confuse" issues of serious injury, as well as causation, with the distinct requirement of increased imports. Japan argues that under a proper analysis of increased imports, an increase in imports can be sudden, independently of the "onset of serious injury".[99]

[97]Japan's appellee's submission, para. 36.

[98]*Ibid*., para. 43.

[99]*Ibid*., para. 47.

(b) Specific Arguments with respect to CCFRS [100]

123. Japan contends that the Panel correctly applied the relevant standards articulated by the Appellate Body in *Argentina – Footwear (EC)* and the panel in *US – Line Pipe*, which require the authority to determine, on a case-by-case basis, whether imports increased in absolute and relative terms and whether the increase was sufficiently sudden and recent within a relevant period of time. In the present case, there is no dispute that imports of CCFRS first increased and then declined significantly, in absolute and relative terms, before falling more dramatically in mid-2001 to levels below those in 1998 and 1996. The USITC performed an end-point to end-point analysis and found that imports of CCFRS had increased. In Japan's view, the USITC should have instead considered the trends over the entire period of investigation and especially the end of that period. Japan further disputes what it considers to be the United States' characterization of the Appellate Body's treatment of increased imports in *Argentina – Footwear (EC)* as relating primarily to causation.

(c) Specific Arguments with respect to Tin Mill Products and Stainless Steel Wire [101]

124. Japan refers the Appellate Body to its submissions to the Panel. Japan further submits that the Panel did not challenge the right of the President of the United States to rely "on whatever number of commissioner votes he wanted". [102] Rather, the Panel found, because the President relied on the affirmative votes of three Commissioners who had performed their analysis on different product definitions, there was no reasoned and adequate explanation to justify the imposition of a measure on the respective individual product.

125. In Japan's view, there must be a "one-to-one relationship" between the injury determination and the like product definition. [103] This requirement was not fulfilled in respect of tin mill products and stainless steel wire because the USITC Commissioners, on whose determinations the President of the United States relied, did not make their findings of increased imports based on the same like product definitions or data sets. Thus, according to Japan, there was no coherent set of findings of increased imports to support the measures. Finally, Japan believes that the Panel's decision does not

[100]With respect to the Panel's findings on hot-rolled bar and stainless steel rod, Japan incorporates, by reference, the relevant arguments put forward by the other Complaining Parties. (Japan's appellee's submission, para. 58)

[101]Japan submits these arguments also with respect to the Panel's causation and parallelism analysis for these two products. (Japan's appellee's submission, paras. 126 and 152)

[102]Japan's appellee's submission, para. 139.

[103]*Ibid*., para. 164.

depart from the findings of the Appellate Body in *US – Line Pipe*, which involved the "aggregation of affirmative decisions" based on different kinds of injury[104]; the present case, however, in Japan's view, involves aggregating votes based on different "like product" definitions. Japan also submits that the Panel's findings do not encroach upon a Member's right to lay down the decision-making process of its competent authority.

3. Parallelism

126. Japan argues that the Panel was correct in finding that the United States acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* by failing to establish that imports from sources subject to the safeguard measures satisfied the conditions for the application of such measures.

127. In Japan's view, the Panel correctly applied existing Appellate Body jurisprudence concerning how authorities must conduct their analysis and explain their findings in imposing safeguard measures on a non-MFN basis. In imposing such measures, authorities must analyze the causal relationship between imports that are subject to the measure and domestic industry performance. Rather than treating excluded imports as an other factor under the non-attribution requirement in Article 4.2(b) of the *Agreement on Safeguards*, the competent authority must ensure that the effects of non-import factors are not attributed to the imports subject to the measure, as opposed to all imports. The USITC did not make a specific causation finding for non-NAFTA imports of CCFRS or any other product. Thus, the USITC failed to ensure that its NAFTA-inclusive causation findings were consistent with the NAFTA-exclusive scope of the safeguard measures.

128. In Japan's view, the United States' arguments concerning Israel and Jordan essentially state that imports from these countries were so small that it was self-evident that, if they were removed from total imports, the effect on the United States' industry of the remaining imports would be the same. However, the point is not the quantity of the imports, but whether the USITC performed the required analysis. Japan submits that the USITC did not do so.

[104]Japan's appellee's submission, para. 166.

4. Causation

(a) Specific Arguments with respect to CCFRS [105]

129. Japan maintains that the Panel was correct in finding that the United States acted inconsistently with Articles 2.1, 3.1 and 4.2(b) of the *Agreement on Safeguards* by failing to establish that a causal link existed between any increased imports and serious injury to the relevant domestic producers.

130. According to Japan, the United States ignored the importance of the relationship between domestic industry performance and increased imports. The Panel correctly conducted an analysis of how import trends related to the various injury factors, and concluded that the analysis performed by the USITC was not reasonable; in so doing, the Panel did not conduct, as the United States contends, a *de novo* review. Japan submits that the Panel correctly found that, because imports began a sustained decline from 1998 through to the end of the period of investigation, there was no support for the USITC's finding that imports were the primary cause of the industry's price and profitability declines at the end of the period. Japan also submits that the Panel was not required to include an analysis of import pricing in its coincidence analysis—import pricing is the focus of the "conditions of competition" analysis performed by the Panel.

131. Japan further submits that the USITC's underselling analysis failed to meet the "compelling explanation" requirement because the underselling by imports was not shown to have an impact in the market. In other words, import pricing did not appear to have taken sales away from domestic companies. Japan submits that the Panel was correct to criticize the USITC's use of AUVs; the USITC's determination does not reveal an evaluation or discussion of AUVs for the overall CCFRS category—where a competent authority merely includes a number in the determination, this does not establish that the authority actually relied on that fact. The USITC also did not explain why AUVs were appropriate surrogates, even though it specifically acknowledged that the reliability of this data could be compromised as a result of the underlying product mix.

132. Japan next argues that the USITC's product grouping of CCFRS was arbitrary and too broad to allow meaningful comparisons of aggregated volume, price, cost or production data. The Panel's findings on coincidence and conditions of competition are not dependent on its criticisms of the

[105]Japan does not submit arguments with respect to other product categories. However, with respect to hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar, Japan incorporates, by reference, the arguments of the other Complaining Parties. (Japan's appellee's submission, para. 126)

CCFRS product grouping. However, if the Appellate Body finds that the Panel was required to make a specific finding regarding the WTO-consistency of the USITC's like product definition in order to assess the USITC's causation analysis, Japan refers the Appellate Body to the arguments on this topic contained in the other appellant's submission by Brazil, Japan, and Korea.

133. Japan contends that the Panel was correct in finding that the United States failed to comply with the non-attribution requirement and in examining all the relevant facts in reaching this finding. With respect to capacity increases, Japan argues that the USITC did find that capacity increases were affecting prices but did not attempt to separate and distinguish these effects. Japan argues that the USITC also failed to consider capacity utilization rates assuming capacity had remained stable over the period rather than increased, as required by the Appellate Body decision in *US – Wheat Gluten*.

134. With respect to declining demand, Japan submits that the USITC did not explain why this factor was not responsible for the injury to the domestic industry, despite the fact that the most severe injury occurred at the end of the period, when imports and demand were both falling. With respect to intra-industry competition, Japan contends that the USITC did not fully analyze this factor and did not respond to specific evidence that customers viewed minimills, rather than imports, as the price leaders in the cold-rolled market. Finally, with respect to legacy costs, Japan submits that the USITC's discussion of this factor implicitly recognizes that these costs weighed heavily on the performance of the industry and compromised the competitive position of certain domestic producers; in particular, Japan maintains that the USITC acknowledged that, even with import relief, the viability and health of the industry could only be ensured by addressing legacy costs.

135. Japan also agrees with the Panel's finding that the USITC failed to consider the collective effects of other factors as required by Article 4.2(b), although this finding was not necessary to the Panel's overall finding regarding non-attribution. The Appellate Body Reports in *US – Line Pipe*, *US – Hot-Rolled Steel*, and *EC – Tube or Pipe Fittings* allow for an overall consideration of the effects of other factors, given the interaction between such factors. Specifically, Japan argues that the Panel is not precluded from determining that such a consideration was required in particular factual circumstances such as the present case, in which several factors intertwine.

F. *Arguments of Korea – Appellee*[106]

1. Article 3.1 of the *Agreement on Safeguards* and Article 12.7 of the DSU

136. Korea considers that the Panel correctly applied Article 3.1 of the *Agreement on Safeguards*. According to Korea, the United States seeks to re-argue the appropriate standard that is required pursuant to Articles 3.1 and 4.2(b) of the *Agreement on Safeguards* "as if [that] standard had not been fully set out in prior Appellate Body reports."[107] The United States does this by arguing that competent authorities are not required to provide explanations for their determinations[108] or that explanations—even if required—need not be adequate[109] nor explicit.[110]

137. Korea takes issue with the United States' argument that the word "explicit" is not contained in Article 3.1 of the *Agreement on Safeguards*. Korea considers that it is "difficult to imagine"[111] how the requirements to provide a "detailed analysis" pursuant to Article 4.2(c) of the *Agreement on Safeguards* and to "set forth" findings and reasoned conclusions pursuant to Article 3.1 could be satisfied by anything other than an "explicit" explanation.

138. As for the United States' contention that the Panel's findings should be restricted to Article 3.1 of the *Agreement on Safeguards*, Korea argues that the failure to provide a reasoned and adequate explanation is not only a violation of Article 3.1, but also of the substantive obligations of the *Agreement on Safeguards*. Korea emphasizes that "[c]learly, in a case where the substantive obligation is not met, the analysis cannot be 'reasoned and adequate'."[112]

139. Korea further considers that the Appellate Body should dismiss the claim of the United States that the Panel acted inconsistently with Article 12.7 of the DSU. The Panel Reports set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations in compliance with Article 12.7.

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[106]Korea endorses the views of the other Complaining Parties with respect to products and issues other than those on which Korea focuses in its appellee's submission. (Korea's appellee's submission, para. 41)

[107]Korea's appellee's submission, para. 46.

[108]*Ibid*., referring to the United States' appellant's submission, para. 59.

[109]Korea's appellee's submission, para. 46, referring to the United States' appellant's submission, para. 62.

[110]Korea's appellee's submission, para. 46, referring to the United States' appellant's submission, paras. 63–64.

[111]Korea's appellee's submission, para. 48.

[112]*Ibid*., para. 57.

2. Increased Imports

(a) General

140. Korea maintains that the Panel properly determined that the USITC's findings of increased imports were not in compliance with the *Agreement on Safeguards*. Korea agrees with the Panel that the increase in imports must have been "sudden" and "recent". In Korea's view, the Panel, in this respect, "synthesized" the prior decisions of the Appellate Body in *Argentina – Footwear (EC)* and *US – Lamb*.[113]

141. Korea considers that the United States incorrectly "dismisses" the significance of the "emergency nature" of safeguard measures.[114] Korea believes that if there were no increase in imports in the recent past, then the conditions for the application of a safeguard measure would not be met because emergency action would no longer be necessary. Only where an unforeseen and sudden increase in imports is present will the need for emergency action exist.

142. Korea also recalls the Appellate Body's findings in *Argentina – Footwear (EC)* that the increased imports requirement is both a quantitative as well as a qualitative requirement. Therefore, in Korea's view, the increase in imports must be recent, sudden, sharp and significant, and that end-of-period trends must be analyzed in the context of trends occurring over the entire period of investigation.

(b) Specific Arguments with respect to CCFRS

143. Korea disagrees with the United States that the Panel focused exclusively on the period between interim 2001 and interim 2002. The Panel did not give the interim period dispositive weight. The Panel also correctly found that it was not possible to reconcile the USITC's statement that imports relative to production were still significantly higher at the end of the period with the interim data that "clearly contradicted" that statement.[115]

144. Korea moreover argues that the Panel properly considered the effect of import declines since 1998. The Panel did not reach "an abstract conclusion concerning a mid-period alone"[116], but

[113]Korea's appellee's submission, para. 73.

[114]*Ibid*., heading IV.B.3.

[115]*Ibid*., para. 90.

[116]*Ibid*., para. 91.

rather examined that mid-period increase in the context of the subsequent decrease. Korea considers that the Panel rejected the USITC's findings for reasons similar to those articulated by the Appellate Body in *Argentina – Footwear (EC)*.

(c) Specific Arguments with respect to Tin Mill Products[117]

145. In Korea's view, the United States attempts to recast the issues of increased imports and causation with respect to tin mill products as a question of national sovereignty and as a debate over the rights of a country to structure its administering authority and decision-making process in safeguard investigations. Korea argues that the United States continues to make this argument, even though the Panel carefully followed the reasoning of the Appellate Body in *US – Line Pipe* to the effect that it was not reviewing the nature of administrative decision-making.

146. Korea submits that the United States relied on determinations of three Commissioners as the basis for the measure on tin mill products. The Panel correctly determined that the determinations of the three Commissioners did not meet the requirements of Articles 2.1, 3.1, and 4.2(b) of the *Agreement on Safeguards*, because these three findings are based on differently-defined like products.

147. Korea contends that the United States incorrectly invokes the Appellate Body's findings in *US – Line Pipe*. In that case, according to Korea, the Appellate Body held that a determination of both serious injury and threat of serious injury could establish the basis for safeguard action because both represented a continuum of injury; each was sufficient individually, or together, to meet the requirements of Article 2.1 of the *Agreement on Safeguards*. However, according to Korea, when employing this same analysis to the present case, the answer must be different. A determination that finds that the like product is CCFRS cannot support the right to take a safeguard action on tin mill products. Korea submits that it is true that all three Commissioners found serious injury—but not to the same industry and not from the same imports.

148. Korea considers that the United States is wrong to state that affirmative determinations under United States law are sufficient to satisfy the requirements of Articles 2 and 4 of the *Agreement on Safeguards*. The Panel, according to Korea, properly determined that the *Agreement on Safeguards* does not permit a WTO Member to base a safeguard measure on a determination supported by a set of

[117]Korea submits the same arguments with respect to the Panel's findings on causation concerning tin mill products.

explanations each of which is based on different facts and different conclusions which are inherently inconsistent with each other.

3. Parallelism

149. Korea submits that the Panel properly found that the USITC's report failed to provide an adequate parallelism analysis for CCFRS, welded pipe, and tin mill products and, therefore, does not conform to the requirements of Articles 2, 4 and 3.1 of the *Agreement on Safeguards*.

150. Korea maintains that, contrary to the United States' assertion, the Panel did not state that the USITC must also conduct a full analysis of the effects of the excluded imports. Korea notes that the Panel did not resolve the issue of whether non-covered imports themselves must be considered and analyzed as an "other factor" of injury. Korea submits that imports from excluded sources should be analyzed as an "other factor" in order to ensure that the effects of injury from those imports are not improperly attributed to covered imports. In addition, Korea argues that the United States did not establish explicitly that increased imports from non-NAFTA countries alone caused serious injury. According to Korea, the USITC's conclusion that its findings would have been the same if imports from Canada and Mexico were excluded from the analysis does not fulfill the conditions of Articles 2.1 and 4.2(b).

151. Finally, as regards the exclusion of imports from Israel and Jordan, Korea argues that the United States did not comply with the requirements of the *Agreement on Safeguards*. Korea submits that in order to establish explicitly that imports from sources covered satisfy alone the conditions for the application of a safeguard measure, a Member must determine whether its conclusions on causation would change if imports from exempt sources, taken together, were excluded from the analysis. Moreover, in Korea's view, there is no second standard for sources of small volumes of imports.

4. Causation

(a) Specific Arguments with respect to CCFRS and Welded Pipe

152. Korea agrees with the Panel that the USITC did not establish a causal link between increased imports and serious injury for CCFRS. The Panel recognized that the *Agreement on Safeguards* does not establish the method for establishing a causal link and specifically recalled that the USITC's analysis had to be analyzed on its substance, not on the basis of labels. The Panel, in Korea's view,

properly found that the United States did not establish a causal link between increased imports and serious injury for CCFRS.

153. Korea argues that, after setting out its approach in a manner consistent with the prior holding of the Appellate Body on this issue, the Panel analyzed whether the USITC could have concluded that there was a coincidence of trends between the various factors of injury and the increase in imports. In sum, the Panel proceeded through each injury factor to determine whether there was a coincidence of trends with respect to each.

154. According to Korea, the United States mistakenly criticizes the Panel for preparing charts summarizing the USITC data with a view to checking whether coincidence existed. In Korea's view, the Panel could not have reviewed the findings of the USITC if it had not first examined in some fashion the movements in imports and in injury factors. Korea contends that the United States is arguing that the Panel should have considered whether coincidence existed between increased imports and other injury factors such as market share. According to Korea, the Panel, however, concluded that there was no coincidence between net commercial sales and imports, which is a different way of analyzing market share.

155. In addition, Korea argues that, in the absence of coincidence, the United States failed to provide evidence that the USITC's analysis was a "compelling explanation" of why causation existed. Korea notes that the Panel examined whether the USITC's findings of build-up of import inventories and declining import prices provided a compelling explanation of causation after imports declined in 1998. The Panel rejected the USITC's "compelling analysis" as it related to importer inventories and, Korea notes, the United States does not appeal that finding. Korea contends that the United States incorrectly maintains that the Panel did not analyze the USITC's findings regarding pricing trends. Moreover, Korea submits that the USITC's pricing analysis was intended to show that imports led prices down. Therefore, Korea contends that, presumably, the trends in prices and overselling would be the most relevant to that question. However, according to Korea, the USITC made no reference to import pricing trends. Finally, Korea argues that the United States responds to the Panel's analysis strictly by pointing to new evidence. According to Korea, the data referred to was not relied upon by the USITC because they were never cited by the USITC, nor would they have been, because they contained prices only for non-NAFTA imports and the USITC analysis of pricing was with respect to all imports.

156. Korea argues that the United States misinterprets the Panel's finding with respect to CCFRS as rejecting the USITC's analysis of causation on the basis of the like product definition. In Korea's view, the Panel simply recognized that the broad like product definition of CCFRS added complexities to the analysis of conditions of competition. This, according to Korea, is legally distinct from a finding regarding the proper definition of the like product, a finding that the Panel did not make.

157. Korea contends that the Panel correctly found that the USITC's non-attribution analysis with respect to CCFRS and welded pipe was "fatally flawed".[118] Korea notes that the United States, in its appellant's submission, puts emphasis on the requirement that the other factors "simultaneously" cause injury. However, Korea argues that, with the exception of welded pipe, the USITC does not identify injury from imports as occurring at any particular time in the period. Moreover, Korea disagrees with the United States' position that if the effect of a factor is minor, it does not have to be separated and distinguished. In Korea's view, *EC – Tube or Pipe Fittings* does not stand for the proposition that the mere assertion that a factor is minor satisfies the non-attribution standard.

158. Korea submits that, on the one hand, the United States maintains that no analysis of cumulative causes is required in order to adequately separate and distinguish the effects of other factors of injury, and, on the other, the United States acknowledges that the cumulative assessment of factors could lead to different results. For example, the United States argued that it was not possible for legacy costs, standing alone, to cause price declines. Furthermore, Korea contends that the United States overstates the findings of the Appellate Body in *EC – Tube or Pipe Fittings*, because in that case, the Appellate Body specifically left open the possibility that a cumulative analysis might be required in certain factual circumstances.

159. In addition, in Korea's view, the United States incorrectly interprets the Panel's findings as requiring a "weighing" of factors versus imports. The Panel, according to Korea, did not require a weighing, but rather commented on the importance of an overall assessment in the context of the USITC methodology whereby causal factors are completely disregarded if they are not more important than increased imports and regardless of whether such factors are found to be causing some of the injury.

[118]Korea's appellee's submission, heading V.B.

G. *Arguments of New Zealand – Appellee*

1. Unforeseen Developments, Article 3.1 of the *Agreement on Safeguards*, and Article 12.7 of the DSU

160. New Zealand requests the Appellate Body to uphold the finding of the Panel that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*. In New Zealand's view, the Panel applied the correct standard of review in the application of Article XIX of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*. In *US – Lamb*, the Appellate Body did not establish a standard of review for Article 4.2 different from the standard applicable to other provisions of the *Agreement on Safeguards* or to Article XIX of the GATT 1994. Accordingly, the Panel applied the standard of review set out in Article 11 of the DSU and did not allow its examination to reflect concerns relevant to Article 4.2 or disregard concerns relevant to Article XIX of GATT 1994.

161. New Zealand considers that the Panel was correct in requiring the USITC to establish that unforeseen developments resulted in increased imports in respect of each specific product subject to a safeguard measure. If there were no such requirement, a Member could impose a safeguard measure on a range of products even if unforeseen developments had led to an increase in imports of only one of them.

162. New Zealand further maintains that the Panel was correct in finding that the USITC's conclusions were not supported by data linking those developments to specific increased imports. The logic of the United States' position is that a competent authority need only collect information in a report and make a determination without providing any reasoning. Article 3.1 of the *Agreement on Safeguards* requires, however, that the report of the competent authorities set forth "reasoned conclusions on all pertinent issues of fact and law". A "reasoned conclusion" is one "that links the pertinent facts to the conclusion reached. It is not one where key elements of the analysis are left to guesswork and supposition".[119] New Zealand submits that the United States' argument that there is no requirement for competent authorities to provide a "reasoned and adequate explanation" as long as there is a "logical basis" for their conclusions undermines the disciplines of the *Agreement on Safeguards*.

[119]New Zealand's appellee's submission, para. 4.13.

2. Increased Imports

163. In New Zealand's view, the Panel applied the correct standard in determining whether there are increased imports for purposes of Article 2.1 of the *Agreement on Safeguards*. New Zealand rejects the United States' suggestion that the enquiry whether an increase in imports was "recent", "sudden", "sharp", and "significant" should be "deferred" until the phase in which serious injury and causation are determined. New Zealand also contests the United States' interpretation of the phrase "in such increased quantities" to mean that the level of imports at, or reasonably near to, the end of a period of investigation be higher than at some unspecified point in time; such an interpretation would "remove an essential discipline"[120] from the *Agreement on Safeguards* and establish a standard that would allow "the arbitrary imposition of safeguards measures just because imports have increased at some stage in the past".[121] New Zealand also submits that, in determining whether imports have increased, the Panel applied a standard which is "well established in the law"[122], and properly found that the USITC had failed to provide a reasoned and adequate explanation for its determination.

164. New Zealand emphasizes that the Panel's analysis of increased imports of CCFRS was correct. The Appellate Body found in *Argentina – Footwear (EC)* that a consideration of trends is required for determining whether there are increased imports for purposes of Article 2.1 and that it is not sufficient to merely compare import levels as they stood at the end points of the period of investigation.[123] According to New Zealand, the USITC "ignored these requirements"[124] by not considering trends in imports over the entire period of the investigation.

3. Parallelism

165. New Zealand requests that the Appellate Body uphold the Panel's finding that the United States acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* by failing to comply with the requirement of "parallelism". New Zealand first submits that, contrary to what the United States' argues, the Panel did not suggest that the USITC was required to conduct a separate analysis of imports from sources not subject to the measure. Rather, the Panel merely pointed out that increased imports of products excluded from the application of a measure cannot be used to support a

[120]New Zealand's appellee's submission, para. 5.9.

[121]*Ibid*.

[122]*Ibid*., para. 5.12.

[123]New Zealand's appellee's submission, para. 5.17, referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

[124]New Zealand's appellee's submission, para. 5.17.

determination that the product is being imported in such increased quantities as to cause serious injury. The Panel's statement that it is necessary "to account for the fact that excluded imports may have some injurious impact on the domestic industry" is a "purely descriptive alternative way of saying that excluded imports cannot be used to support a determination of increased imports".[125] In New Zealand's view, the competent authority need not conduct a separate analysis, or make separate findings for excluded products, but it does have to account for the effects of such products in making findings regarding the products subject to the safeguards measure. This, in New Zealand's view, is "central to the logic of the parallelism requirement".[126]

166. With respect to the United States' argument concerning the exclusion of imports from Israel and Jordan, New Zealand argues that the United States has "misconstrued the Panel's finding".[127] New Zealand submits that, with respect to imports from Israel and Jordan, the Panel was "making the point that the USITC did not ask itself the right question."[128] The USITC enquired, first, whether increased imports from all sources other than Canada and Mexico were a substantial cause of serious injury; and it then enquired, second, into whether the exclusion of imports from Israel and Jordan would change this conclusion. However, the correct enquiry was whether imports covered by the measure—that is, imports other than those from Canada, Mexico, Israel, and Jordan—were a substantial cause of serious injury. With respect to the United States' presentation of import statistics for Israel and Jordan, New Zealand argues that the issue before the Panel was not whether a reasoned and adequate explanation *could* be provided demonstrating that imports covered by the measure were a cause of serious injury. According to New Zealand, the issue was whether the USITC *had* in fact provided such an explanation explicitly in its report.

4. Causation

(a) General

167. New Zealand argues that the Panel was correct in finding that the United States acted inconsistently with Articles 2.1, 3.1 and 4.2(b) of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation establishing a causal link between "increased imports" of

[125]New Zealand's appellee's submission, para. 7.4.

[126]*Ibid*., para. 7.5.

[127]*Ibid*., para. 7.9.

[128]*Ibid*., para. 7.10.

CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar and "serious injury" to the relevant domestic producers.

168. New Zealand submits that the Panel was correct in concluding that the USITC should have provided a collective analysis of the injurious effects of factors other than increased imports. In *EC – Tube or Pipe Fittings*, the Appellate Body found that in the context of a causation analysis under the *Anti-Dumping Agreement*, a collective assessment of the injurious effects of all other factors was not required in all cases, but may be required in specific circumstances where the lack of a collective assessment would lead to injury caused by other factors being attributed to imports. In New Zealand's view, the practice of the USITC of assessing the injurious effects of other factors individually "runs the risk of a finding of causation … even though the other factors cumulatively had a greater effect on serious injury than increased imports".[129] Furthermore, the USITC found, in the present case, that other factors causing serious injury (decline in demand, domestic capacity increases, legacy costs and intra-industry competition) did contribute significantly to the alleged serious injury. An individual assessment of those factors, in New Zealand's view—particularly when these factors are "linked and intertwined"—does not make clear what their full impact on serious injury has been.[130] New Zealand argues that the Appellate Body's reference in *US – Lamb* to the need to assess the nature and the extent of the injury caused implies a collective assessment of that injury.

169. New Zealand furthermore disagrees with the United States' contention that the Panel misunderstood the USITC's causation analysis and frequently failed to take into account all of the findings of the USITC on particular issues.

(b) Specific Arguments with respect to CCFRS

170. In New Zealand's view, the Panel was correct in concluding that the USITC had failed to provide a reasoned and adequate explanation demonstrating a causal link between increased CCFRS imports and serious injury. Contrary to the United States' contention, the Panel did not conduct a *de novo* review; the "data set" prepared by the Panel consisted of graphs made on the basis of data contained in the USITC's record.

171. According to New Zealand, the Panel also did not substitute its own conclusions on coincidence for those of the USITC, but rather looked for the reasoned and adequate explanation of

[129]New Zealand's appellee's submission, para. 6.10.

[130]*Ibid*., para. 6.11.

the USITC's determination. The Panel correctly found a lack of coincidence between import trends and trends in injury factors. Furthermore, the Panel did not ignore the effects of import prices, as alleged by the United States, but rather examined the USITC's pricing analysis after it found an absence of coincidence. New Zealand also argues that the Panel did not fail to consider the overall situation of the domestic industry; rather, the USITC itself essentially considered only two indicators. In New Zealand's view, the United States is, in reality, criticizing the Panel for not conducting a *de novo* review.

172. New Zealand further submits that the Panel was correct in finding, in its consideration of "conditions of competition", that the USITC's pricing analysis was not reasoned and adequate. Contrary to the United States' assertions, the Panel did not suggest that it was necessary for the USITC to show underselling for each product at every point in time to justify a finding of underselling. Rather, New Zealand submits, the Panel—correctly—found fault with the USITC's pricing analysis because the USITC did not provide a reasoned and adequate explanation of how the facts supported the USITC's "general thesis" that "imports were priced below domestically produced steel."[131]

173. New Zealand also argues that the Panel was correct in insisting that the USITC "justify its reliance" on AUV pricing data when conducting its pricing analysis. The Panel noted the reservations expressed by the USITC itself about using aggregate, as opposed to individual, product data. The Panel made "the perfectly reasonable observation"[132] that, having expressed qualifications and reservations about the pricing data on which it was relying, the USITC had to justify its reliance on that data. New Zealand recalls that the Panel also found that even this data did not support the conclusions that the USITC had drawn.

174. New Zealand next submits that the Panel was correct in concluding that the broad product definition of CCFRS made it difficult for the competent authority to identify the proper locus of competition while undertaking a conditions of competition analysis. In the case of a broad product definition, the statistics for the industry and imports will only show averages and will not provide sufficiently specific information about the locus of competition in the market. In New Zealand's view, the Panel was not addressing the "like product" issue; rather, the Panel made the point that, regardless of whether the "like product" determination is or is not consistent with Article 2.1, a broad product definition has implications for a causation determination. Contrary to the United States'

[131]New Zealand's appellee's submission, para. 6.33.

[132]*Ibid*., para. 6.39.

allegations, the Panel did not misconstrue the findings of the panel in *Argentina – Footwear (EC)* in this respect.

175. New Zealand finally contends that the Panel was correct in concluding that the USITC had failed to separate and distinguish the injurious effects of the following factors from those of increased imports. With respect to declining demand, New Zealand argues that the United States' objection to the Panel's findings involves a disagreement with the Panel's factual conclusions; at the end of the period of investigation, there was a strong coincidence between declining demand and injury, while imports were declining. With respect to domestic capacity increases, according to New Zealand, the USITC acknowledged that such increases likely played a role in domestic price declines; however, the USITC then dismissed this factor without assessing its nature and extent, although the facts indicate that the domestic industry used excess capacity in a manner that caused or contributed to declining prices.

176. With respect to intra-industry competition, New Zealand argues that the USITC itself acknowledged the role played by intra-industry competition in causing injury, but subsequently failed to explain how it ensured the non-attribution of the injurious effects of this factor. The United States suggests that the cost advantages of minimills did not change during the period of investigation; however, as the Panel recognized, the existence of a factor throughout the period does not mean it cannot play a role in causing serious injury. New Zealand also objects to the United States' introduction of previously undisclosed data in support of its arguments.

177. With respect to legacy costs, New Zealand contends that the findings of the USITC, as well as the data considered by the Panel, show that legacy costs imposed a significant burden on integrated producers. New Zealand argues that the USITC itself recognized the problems caused to the industry by these costs, but then dismissed this factor—"in half a sentence"[133]—on the basis of the assertion that these costs did not contribute to declining prices.

H. *Arguments of Norway – Appellee*

1. Unforeseen Developments, Article 3.1 of the *Agreement on Safeguards*, and Article 12.7 of the DSU

178. Norway requests the Appellate Body to reject the United States' appeal of the Panel's conclusions concerning unforeseen developments. Norway recalls that the Appellate Body found in

[133]New Zealand's appellee's submission, para. 6.72.

US – Lamb that the existence of unforeseen developments is a "pertinent issue of fact and law" within the meaning of Article 3.1 of the *Agreement on Safeguards*, and that, therefore, the report of the competent authorities must contain a finding or a reasoned conclusion on unforeseen developments. Norway further refers to the Appellate Body's statement that a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate "only if the panel critically examines that explanation, in depth and in the light of the facts before the panel."[134] Consequently, according to Norway, a panel must examine whether the competent authorities considered all the relevant facts and adequately explained how the facts support their determinations. In Norway's view, it is obvious that a demonstration of unforeseen developments must be integrated with, and must be logically connected to, the explanation of the other requirements, and must also be reasoned and adequate.

179. Norway contends that Article XIX of the GATT 1994 requires that unforeseen developments be linked to the product which is being imported in increased quantities. The United States, in Norway's view, seems to suggest that the USITC concluded that the effects of certain macroeconomic developments were fairly consistent across the respective steel industries. According to Norway, there is no such conclusion in the USITC report and, moreover, the conclusion is incorrect.

180. Norway further submits that data not used by the USITC in its analysis of unforeseen developments, but used elsewhere in the USITC's report, are not relevant for the Panel's review. In Norway's view, a reasoned conclusion is one that links the pertinent facts to the conclusion reached, not one where "key elements of the analysis are left to guesswork and supposition".[135] According to Norway, the United States' position appears to be that a competent authority need only collect information in a report and make a determination—without providing any reasoning to support the determination.

181. As for the United States' contention that the Panel's findings on the lack of a reasoned and adequate explanation imply only a violation of Article 3.1 and not of Articles 2 and 4 of the *Agreement on Safeguards*, Norway submits that the Appellate Body has explained in previous safeguards cases that the failure to provide a reasoned and adequate explanation is not only a violation of Article 3.1, but also of the substantive obligations of the *Agreement on Safeguards*.[136] According

[134]Norway's appellee's submission, para. 118, referring to Appellate Body Report, *US – Lamb*, para. 106.

[135]Norway's appellee's submission, para. 132.

[136]*Ibid*., para. 98.

to Norway, "[i]t is inherent in the notion of 'determination', which underlies both Articles 2 and 4 of the *Agreement on Safeguards*, that there be full consideration of all the facts and arguments and a reasoned and adequate explanation of how all the requirements for imposing the measure have been met."[137]

182. With respect to Article 12.7 of the DSU, Norway submits that the United States is in fact reproaching the Panel for making more findings than were needed. The Panel was called upon to examine whether the USITC had provided reasoned and adequate explanations to support its determinations. Once the Panel had decided that there were no such explanations, its analysis should have ended. It was, therefore, not for the Panel to develop alternative explanations or to examine whether there was evidence to come to a different conclusion than the USITC.

2. Increased Imports

183. Norway submits that the United States' appeal of the Panel's findings on increased imports rests on two grounds. First, the United States challenges the standard applied by the Panel as not being supported by the text of the *Agreement on Safeguards*. Second, the United States asserts that the Panel erred in its analysis of the import data for CCFRS, hot-rolled bar and stainless steel rod. In its submission, Norway addresses only the general legal standard for increased imports and, with respect to the product-specific arguments for CCFRS, hot-rolled bar and stainless steel rod, incorporates by reference the relevant arguments of the other Complaining Parties.[138]

184. Norway understands the United States to argue that the requirement, set out in *Argentina – Footwear (EC)*, that increases in imports be "recent enough, sudden enough, sharp enough and significant enough", applies to the phase in which serious injury or causation are determined. This argument, in Norway's view, "simply ignores"[139] what was said in *Argentina – Footwear (EC)* and the way in which the requirements set out there have been applied more generally in WTO dispute settlement. The Appellate Body was not making a statement about the entire investigative process. The Appellate Body, in Norway's view, was not seeking to defer the requirement that increases be recent, sudden, sharp and significant to the phase in which serious injury or causation are determined.

[137]Norway's appellee's submission, para. 100.

[138]*Ibid*., para. 141.

[139]*Ibid*., para. 145.

185. Norway submits that, in assessing increased imports, the USITC was required to examine the recent past. Given the extraordinary or abnormal nature of safeguard measures, as recognized by the Appellate Body, it is not enough for the competent authorities to determine simply that the level of imports at or near the end of the period was higher than at some unspecified earlier point. In particular circumstances, a decrease in imports at the end of the period of investigation may preclude a finding of increased imports pursuant to Article 2.1 of the *Agreement on Safeguards*. Norway contends that the United States' argument that "any increase will do" would allow authorities to ignore trends throughout the investigation period and would undermine the disciplines of the Agreement.

186. Norway argues that the effect of the United States' approach is to try to move from a standard that is consistent with the objectives of the *Agreement on Safeguards*, namely, to provide relief from import surges, to a standard that allows the arbitrary imposition of safeguards measures just because imports have increased at some stage in the past. The United States, according to Norway, wants the Appellate Body to reverse its previous case law to allow the United States to continue its practice whereby a mere increase or "any increase" is sufficient; this test would allow a determination that imports have increased to be made on the basis of a peak in imports at some time during the period of investigation and would ignore trends throughout that period. Norway concludes that this test has no basis in law and must therefore be rejected.

(a) Specific Arguments with respect to Tin Mill Products and Stainless Steel Wire

187. Norway argues that the Panel correctly found that the USITC's determination relating to tin mill products and stainless steel wire did not comply with the requirements under Articles 2.1, 3.1 and 4.2(c) of the *Agreement on Safeguards*. According to Norway, the specific legal problem arising in this case is that not all the three Commissioners, who, according to the United States, voted in the affirmative in respect of tin mill products and stainless steel wire, related their findings to tin mill products and stainless steel wire. The Panel examined whether the United States had established, through a proper determination supported by a report setting out reasoned and adequate explanations, that it had a right to apply a safeguard measure on tin mill products and stainless steel wire. Norway submits that the Panel correctly found that there was no such determination supported by a reasoned and adequate explanation because the Presidential Proclamation refers to three irreconcilable determinations based on different products.

188. The Panel's reasoning was based on the requirement that the measure ultimately imposed must be based on a determination, and the underlying investigation, as published in the report. This

obligation, in Norway's view, has two aspects. First, there must be a determination, supported by a report setting out reasoned and adequate explanations; second, that determination must relate to the products on which safeguard measures are imposed.

189. Both of these aspects are well set out in the text of the *Agreement on Safeguards* and have long been clarified by the Appellate Body. Thus, the determination required by WTO Members under the *Agreement on Safeguards* must be a singular act for which a WTO Member is accountable. The Panel did not depart from the Appellate Body's findings in *US – Line Pipe*; rather, the Panel followed these Appellate Body findings by asking whether a single legal act in the form of a determination supported by a report with reasoned and adequate explanations existed. Norway argues that the Panel correctly found that there was none.

190. Norway argues that, contrary to what the United States argues, divergent findings that are based on differently-defined products are intrinsically irreconcilable. Norway is furthermore of the view that the question before the Panel was not whether there was a match between the product coverage of the determinations reached by Commissioners Bragg, Devaney, and Miller. As the Panel clarified, it examined whether these opinions were reconcilable for purposes of the *Agreement on Safeguards*. Norway argues that, in order to reconcile the different analyses and findings of the three Commissioners that are based on different import volumes, the Panel would have had to examine *ex post* all the data on which the three different Commissioners based their analyses and determine whether the increased imports requirement was fulfilled. Norway submits that it is not for the Panel to reconcile, to re-assess or to re-write the measure by looking at data somewhere in the report. The Panel's task, according to Norway, is to evaluate whether the United States fulfilled its obligations under the *Agreement on Safeguards.*

191. Norway also disagrees with the United States' argument that the Panel Reports improperly impinge on the manner in which a Member structures the decision-making process of its competent authority. In Norway's view, the Panel "fully followed"[140] the Appellate Body in recognizing the sovereign discretion of the United States to structure its internal decision-making process as an exercise of its sovereignty. Norway is of the view that the Panel did not impose any requirement on how the United States structures its internal decision-making in safeguard investigations.

192. Finally, Norway contends that the Panel did not have to address the arguments of the Complaining Parties that each of the individual opinions analyzed separately also fails to fulfil the

[140]Norway's appellee's submission, para. 286.

requirements set by Articles 2.1 and 4 of the *Agreement on Safeguards*. However, Norway submits that, should the Appellate Body consider it necessary to do so, there are sufficient findings, arguments and undisputed facts on the record to show that the assertion of the United States is incorrect.

3. Parallelism

193. Norway submits that there is no reason for the Appellate Body to disturb the Panel's findings on parallelism. Norway disagrees with the United States' assertion that the Panel created a new requirement of a separate analysis of imports from sources not subject to the safeguard measures. Norway submits that Article 2.1 has been interpreted to refer only to imports from covered sources and limits the product basis of the determination to imports covered by the measures. The term "imports" in Article 4 must have the same meaning, and thus the phrase "factor other than imports" must be read "factors other than covered imports". Therefore, in the view of Norway, in requiring that the effects of imports not covered by the measure be accounted for and not be attributed to covered imports, the Panel was simply applying Article 4.2(b), second sentence, to the proper product scope. Moreover, Article 4.2(b), by referring to "other factors", does not establish a closed list and the competent authorities have a duty to investigate even beyond the listed injury factors. Norway argues that the United States never explains how a competent authority could demonstrate, other than by conducting a non-attribution analysis with respect to excluded imports, that there is a causal link between imports actually covered by the relevant measures and serious injury.

194. In this regard, Norway also notes that a failure, by the competent authority, to proceed properly may well have significant consequences for its conclusion. For some product groups, imports from Mexico and Canada taken together were 40 percent of imports from all other sources. Indeed, for some products, the United States' authorities themselves concluded that imports from such sources, even taken individually, were contributing importantly to serious injury.

195. According to Norway, the United States contends that because imports from Israel and Jordan were non-existent or infinitesimal, the discussion of non-NAFTA imports also provides the requisite explicit findings with respect to imports from all sources other than Canada, Mexico, Israel, and Jordan. Norway submits that the United States is actually invoking a *de minimis* exception which does not exist. Norway further submits that the United States' contention that the Panel's requirement imposes the obligation to make redundant findings is also erroneous. By requiring the United States to make specific findings for non-FTA imports, Norway believes, the Panel is making it possible for

the competent authorities to make a proper determination, based only on the covered imports, that is fully consistent with WTO requirements.

4. Causation

196. Norway requests the Appellate Body to uphold the Panel's findings that the USITC failed to meet the necessary causation standard for CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, tin mill products, and stainless steel wire.

197. Norway notes that there is no basis for the United States' claims that the Panel misinterpreted the causation standard and "consistently read into the ITC's analysis findings the ITC did not make, misstated or ignored critical findings of the ITC [ ] and even substituted its own views of the record for that of the ITC."[141]

198. Norway argues that, contrary to the United States' arguments, the Panel did not substitute the USITC's *reasonable* conclusions on causation with its own conclusions. Rather, it reviewed the evidence that was before the USITC and recognized the obvious lack of coincidence between increased imports and domestic industry performance. Because of the lack of coincidence, the Panel sought out the USITC's analysis as to why a causal link between increased imports and serious injury to the domestic industry still existed. Norway contends that, based on the evidence before the Panel, there was no analysis offered by the USITC that could meet the standard.

199. Norway contends that, by stopping its investigation of individual factors after it had established that they were not a cause of injury equal to or greater than increased imports, the USITC did not comply with the requirement of Article 4.2(b). This approach is, in Norway's view, clearly not a correct one, as it does not comply with Article 4.2(b) of the *Agreement on Safeguards* that, according to Appellate Body practice, requires a competent authority to separate and distinguish the injurious effects of the increased imports from the injurious effects of other factors.

200. According to Norway, the United States is also mistaking a critical review by the Panel for a *de novo* review of the facts. In Norway's view, the Panel correctly applied the standard of review and examined whether the USITC assessed all relevant factors and provided a reasoned and adequate explanation of how the facts supported its determination of a causal link as well as its non-attribution analysis.

[141]Norway's appellee's submission, para. 164, referring to the United States' appellant's submission, para. 168.

201. Norway furthermore associates itself with the product-specific arguments made by the other appellees. In particular, as regards the standard of review issue and the details of the CCFRS analysis, Norway specifically refers to Brazil's appellee's submission.

I. *Arguments of Switzerland – Appellee*

1. Unforeseen Developments, Article 3.1 of the *Agreement on Safeguards*, and Article 12.7 of the DSU

202. Switzerland requests that the Appellate Body uphold the Panel's conclusions concerning unforeseen developments.

203. As for the United States' argument that the word "explicit" is not contained in the *Agreement on Safeguards*, Switzerland submits that the need for an explicit determination is simply a clarification of the requirement contained in Article 3.1 that the published report must contain "reasoned conclusions" and the requirement under Article 4.2(c) to provide a "detailed analysis", including a "demonstration of the relevance of the factors examined."

204. Switzerland submits that the Panel applied the correct standard of review in examining the issue of unforeseen developments under Article XIX:1(a) of the GATT 1994. In stating that it had to examine whether the competent authorities had "considered all the relevant facts and had adequately explained how the facts supported the determinations that were made"[142], the Panel was simply articulating what its responsibilities were in applying the standard of review set out in Article 11 of the DSU. Switzerland asserts that the Panel was not allowing its approach, in this respect, to reflect concerns relevant to Article 4.2 of the *Agreement on Safeguards*.

205. Switzerland argues that Article XIX:1(a) of the GATT 1994 requires that there must be a link between the relevant unforeseen developments and increased imports of each of the specific products that may be subject to a safeguard measure. According to Switzerland, it is not sufficient, therefore, to link the unforeseen developments to only one of those products.

206. Switzerland further maintains that the Panel was correct in finding that the USITC's conclusions were not supported by data linking those developments to specific increased imports. A "reasoned conclusion" under Article 3.1 of the *Agreement on Safeguards* is one that links the pertinent facts to the conclusion reached, not one where "key elements of the analysis are left to

[142]Switzerland's appellee's submission, para. 72, referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.

guesswork and supposition".[143] Switzerland submits that the United States' position appears to be that a competent authority only needs to collect information in a report and make a determination without being under an obligation to provide sound reasoning to support its conclusion. In Switzerland's view, such a result makes a "mockery"[144] of the requirement in Article 3.1 that the competent authority must publish a report of its "findings and reasoned conclusions on all pertinent issues of fact and law."

207. With respect to Article 12.7 of the DSU, Switzerland argues that the Panel fully considered all the facts and arguments of the United States and properly stated the basic rationale for its findings.

2. Increased Imports

(a) General

208. Switzerland submits that the Panel correctly concluded that the increase in imports must have been recent. According to Switzerland, this conclusion "tracks precisely" the Appellate Body's finding in *Argentina – Footwear (EC)*[145], and follows from the use of the present tense in the phrase "is being imported" in Article 2.1 of the *Agreement on Safeguards*.

209. Switzerland also agrees with the Panel's finding that the increase in imports must be sudden. According to Switzerland, this interpretation is fully supported by the Appellate Body's finding in *Argentina – Footwear (EC)*, which, in turn, is based on a contextual reading of Article XIX of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*.

210. Finally, Switzerland disagrees with the Unites States' position that "the phrase 'in such increased quantities' simply states the requirement that, in general, the level of imports at (or reasonably near) the end of the [period of investigation] be higher than at some unspecified earlier point in time."[146] Switzerland sees this argument as endorsing the "simplistic"[147] end-points analysis that was rejected by the Appellate Body in *Argentina – Footwear (EC)*.[148]

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[143]Switzerland's appellee's submission, para. 81.

[144]*Ibid*., para. 81.

[145]Switzerland's appellee's submission, para. 90, referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.

[146]Switzerland's appellee's submission, para. 94, referring to the United States' appellant's submission, para. 102.

[147]Switzerland's appellee's submission, para. 94.

[148]*Ibid*., referring to Appellate Body Report, *Argentina – Footwear (EC)*, paras. 129 and 131.

(b) Specific Arguments with respect to CCFRS [149]

211. According to Switzerland, the United States seeks to "rehabilitate" [150] the USITC report by comparing the level of imports between 1996 and 2000 and without addressing the level of imports at the end of the period of investigation. Switzerland sees this approach as "patently wrong". [151]

(c) Specific Arguments with Respect to Tin Mill Products and Stainless Steel Wire

212. Switzerland asserts that the Panel's findings are correct and completely in line with prior panel and Appellate Body practice. The Panel's concern was not with how the United Sates law functions, but that by function of United States law—which required the President to rely on the decision of at least three Commissioners—there needed to be consistent treatment of the like product. Otherwise, the analysis of these Commissioners could not support the measures on these individual products.

213. Switzerland argues that the United States is incorrect in claiming that the Panel's findings "provide[ ] no insight into the Panel's reasoning". The Panel expressed its reasoning well. Switzerland fails to understand how the United States can recognize the fact that the three Commissioners based their findings on data for two different product groupings, but then claim that the disparate findings based on the data for those groupings both support a measure on only one grouping. The findings cannot possibly be reconciled because they address entirely different issues. The Panel found simply that, to comply with the provisions of the *Agreement on Safeguards*, a Member's authority may not reach an affirmative finding (however that is defined) and impose a measure that is based on multiple, inconsistent like product definitions. This is not a far-reaching finding.

214. According to Switzerland, the United States erroneously claims that the "something beyond" language derived from the Appellate Body Report in *US – Line Pipe* applies in the present case. Rather, the language is a statement by the Appellate Body that, in hierarchical terms, a showing of threat is easier to make than a showing of actual injury, which is "something beyond" threat. Therefore, the Appellate Body appears to have reasoned, if three threat of injury votes would suffice,

[149]For hot-rolled bar and stainless steel rod, Switzerland refers to the arguments of the other Complaining Parties and incorporates them by reference. (Switzerland's appellee's submission, para. 100)

[150]Switzerland's appellee's submission, para. 104.

[151]*Ibid*.

so would a combination of three threat and injury votes. Lastly, in Switzerland's view, the Panel's decision does not improperly infringe on a Member's right to structure the decision-making process of its competent authority.

3. Parallelism

215. According to Switzerland, the Appellate Body established unequivocally—based on the identity of the language in Article 2.1 and Article 2.2—that imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure under Article 2.2 of the *Agreement on Safeguards*. This is crucial for the present case. It does not mean that a "gap" may not exist between imports covered under the investigation and imports falling within the scope of the measure. However, according to Switzerland, such a gap can only be justified—as stated by the Appellate Body—if it is explicitly established that increased imports from non-FTA sources *alone* caused serious injury or threat of serious injury.

216. The United States, in Switzerland's view, obviously failed to meet this standard. Equally invalid is the United States' criticism of the Panel for inserting an allegedly incorrect additional analytical step. The approach followed by the Panel, again, is based on consistent panel and Appellate Body practice. Switzerland also disagrees with the United States' argument that, if the volume of FTA imports is extremely small, the competent authority's conclusions with respect to all imports are also applicable to imports from all sources other than the excluded FTA sources. Switzerland contends that, even though imports from Israel and Jordan were small, or sometimes even quasi-non-existent, this does not release the United States from establishing explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure alone do satisfy the conditions for the application of a safeguard measure.

4. Causation

(a) General

217. Switzerland requests that the Appellate Body uphold the Panel's findings on causation. For the United States, the central element of the Panel's alleged errors with respect to causation relates to its establishment of the facts and its weighing and appreciation of the evidence. Yet, nowhere in its arguments on causation does the United States allege that the Panel has infringed Article 11 of the DSU. All the United States has alleged, in its detailed product-by-product arguments, is that the Appellate Body should reach a different factual finding to that reached by the Panel. Since the United

States has not pleaded before the Appellate Body that Article 11 has been infringed, it cannot have the Panel's fact-finding and weighing of the evidence reversed. The situation is similar to the situation faced by the Appellate Body in *US – Countervailing Measures on Certain EC Products*.[152]

218. Switzerland further argues that the United States' submission erroneously suggests that the Panel allegedly failed to meet an undefined "burden of proof" before it could conclude that the USITC's findings were WTO-inconsistent. The Panel was required to make an "objective assessment of the matter before it" pursuant to Article 11 of the DSU. This involves the Panel determining, in the words of the Appellate Body, whether the USITC provided a reasoned and adequate explanation. The United States has not alleged, however, that the Panel infringed its obligations under Article 11 of the DSU. According to Switzerland, the United States furthermore erroneously assumes that merely by reversing the Panel's findings on specific issues, the Appellate Body could uphold the USITC's causation analysis.

219. Switzerland contends that there are at least two general methodological faults committed by the USITC. First, in the instances where the USITC has determined that there is more than one alternative cause of injury, the USITC failed to assess, separate and distinguish the collective effects of the other causes from the effects allegedly caused by increased imports. Second, the USITC continues to consider that merely determining that increased imports are a cause "equal or greater than" any alternative cause of injury satisfies the non-attribution requirement of Article 4.2(b) of the *Agreement on Safeguards*; this is the same approach that was found inconsistent by the Appellate Body in *US – Lamb*.

220. Switzerland submits that the Panel's general analytical framework is "unobjectionable". Switzerland notes that the Panel "compartmentalised"[153] the "coincidence" and "conditions of competition" analysis and submits that, after the Panel found an absence of coincidence, did not conduct a sufficiently critical analysis of whether the USITC had nevertheless demonstrated the existence of a causal link. Switzerland submits that in the absence of coincidence, the facts established by the USITC do not establish a compelling explanation that a causal link exists. However, even on the basis of an "uncritical and unduly deferential examination"[154], the Panel concluded in nine out of ten cases that there was no reasoned and adequate explanation.

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[152]Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 51–75.

[153]Switzerland's appellee's submission, para. 133.

[154]*Ibid*., para. 136.

221. Switzerland agrees with the Panel's finding that where several factors are causing injury, a competent authority must assess their effects collectively in order to ensure that it does not attribute any injury caused by other factors to increased imports. Indeed, the Panel could have found every one of the USITC's causation determinations inconsistent with the *Agreement on Safeguards* on these grounds. The Panel did not suggest that a causation methodology needs to provide for a non-attribution analysis of the cumulative effects of other factors in each and every case; rather, the cases requiring a cumulative assessment are where an assessment on an individual relative basis is insufficient to ensure that the injurious effects of other factors are not attributed to increased imports. Switzerland finds support for its reasoning in the Appellate Body's findings in *US – Lamb* and *US – Line Pipe*.

222. Further, in Switzerland's view, the Appellate Body in *EC – Tube or Pipe Fittings* found that a factor which has *no injurious effect*, rather than *minimal effects*, does not have to be subject to a non-attribution analysis. Permitting a competent authority to ignore causal factors considered to have only "minimal" effects would create a *de minimis* exception to the non-attribution requirement not contemplated in Article 4.2(b). Accordingly, Switzerland requests the Appellate Body to uphold the Panel's finding for welded pipe and FFTJ with respect to this matter.

(b) Specific Arguments with respect to Welded Pipe[155]

223. Switzerland submits that the Panel correctly found the USITC's analysis of domestic capacity increases to be insufficient in order to satisfy the non-attribution requirement. The Panel also correctly found the USITC's analysis of non-import related poor performance of a significant domestic producer to be deficient; Switzerland contends that the Panel was correct to find that even factors which have a minor effect should be subject to a non-attribution analysis. Even if the Appellate Body reverses the Panel's findings, Switzerland argues that the Appellate Body should still uphold the Panel's ultimate conclusion; for this purpose, Switzerland refers the Appellate Body to its and other Complaining Parties' arguments before the Panel on which the Panel did not decide.

[155]Switzerland incorporates, by reference, the arguments of the other Complaining Parties with respect to the other product categories in dispute. (Switzerland's appellee's submission, para. 162)

J. *Conditional Appeals*

1. Arguments of Brazil, Japan, and Korea – *Joint Appellants*

224. Brazil, Japan, and Korea request the Appellate Body conditionally to address their claims with respect to the definition of the like product and the domestic industry under Articles 2.1 and 4.1(c), as well as their claims with respect to Article 5.1 of the *Agreement on Safeguards*.

(a) Definition of the like product and the domestic industry

225. In their joint conditional appeal, Brazil, Japan, and Korea request the Appellate Body to rule on whether the grouping by the USITC of CCRFS products into a single like product was consistent with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*, in the event that the Appellate Body: (i) disagrees with the Panel's finding that the safeguard measures are "deprived of a legal basis"; (ii) reverses an aspect of any of the Panel's findings against the United States with respect to CCFRS; or (iii) concludes that the Panel should have issued a like product ruling to support its CCFRS causation finding.

226. According to Brazil, Japan, and Korea, the parties agree that the products composing the CCFRS product category are distinct, since "they have different physical properties, end uses, consumer tastes and habits, customs treatment, and production processes."[156] In addition, Brazil, Japan, and Korea argue that the USITC declined to group CCFRS products together in prior trade remedy cases.

227. According to Brazil, Japan, and Korea, each of the domestic products within a grouping must be "like" all of the subject imports within that grouping. It is not enough to find that the grouping of the domestic products is like that of the imported products. Moreover, Brazil, Japan, and Korea argue that the Appellate Body explained in *US – Lamb* "that a continuous line of production between products—a characteristic heavily relied upon by the United States in the case of flat rolled steel products—is insufficient to overcome their lack of 'likeness'."[157]

[156]Brazil's, Japan's, and Korea's other appellants' submission, para. 25.

[157]*Ibid*., para. 31.

228. In Brazil, Japan, and Korea's view, the domestic industry should be defined on the basis of the competitive relationship between the imported product and the like domestic product. Finally, Brazil Japan, and Korea submit that the product definition of CCFRS is inconsistent with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*, because CCFRS products are not a single product and do not compose one authentic market.

(b) Article 5.1 of the *Agreement on Safeguards*

229. In the event the Appellate Body upholds or modifies the Panel's findings on causation, Brazil, Japan, and Korea request the Appellate Body to complete the analysis "regarding the failure of the United States to adequately analyze causation and to find that the United States failed to ensure that its safeguard measures were limited to the extent necessary, as required by Article 5.1".[158] Alternatively, in the event the Appellate Body reverses the Panel's findings with respect to increased imports and causation, Brazil, Japan, and Korea request the Appellate Body to examine whether the safeguard measures, as explained by the United States in its *ex post facto* economic model, comply with Article 5 of the *Agreement on Safeguards*.

230. Brazil, Japan, and Korea argue that, in accordance with the Appellate Body findings in *US – Line Pipe*, the Complaining Parties established a *prima facie* case that the United States violated Article 5.1, because the Panel found that the United States failed to comply with the causation requirements of Article 4.2(b) of the *Agreement on Safeguards*. According to Brazil, Japan, and Korea, the United States failed to rebut the Complaining Parties' *prima facie* case. Brazil, Japan, and Korea argue that the United States' *ex post facto* analysis is not in accordance with the requirements of Article 5.1 of the *Agreement on Safeguards*, because the United States failed to account for the effects of decreasing demand, domestic capacity increases, intra-industry competition, as well as legacy costs on the domestic industry's performance.

2. Arguments of China – *Appellant*

231. In the event the Appellate Body should reverse sufficient of the Panel's findings to undermine the Panel's conclusion that the safeguard measures were deprived of legal basis, China requests the Appellate Body to address its claim with respect to the definition of the imported product, the like product and the domestic industry under Articles 2.1 and 4.1(c), as well as its claims with respect to Articles 5.1, 9.1 and 3.1 of the *Agreement on Safeguards*.

[158]Brazil's, Japan's, and Korea's other appellants' submission, 2.

(a) Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*

232. China argues that the United States acted inconsistently with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* because the United States failed to properly define the imported product, the like product, and the domestic industry. According to China, the United States' approach of bundling together products in arbitrary groups failed to allow for an examination of the competitive dynamics amongst the various products. China submits that in the absence of such a competitive analysis, an industry not suffering injury could benefit from the imposed relief on a broader group of imported products, some of which might not have even increased. In addition, China alleges that it has demonstrated, along with the remaining other appellants, that even on the basis of the flawed product groupings, the United States was not entitled to impose the safeguard measures.

(b) Article 5.1 of the *Agreement on Safeguards*

233. China argues that the United States violated Article 5.1 of the *Agreement on Safeguards* because the United States' safeguard measures were not limited to remedying or preventing the serious injury caused by imports. China submits that the other appellants have demonstrated that the USITC failed to properly segregate the injurious effects of other factors from the injurious effects of increased imports. In addition, according to China, the *ex post facto* analysis submitted by the United States does not separate and distinguish the effects of factors other than imports on the domestic industry.

(c) Article 9.1 of the *Agreement on Safeguards*

234. China further claims that the United States acted inconsistently with Articles 9.1 and 3.1 of the *Agreement on Safeguards*. China alleges, first, that the United States' approach of linking developing country status under Article 9.1 with the United States' GSP is erroneous. China notes that the United States exercises discretion in deciding the list of beneficiaries within the context of its GSP, and that a number of the eligibility criteria for this list are not related to a country's development status. China contends that this approach is inconsistent with Article 9.1, which expressly requires a link between the special and differential treatment granted under this provision and the developing status of a Member.

235. China submits furthermore that the United States violated Articles 9.1 and 3.1 of the *Agreement on Safeguards* because it failed to provide a reasoned and adequate explanation for China's exclusion from the treatment set forth under Article 9.1. China maintains that its Protocol of

Accession lays down China's status as a developing country, and that this status applies for the purposes of the *Agreement on Safeguards*. Despite these non-ambiguous circumstances, the United States, in China's view, has failed to provide an explanation for China's exclusion from the special and differential treatment provisions of the *Agreement on Safeguards*. Moreover, China alleges that the United States failed to provide an explanation as to why Chinese imports did not meet the *de minimis* test of Article 9.1. In China's view, based on the preliminary calculations and the USITC statistics, China had, for a large number of products, a share of imports into the United States accounting for less than three percent, with the exporting developing countries collectively accounting for no more than nine percent of total imports.

3. Arguments of the European Communities – *Appellant*

236. In the event the Appellate Body should reverse sufficient of the Panel's findings as to undermine its conclusion that there was no legal basis for the safeguard measures imposed by the United States, the European Communities requests the Appellate Body to address its claim with respect to the definition of the imported product, the like product, and the domestic industry under Articles 2.1 and 4.1(c), as well as its claim with respect to Article 5.1 of the *Agreement on Safeguards*.

(a) Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*

237. The European Communities first alleges that the United States acted inconsistently with its obligations to properly define the product groupings and the domestic industry as required by Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*. The European Communities submits that the bundling of products into what it considers to be arbitrary groups is incompatible with the *Agreement on Safeguards*. First, the USITC failed to identify the "imported product", contrary to the requirement under Article 2.1, which, according to the Appellate Body's finding in *US – Lamb*, must be a specific product. Second, in order to be considered a "specific product", a group of products must be coherent and may not contain gaps. Consequently, according to the European Communities, separate investigations should be conducted for each definable or specific product for which a Member is considering to impose safeguard measures. Third, the European Communities argues that, since the domestic product must be "like" the imported product, it is necessary for products contained in a specific product definition to be "like" each other. Therefore, in the European Communities' view, an analysis of the competitive dynamics among the various products is required.

238. In addition, the European Communities submits that the other appellants have otherwise demonstrated that the United States was not entitled to impose the safeguard measures even on the basis of the flawed product groupings. According to the European Communities, the Panel "upheld that view in deciding not to address these claims, although it recognized the problem … in several instances."[159]

(b) Article 5.1 of the *Agreement on Safeguards*

239. The European Communities argues that the United States' safeguard measures exceed what is necessary to remedy or prevent serious injury and facilitate adjustment. The European Communities contends that, contrary to the United States assertion, the two conditions set out in Article 5.1 of the *Agreement on Safeguards* are cumulative, rather than alternative. Thus, according to the European Communities, a Member may only impose a safeguard measure to the lesser of the extent necessary to prevent or remedy serious injury or to the extent necessary to facilitate adjustment.

240. Finally, the European Communities argues that the *ex post facto* analysis submitted by the United States does not separate and distinguish the effects of factors other than imports on the domestic industry. In the European Communities' view, the United States' *ex post facto* analysis repeated the errors manifest in the USITC report, because it failed to account for factors improperly found to be non-injurious, such as the legacy costs in respect of CCFRS. Moreover, according to the European Communities, the United States did not model the proper product in its *ex post facto* analysis for the measure on slab. Thus, the European Communities submits that the United States improperly included data on slabs to calculate the measure for CCFRS and subsequently excluded slab from the safeguard measure imposed on CCFRS. Consequently, according to the European Communities, the United States *ex post facto* justification that includes slab cannot justify a measure on CCFRS that excludes slab. Therefore, the European Communities argues that the *ex post facto* analysis cannot demonstrate that the measure is limited to the extent necessary.

4. Arguments of New Zealand – *Appellant*

241. If the Appellate Body were to reverse sufficient of the Panel's findings to undermine the conclusion that there was no legal basis for the safeguard measures imposed by the United States, New Zealand requests the Appellate Body to address its claim that the United States failed to define "the domestic industry that produces like … products", under Articles 2.1 and 4.1(c), as well as its

[159]European Communities' other appellant's submission, para. 17.

claim with respect to Article 5.1 of the *Agreement on Safeguards*. In addition, in the event the Appellate Body upholds the causation findings of the Panel, New Zealand associates itself with the first conditional claim of Brazil, Japan, and Korea[160] and the related arguments, and requests the Appellate Body to address the claim under Article 5.1 of the *Agreement on Safeguards*.

(a) Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*

242. New Zealand alleges that the United States has failed to define the domestic industry in accordance with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*. With respect to the legal standard for determining the like product, New Zealand argues that the like product in the *Agreement on Safeguards* has a narrow meaning, derived from its juxtaposition with the term "directly competitive products". In addition, the analysis of competitive relationships is central to determining whether products are "like". New Zealand's view is that a proper consideration of the likeness of products is product, and not producer, oriented and that production processes are not relevant in this respect. The United States failed to meet the requirements of the *Agreement on Safeguards* in its determination of the domestic industry producing CCFRS, because it improperly bundled together unlike products. The United States' approach of focusing on commonalities within the industry producing CCFRS was erroneous.

243. New Zealand further argues that the bundling of unlike products is impermissible, because it would allow a competent authority to define the domestic product that is "like" the imported product in a way that predetermines a finding that increased imports are causing serious injury. Finally, New Zealand submits that if different products are bundled into one product category, the *Agreement on Safeguards* requires that likeness be established between each of the imported products in that category, as well as each of the products in the domestic products category.

(b) Article 5.1 of the *Agreement on Safeguards*

244. New Zealand claims that the United States failed to comply with the requirements of Article 5.1 of the *Agreement on Safeguards*. First, New Zealand argues that the President of the United States, without any justification, imposed safeguard measures on CCFRS that are more restrictive than the USITC's recommendations. Second, a less restrictive remedy was placed on slab as compared to the remedy imposed on the other products in the CCFRS category, even though there was no corresponding difference in the injury alleged to be caused by the increased imports of these

[160]This first conditional appeal of Brazil, Japan, and Korea is set forth in Brazil's, Japan's, and Korea's other appellants' submission, para. 2.

products. Third, New Zealand argues that the safeguard measures were applied to a greater extent than necessary to facilitate the adjustment of the United States' domestic industry. Fourth, the *ex post facto* analysis submitted by the United States is fundamentally flawed, because the United States' methodology has the effect of overestimating the tariff required to restore the domestic industry to profitability. Specifically, New Zealand notes, in relation to CCFRS, that the United States included data on slabs to calculate the permissible extent of the measure, despite the fact that slabs were excluded from the remedy imposed by the President. Finally, according to New Zealand, the United States' methodology attributes to imports serious injury caused by other factors.

5. Arguments of Norway – *Appellant*

245. If the Appellate Body should reverse sufficient of the Panel's findings as to undermine its conclusion that there was no legal basis for the safeguard measures imposed by the United States, Norway requests the Appellate Body to address its claim with respect to the definition of the imported product, the like product, and the domestic industry under Articles 2.1 and 4.1(c), as well as its claim with respect to Articles 5.1 and 3.1 of the *Agreement on Safeguards*.

(a) Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*

246. According to Norway, the United States incorrectly defined the "like product" and the "imported product" and failed to apply the appropriate standard for determining the "domestic industry that produces like or directly competitive products". Norway argues that the USITC bundled together a broad range of distinct products, notwithstanding the fact that the products within that range were not like each other. For example, the USITC grouped together several unlike imported products as "certain carbon flat-rolled steel products", and then bundled the same unlike domestic products. In Norway's view, the failure of the USITC to define the "like product" correctly undermines all of its other findings on matters such as increased imports, causation, serious injury, and remedy.

247. Norway further submits that the United States incorrectly argues that it is permissible for competent authorities to first identify the domestic industry, and only thereafter to enquire whether there were any imports that injured that industry. Furthermore, the USITC defined the relevant "domestic industry" as the producers of a broad range of bundled, but distinct, products, notwithstanding the fact that the products within that range were not like each other. Norway argues that products compete with each other only if they are properly grouped together, whether in the context of Article III of the GATT 1994 or in the context of trade remedies. Norway is of the view

that, where there is no competitive nexus between the products involved, the analyses to establish injury and to choose an appropriate remedy become meaningless.

(b) Articles 3.1 and 5.1 of the *Agreement on Safeguards*

248. According to Norway, the United States did not apply its safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment within the meaning of Article 5.1, first sentence, of the *Agreement on Safeguards*. Norway incorporates by reference the arguments developed before the Panel either by Norway alone or together with the remaining other appellants. Norway argues that Article 5.1 requires that a safeguard measure be proportional to the injury caused by increased imports, and no additional relief can be imposed over and above what is necessary to remedy the serious injury attributed to increased imports. In Norway's view, a justification for the extent of the measure is necessary so as to enable a Member to make a correct decision regarding the measures to be imposed and serves the purpose of avoiding disputes. Norway submits that the *ex post facto* justification argued before the Panel is not in accordance with Article 5.1, first sentence, and Article 3.1 of the *Agreement on Safeguards*. Norway further argues that the measures imposed by the United States go beyond what is necessary to prevent or remedy serious injury, because the *ex post* analysis fails both to isolate and separate the effects of other factors and, therefore, attributes serious injury caused by other factors to imports.

6. Arguments of Switzerland – *Appellant*

249. If the Appellate Body should reverse sufficient of the Panel's findings as to undermine its conclusion that there was no legal basis for the safeguard measures imposed by the United States, Switzerland requests the Appellate Body to address its claim with respect to the definition of the imported product, the like product, and the domestic industry under Articles 2.1 and 4.1(c), as well as its claim with respect to Article 5.1 of the *Agreement on Safeguards*.

(a) Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*

250. Switzerland alleges that the USITC's bundling of products in arbitrary groups is incompatible with the *Agreement on Safeguards.* Switzerland's claims are based on three main arguments. First, Switzerland argues that the USITC failed to identify the "imported product" pursuant to the requirement under Article 2.1 to base a determination on "a product", which, according to the Appellate Body in *US – Lamb*, must be a "specific product". Second, in order to be considered a "specific product", a group of products must be coherent and may not contain gaps. Consequently,

according to Switzerland, separate investigations should be conducted for each specific product for which a Member is considering imposing safeguard measures. Third, the domestic product must be "like" the imported product, and it is also necessary for products contained in a specific product definition to be "like" each other. If an analysis of the competitive dynamics amongst the various products were not required, WTO Members could protect an entire industry by grouping together all products produced by that industry.

251. In Switzerland's view, in order to determine the scope of the imported product, a competent authority should rely on the four criteria developed by GATT practice as well as the Appellate Body to establish likeness—physical characteristics, end uses, consumer preferences and tariffs classifications. Switzerland submits that it has demonstrated in its submissions before the Panel, along with the other Complaining Parties, that the United States did not properly apply these criteria in determining the likeness of domestic and imported steel products.

(b) Article 5.1 of the *Agreement on Safeguards*

252. Switzerland argues that the United States did not limit its safeguard measures to the extent necessary to prevent or remedy serious injury and to facilitate adjustment, as required by Article 5.1 of the *Agreement on Safeguards*. Switzerland argues that, in accordance with the Appellate Body ruling in *US – Line Pipe*, because the Panel found that the United States failed to comply with the causation requirements of Article 4.2(b) of the *Agreement on Safeguards*, the Complaining Parties before the Panel established a *prima facie* case that the United States violated Article 5.1.

253. Moreover, according to Switzerland, the United States failed to rebut the other appellants' *prima facie* case because its *ex post facto* analysis does not isolate the effects of other factors of injury from the injury caused by increased imports. In Switzerland's view, the United States' *ex post facto* analysis repeats the errors manifest in the USITC report, because it fails to account for factors improperly found to be non-injurious, such as the legacy costs of the domestic industry. Moreover, according to Switzerland, the United States did not model the proper product in its *ex post facto* analysis with respect to CCFRS. Thus, Switzerland submits that the United States improperly included data on slabs to calculate the measure for CCFRS and subsequently excluded slab from the safeguard measure imposed on CCFRS. Consequently, according to Switzerland, the United States' *ex post facto* justification that includes slab cannot justify a measure on CCFRS that excludes slab. Finally, Switzerland argues that, although the USITC recognized that domestic capacity increases likely played a role in causing injury, the *ex post facto* analysis contains no

discussion on the effect of domestic capacity increases and does not attempt to isolate the injurious effect of this other factor.

7. Arguments of the United States – *Appellee*

(a) Product definition – Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*

254. The United States maintains that the Appellate Body cannot complete the analysis of this issue due to the absence of factual findings by the Panel or undisputed facts in the Panel record on which it could base such an analysis. According to the United States, this conclusion flows from Article 17.6 of the DSU, as interpreted by the Appellate Body.

255. In the United States' view, the other appellants' submissions confirm that the Appellate Body is being asked to address factual matters, such as identifying whether the product definition was coherent (which requires facts about the relevant merchandise) and determining the likeness of particular products. The United States' arguments before the Panel, as reflected in the Panel Reports, also demonstrate the fact-based nature of the USITC's like product analysis. In addressing these issues, the Appellate Body would need to rely on findings by the Panel (which are not available due to the Panel's exercise of judicial economy) or undisputed facts in the Panel record, which do not exist. In this regard, the United States disputes the suggestion by Brazil, Japan, and Korea that the parties agree that the products composing the USITC's product grouping for CCFRS are distinct. The United States contends that the findings of the USITC and the arguments of the United States before the Panel demonstrate that this is not the case.

(b) Extent of Measures – Article 5.1 of the *Agreement on Safeguards*

256. The United States maintains that the Appellate Body cannot complete the analysis of this issue due to the absence of factual findings by the Panel or undisputed facts in the Panel record on which it could base such an analysis. According to the United States, this conclusion flows from Article 17.6 of the DSU, as interpreted by the Appellate Body.

257. The United States contends that the other appellants have not met their burden of proof regarding Article 5.1. However, even if this were not the case, the Appellate Body could not make a finding regarding Article 5.1 without evaluating several factual matters. For example, in assessing the United States' numerical exercise and modelling exercise, the Appellate Body would need to identify data indicating the industry's condition in the absence of the injury attributable to increased imports,

data relevant to ensuring that the injurious effects of other factors are not attributed to increased imports, and data estimating the effect of the safeguard measures. According to the United States, the parties disagreed about these issues so there are no undisputed facts in the Panel record, and the Panel did not make any relevant factual findings on which the Appellate Body could rely.

258. The United States argues that several of the other appellants' arguments do not have a valid foundation. For example, arguments of the other appellants regarding Article 5.1 are frequently based on their allegations of inconsistency with Article 4.2(b). This basis would be removed if the Appellate Body reversed the Panel's findings on Article 4.2(b). The other appellants also frequently maintain that the USITC or the President of the United States failed to provide an explanation when imposing the measures of how the measures complied with Article 5.1. However, the Panel found that the *Agreement on Safeguards* does not require any such explanation before the dispute settlement process. According to the United States, the Panel has therefore disposed of this issue and this finding has not been appealed.

(c) China – Article 9.1 of the *Agreement on Safeguards*

259. The United States maintains that the Appellate Body cannot address this claim because it does not involve any issues of law or legal interpretations that could be reviewed under Article 17.6 of the DSU. According to the United States, this is a novel and complex issue that is not resolved by the *Agreement on Safeguards* and on which WTO Members have not reached agreement, making it even more inappropriate for the Appellate Body to determine it in the absence of relevant Panel findings.

260. If the Appellate Body nevertheless decides to address this claim, the United States argues (with reference to its arguments before the Panel) that it should find that China failed to establish that the United States acted inconsistently with Article 9.1 of the *Agreement on Safeguards*. China did not present any facts to the Panel to establish that it is a developing country Member. It therefore failed to met its burden of proof. The statements of individual WTO Members that China referred to do not reflect a general understanding that China is a developing country. Rather, they demonstrate that Members advocated a "pragmatic approach" to this question, which may differ between the covered agreements. The United States argues that this approach does not require Members to treat China as a developing country Member under Article 9.1.

261. Finally, the United States maintains that the Panel did not exercise judicial economy in respect of China's claim that Article 3.1 obliged the United States to provide an adequate and reasoned explanation at the time of imposing the safeguard measures, for not excluding China

pursuant to Article 9.1. Contrary to China's arguments, the United States contends that the Panel found that a Member is only required to respond to allegations regarding the level and extent of safeguard measures pursuant to Article 9.1 during the dispute settlement process.

K. *Arguments of the Third Participants*

1. Canada

262. Canada maintains that it is fully supportive of the United States in its appeal of the Panel's findings regarding the exclusion of imports from FTA partners from the application of the safeguard measures. Canada submits that the Panel erred in finding that the competent authority is under an obligation to account for the fact that excluded FTA imports contributed to the serious injury, in establishing whether imports from sources covered by the measure satisfy the requirements for imposing the safeguard measure. The "excluded sources accounting requirement", established by the Panel, is a new requirement that lacks any textual basis in the *Agreement on Safeguards*. Moreover, the Appellate Body in *US – Wheat Gluten* only stated the nature of the parallelism requirement and did not purport to set conditions on how an authority must conduct its parallelism analysis. Canada also agrees with the United States that in *US – Line Pipe* the Appellate Body's explanation of the parallelism requirement was the same as in *US – Wheat Gluten*. The Panel erred in reading *US – Line Pipe* to mean that parallelism necessarily requires the competent authority to account for the fact that excluded imports may have some injurious effect on the domestic industry. Thus, according to Canada, this requirement has no basis in prior Appellate Body reports or in the language of Articles 2.1 or 4.2 of the *Agreement on Safeguards*.

263. Canada submits that the Panel's finding on parallelism is contrary to Article 3.2 of the DSU, because the Panel created a new requirement that adds to a Member's obligations under the *Agreement on Safeguards*. Moreover, Canada argues that if the Panel had applied the correct standards, it would have concluded that the USITC's parallelism analysis was consistent with the *Agreement on Safeguards*. In Canada's view, the United States fully satisfied the requirements actually contained in the *Agreement on Safeguards*. The Appellate Body should therefore reverse the Panel's findings on parallelism.

IV. Issues Raised In This Appeal

264. Members of the WTO have agreed in the *Agreement on Safeguards* that Members may suspend their trade concessions temporarily by applying import restrictions as safeguard measures if certain prerequisites are met. These prerequisites are set forth in Article XIX of the GATT 1994, dealing with "Emergency Action on Imports of Particular Products", and in the *Agreement on Safeguards*, which, by its terms, clarifies and reinforces the disciplines of Article XIX. Together, Article XIX and the *Agreement on Safeguards* confirm the right of WTO Members to apply safeguard measures when, as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. However, as Article 2.1 of the *Agreement on Safeguards* makes clear, the right to apply such measures arises "*only*" if these prerequisites are shown to exist.

265. In this case, we will address the issues raised on appeal with respect to the ten safeguard measures applied by the United States to imports of certain steel products, in the following order:

(a) whether the Panel erred in finding that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation demonstrating that unforeseen developments resulted in increased imports causing serious injury to the domestic producers of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire;

(b) whether the Panel erred in finding that the United States acted inconsistently with Articles 2.1 and 3.1 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation of how the facts supported its determinations that imports of CCFRS, tin mill products, hot-rolled bar, stainless steel rod and stainless steel wire increased;

(c) whether the Panel erred in finding that the United States acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation establishing explicitly that imports from sources not excluded from the scope of the measure satisfy, *alone*, the conditions required for

the application of safeguard measures on imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire;

(d) whether the Panel erred in finding that the United States acted inconsistently with Articles 2.1, 3.1, and 4.2(b) of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation demonstrating the existence of a causal link between increased imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, and stainless steel wire, and serious injury or threat of serious injury to the relevant domestic industry;

(e) whether the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the GATT 1994 and the *Agreement on Safeguards*; and

(f) whether the Panel acted inconsistently with Article 12.7 of the DSU by failing to provide the "basic rationale" behind certain of its findings and conclusions.

266. There are also some conditional appeals the consideration of which depends upon our findings on some of the issues otherwise raised in this appeal. We will address them in the following order:

(a) if we reverse "sufficient of the Panel's findings"[161] to undermine the conclusion that the safeguard measures were "deprived of a legal basis"[162]:

(i) whether the United States acted inconsistently with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* by failing to define properly the imported product, the like product, and the domestic industry with respect to the product groups covered by the safeguard measures;

[161]China's other appellant's submission, para. 3; European Communities' other appellant's submission, para. 6; New Zealand's other appellant's submission, para. 1.1; Norway's other appellant's submission, para. 3; Switzerland's other appellant's submission, para. 3.

[162]Panel Reports, para. 10.705.

(ii) whether the United States acted inconsistently with Article 5.1 of the *Agreement on Safeguards* by imposing safeguard measures beyond the extent necessary to remedy or prevent serious injury and to facilitate adjustment;

(iii) whether the United States acted inconsistently with Articles 3.1 and 9.1 of the *Agreement on Safeguards* by using the rules of its Generalised System of Preferences to identify developing country Members, and by failing to provide a reasoned and adequate explanation as to why China did not qualify for the exemption under Article 9.1;

(b) if we reverse an aspect of any of the Panel's findings on CCFRS, or if we conclude that the Panel should have made a finding on the correct definition of the like product with respect to CCFRS, whether the United States acted inconsistently with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* by failing to define properly the like product with respect to CCFRS;

(c) if we uphold or modify the Panel's findings on causation, whether we should complete the analysis with respect to causation, and determine whether the United States failed to ensure that its safeguard measures are limited to the extent necessary to remedy or prevent serious injury and to facilitate adjustment as required by Article 5.1 of the *Agreement on Safeguards*;

(d) if we reverse the Panel's findings on increased imports and causation, whether the safeguard measures are limited to the extent necessary to remedy or prevent serious injury and to facilitate adjustment and, therefore, comply with Article 5 of the *Agreement on Safeguards*.

267. In response to our questioning at the oral hearing, all parties agreed that this dispute concerns only the *specific* safeguard measures as applied by the United States. Consequently, there is no United States law, regulation, or methodology that is challenged, *as such*, in this dispute.

268. Before turning to the substantive issues, we note that an *amicus curiae* brief was received from an industry association, the American Institute for International Steel, in the course of this appeal. As we mentioned earlier[163], the European Communities inquired by letter of

[163]*Supra*, paras. 9–10.

23 September 2003 whether we would accept the brief and take it into account, and Brazil requested by letter of 24 September 2003 that we disregard the brief. At the oral hearing, Brazil requested that we disregard the brief "for legal and systemic concerns".[164] Likewise, Mexico stated at the oral hearing that it opposed the acceptance of the *amicus curiae* brief.[165] Cuba and Thailand agreed with Brazil and Mexico that the *amicus curiae* brief should be disregarded.[166] We note that the brief was directed primarily to a question that was not part of any of the claims. We did not find the brief to be of assistance in deciding this appeal.

V. Unforeseen Developments and Article 3.1 of the *Agreement on Safeguards*

269. The United States appeals the Panel's finding that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* because the USITC failed to demonstrate, through a reasoned and adequate explanation, that "unforeseen developments"[167] had *resulted* in increased imports of *each of the products* on which the United States imposed safeguard measures on 20 March 2002. In examining this issue on appeal, we are mindful of the precise scope of the issue before us. We observe that the United States' appeal does not raise the issue whether the "unforeseen developments" identified as such by the United States—that is, "the Russian crisis, the Asian crisis and the continued strength of the United States' market together with the persistent appreciation of the US dollar"[168] as well as the "confluence"[169] of those events—actually amounted to "unforeseen developments" within the meaning of Article XIX:1(a). In response to our questions at the oral hearing, none of the participants disagreed with this formulation of the issue before us.[170]

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[164]Brazil's statement at the oral hearing.

[165]Mexico's statement at the oral hearing.

[166]Cuba's and Thailand's statements at the oral hearing.

[167]We use the term "unforeseen developments" as shorthand to describe the prerequisites set forth in the first clause of Article XIX:1(a) of the GATT 1994, that is, "[i]f, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions".

[168]Panel Reports, para. 10.72.

[169]*Ibid*.

[170]At the oral hearing, the European Communities requested, however, that, should we reverse the Panel's finding that the USITC failed to demonstrate, through a reasoned and adequate explanation, that "unforeseen developments" resulted in increased imports of each of the relevant products on which the United States imposed safeguard measures, we address other arguments that were raised by the Complaining Parties before the Panel concerning "unforeseen developments". The European Communities refers, for instance, to its argument that "unforeseen developments" that occurred several years ago and may have caused increased imports then but the effects of which have now ceased, cannot be considered as "unforeseen developments" justifying the imposition of safeguard measures. (European Communities' appellee's submission, para. 84)

270. Our analysis examines, first, the arguments advanced by the United States that relate to the Panel's identification and application of the appropriate standard of review for claims arising under Article XIX:1(a) of the GATT 1994. Secondly, we examine the appropriate interpretation of Article 3.1 of the *Agreement on Safeguards*, both in general terms and, in particular, as it relates to "unforeseen developments". Thirdly, we examine whether Article XIX:1(a) of the GATT 1994 requires a demonstration that "unforeseen developments" *resulted* in increased imports for *each specific* safeguard measure at issue. Finally, we look at whether the Panel was "required" to consider data to which the USITC referred in certain parts of the USITC report, other than those dealing with "unforeseen developments", to support the USITC's finding that "unforeseen developments" had *resulted* in increased imports.

271. We will examine separately, in another section of this Report, the United States' claim that the Panel acted inconsistently with its obligation under Article 12.7 of the DSU by failing to provide the "basic rationale behind [its] findings and recommendations" as they relate to "unforeseen developments".

272. This said, we turn first to examine the United States' claim concerning the appropriate standard of review for claims arising under Article XIX:1(a) of the GATT.

A. *Appropriate Standard of Review for Claims Under Article XIX:1(a) of the GATT 1994*

273. At the outset of its analysis, the Panel considered the standard of review that was appropriate for the examination of the claims made by the Complaining Parties relating to "unforeseen developments". After citing our Reports in *Argentina – Footwear (EC)* and in *US – Lamb*, the Panel articulated the standard in the following terms:

> … the role of this Panel in the present dispute is not to conduct a *de novo* review of the USITC's determination. Rather, the Panel must examine whether the United States respected the provisions of Article XIX of GATT 1994 and of the Agreement on Safeguards, including Article 3.1. As further developed below, the Panel must examine whether the United States demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers.

> In considering whether the United States demonstrated as a matter of fact that unforeseen developments resulted in increased imports causing serious injury, the Panel will also examine, in application of its standard of review, whether the competent authorities "considered all the relevant facts and had adequately explained how the facts supported the determinations that were made. [171] (underlining added; footnotes omitted)

The United States objects to the Panel's reliance on this standard, and argues that, in applying this standard to examine the USITC's conclusions on "unforeseen developments", the Panel "failed to take into account the differences between the unforeseen developments requirement and the Article 2 and 4 conditions for applying a safeguard measure". [172]

274. The United States asserts that we made clear in *Korea – Dairy*, *Argentina – Footwear (EC)*, and *US – Lamb* that the "unforeseen developments" language of Article XIX:1(a) constitutes a "distinct obligation [that] is different from obligations" [173] under Articles 2 and 4 of the *Agreement on Safeguards*. The United States maintains that the Panel "paid no heed" [174] to these differences when it relied on statements in *Argentina – Footwear (EC)* and in *US – Lamb* on the standard of review applicable to Article 4 of the *Agreement on Safeguards*. [175] According to the United States, "the standard adopted by the Panel … mistakenly reflects concerns relevant to Article 4.2, and disregards concerns relevant to the 'unforeseen developments' requirement under Article XIX:1(a)." [176] The United States thus argues that the "reasoned and adequate explanation test" is "inappropriate" for claims arising under Article XIX of the GATT 1994. [177]

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[171]Panel Reports, paras. 10.38–10.39.

[172]United States' appellant's submission, para 15. We note that the United States' challenge is to the Panel's *application* of the relevant standard of review. The United States is not, therefore, alleging that the standard of review, as articulated by the Panel, was, in itself, incorrect. The United States confirmed this understanding in response to questioning at the oral hearing. In addition, the United States stated—for instance, in paragraph 54 of its appellant's submission—that the "Panel correctly noted in its standard of review section that the Appellate Body has found 'that a panel must assess whether a reasoned and adequate explanation has been provided as to how the facts support the determination.'" In paragraph 55 of its appellant's submission, the United States further stated that "the Panel also emphasized correctly that with regard to Articles 2, 3, and 4 and Article XIX, 'the role of the Panel is to 'review' determinations and demonstrations made and reported by an investigating authority,' and not to be the initial fact finder." (footnote omitted)

[173]United States' appellant's submission, para. 77.

[174]*Ibid*., para. 78.

[175]*Ibid*., paras. 78–79.

[176]*Ibid*., para. 78.

[177]United States' response to questioning at the oral hearing.

275. We explained in *Argentina – Footwear (EC)* that Article XIX of the GATT 1994 and the *Agreement on Safeguards* "relate to the same thing, namely the application by Members of safeguard measures".[178] We also indicated there our agreement with the statement by the panel in that case that "Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction."[179] In our view, this inseparable relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards* suggests that the United States' call for a different and separate standard of review for Article XIX is unfounded.

276. We explained in *US – Lamb*, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*, that the competent authorities must provide a "*reasoned and adequate explanation* of how the facts support their determination".[180] More recently, in *US – Line Pipe*, in the context of a claim under Article 4.2(b) of the *Agreement on Safeguards*, we said that the competent authorities must, similarly, provide a "*reasoned and adequate explanation*, that injury caused by factors other than increased imports is not attributed to increased imports".[181] Our findings in those cases did not purport to address *solely* the standard of review that is appropriate for claims arising under Article 4.2 of the *Agreement on Safeguards*. We see no reason not to apply the same standard generally to the obligations under the *Agreement on Safeguards* as well as to the obligations in Article XIX of the GATT 1994.

277. Moreover, as we said in *US – Lamb*, the existence of "unforeseen developments" is a "pertinent issue of fact and law" under Article 3.1, and "it follows that the published report of the competent authorities, under that Article, must contain a 'finding' or 'reasoned conclusion' on unforeseen developments."[182] Thus, the Panel in the current dispute correctly noted that "the circumstances of unforeseen developments within the meaning of Article XIX:1(a) of GATT 1994 must be demonstrated as a matter of *fact*, together with the conditions mentioned in Article 2.1 of the Agreement on Safeguards, in the report of the competent authority and before a safeguard measure can be applied."[183]

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[178]Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.

[179]*Ibid*. (original emphasis)

[180]Appellate Body Report, *US – Lamb*, para. 103. (original emphasis)

[181]Appellate Body Report, *US – Line Pipe*, para. 217. (emphasis added)

[182]Appellate Body Report, *US – Lamb*, para. 76.

[183]Panel Reports, para. 10.37. (original emphasis; footnote omitted)

278. In any event, the objection of the United States to the Panel's requirement that competent authorities provide a "reasoned and adequate explanation" for their findings on "unforeseen developments" cannot be reconciled with the obligations of a panel under Article 11 of the DSU, which requires a panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". As we said in *Argentina – Footwear (EC)*:

> … for all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels. The only exception is the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, in which a specific provision, Article 17.6, sets out a special standard of review for disputes arising under that Agreement.[184]

279. We do not see how a panel could examine objectively the consistency of a determination with Article XIX of the GATT 1994 if the competent authority had not set out an explanation supporting its conclusions on "unforeseen developments". Indeed, to enable a panel to determine whether there was compliance with the prerequisites that must be demonstrated before the application of a safeguard measure, the competent authority must provide a "reasoned and adequate explanation" of how the facts support its determination for those prerequisites, including "unforeseen developments" under Article XIX:1(a) of the GATT 1994.

280. For these reasons, we find that the Panel applied the proper standard of review in determining how it should assess the matter before it under Article XIX of the GATT 1994.

281. We turn next to examine the United States' arguments under Article 3.1 of the *Agreement on Safeguards*.[185]

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[184]Appellate Body Report, *Argentina – Footwear (EC)*, para. 118.

[185]The United States refers in its arguments also to the requirement contained in Article 4.2(c) of the *Agreement on Safeguards* for competent authorities to provide a "detailed analysis of the case" and "a demonstration of the relevance of the factors examined." The United States notes, however, that the Panel found that "Article 4.2(c) was not extensively addressed by the parties as a discrete basis for violation", and, accordingly, the Panel "d[id] not consider that an additional reference to Article 4.2(c) in relation to the Panel's findings on increased imports and causation would enhance the complainants' rights." (United States' appellant's submission, footnote 15 to para. 54, referring to Panel Reports, paras. 9.31–9.32).

B. *Article 3.1 of the Agreement on Safeguards*

282. Article 3.1 of the *Agreement on Safeguards* provides, in relevant part, that:

> The competent authorities shall publish a report setting forth their findings and *reasoned* conclusions reached on all pertinent issues of fact and law. (emphasis added)

283. To begin, we note that the United States sets out its arguments concerning Article 3.1 in Section III of its appellant's submission, which is entitled "General Errors in the Panel's Findings Under Article 3.1 of the Agreement on Safeguards".[186] Thus, the United States' argument concerning the correct interpretation of Article 3.1 of the *Agreement on Safeguards* is not confined to the Panel's findings on "unforeseen developments". Indeed, we note that the Panel, in addition to finding that the United States acted inconsistently with Article 3.1 with respect to the determination by the competent authority of "unforeseen developments"[187], also found that certain of the USITC's findings on increased imports and causation were inconsistent with Article 3.1.[188]

284. We begin our analysis with an examination of the interpretation by the United States of Article 3.1, last sentence, which underlies its submissions regarding the Panel's alleged errors under Article 3.1. The United States argues that "the key consideration [under Article 3.1 of the *Agreement on Safeguards*] is whether the authorities present a logical basis for their conclusion."[189] According to the United States, "the Safeguards Agreement does not explicitly require an 'explanation'."[190] The United States rather argues that Article 3.1 of the *Agreement on Safeguards* "implies an explanation only in requiring 'reasoned conclusions on all pertinent issues of fact and law'."[191] To support its interpretation, the United States submits that the "ordinary meaning of the verb 'reason' is to '[t]hink in

[186]In addition to addressing findings that the Panel made in the context of its analysis of "unforeseen developments" (United States' appellant's submission, paras. 58–63), the United States also suggests that the Panel's conclusions on "increased imports" are inconsistent with Article 3.1 in that the Panel required the competent authority to do more than to "present a logical basis for [its] conclusions". (United States' appellant's submission, paras. 59–60)

[187]Panel Reports, paras. 10.150 and 11.2.

[188]*Ibid*., paras. 10.200, 10.262, 10.419, 10.422, 10.445, 10.469, 10.487, 10.503, 10.536, 10.569, 10.573, and 11.2.

[189]United States' appellant's submission, para. 60.

[190]*Ibid*., para. 59.

[191]*Ibid*., para. 60.

a connected or logical manner; use one's reason in forming conclusions ... [a]rrange the thought of in a logical manner, embody reason in; express in a logical form.'"[192]

285. As we understand it, this is the basis for the United States argument that Article 3.1 requires a competent authority to present a "logical basis" for its determination in its published report. The United States did not explain what it meant by a "logical basis" in its written submissions. However, in response to our questioning at the oral hearing, the United States clarified that a "logical basis describes the underpinning to the conclusion."[193] The United States affirmed, further, in the oral hearing, that the United States sees it as possible to have "a 'reasoned conclusion' without a 'reasoned and adequate explanation'."[194]

286. We have misgivings about the approach of the United States to ascertaining the meaning of the last sentence of Article 3.1. The requirement of Article 3.1 is that "competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." The meaning of Article 3.1 must be established through an examination of the ordinary meaning of the terms of Article 3.1, read in their context and in the light of the object and purpose of the *Agreement on Safeguards*.[195] Thus, instead of basing an interpretation of Article 3.1—as the United States does—entirely on the meaning of *one* word—"reasoned"—in that provision, it is, in our view, appropriate to interpret Article 3.1 by examining the ordinary meaning of *all* of the words that together prescribe the relevant obligation in that Article.

287. In doing so, we note that the definition of "conclusion" is "the result of a discussion or an examination of an issue" or a "judgement or statement arrived at by reasoning: an inference; a deduction".[196] Thus, the "conclusion" required by Article 3.1 is a "judgement or statement arrived at by reasoning". We further note that the word "reasoned", which the United States defines in terms of the verb "to reason", is, in fact, used in Article 3.1, last sentence, as an adjective to qualify the term "conclusion". The relevant definition of the intransitive verb "to reason" is "to think in a connected or

[192]United States' appellant's submission, para. 60. The United States refers to the definition of "reason" in the *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol.II, pp. 2495-2496.

[193]United States' response to questioning at the oral hearing.

[194]*Ibid*.

[195]Article 3.2 of the DSU; Article 31 of the *Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

[196]*Shorter Oxford English Dictionary*, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 477.

logical manner; use one's reason in forming conclusions".[197] The definition of the transitive verb "to reason" is "to arrange the thought of in a logical manner, embody reason in; express in a logical form".[198] Thus, to be a "reasoned" conclusion, the "judgement or statement" must be one which is reached in a connected or logical manner or expressed in a logical form. Article 3.1 further requires that competent authorities must "set forth" the "reasoned conclusion" in their report. The definition of the phrase "set forth" is "give an account of, esp. in order, distinctly, or in detail; expound, relate, narrate, state, describe".[199] Thus, the competent authorities are required by Article 3.1, last sentence, to "give an account of" a "judgement or statement which is reached in a connected or logical manner or expressed in a logical form", "distinctly, or in detail."

288. Panels have a responsibility in WTO dispute settlement to assess whether a competent authority has complied with its obligation under Article 3.1 of the *Agreement on Safeguards* to "set forth" "findings and reasoned conclusions" for their determinations. The European Communities and Norway argue that panels could not fulfill this responsibility if they were left to "deduce for themselves" from the report of that competent authority the "rationale for the determinations from the facts and data contained in the report of the competent authority."[200] We agree.

289. We note further, as context, that Article 4.2(c) of the *Agreement on Safeguards* requires the competent authorities to:

> ... publish promptly, *in accordance with the provisions of Article 3*, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. (emphasis added)

We observe that this requirement is expressed as being "in accordance with" Article 3, and not "in addition" thereto. Thus, we see Article 4.2(c) as an elaboration of the requirement set out in Article 3.1, last sentence, to provide a "reasoned conclusion" in a published report.

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[197]*Shorter Oxford English Dictionary*, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2482.

[198]*Ibid*.

[199]*Ibid*., p. 2773.

[200]European Communities' appellee's submission, para. 48; Norway's appellee's submission, para 75.

290. The United States argued at the oral hearing that "Article 4.2(c) does not apply to the competent authorities' demonstration of unforeseen developments"[201] under Article XIX:1(a) of the GATT 1994. We disagree. Article 4.2(c) is an elaboration of Article 3; moreover "unforeseen developments" under Article XIX:1(a) of the GATT 1994 is one of the "pertinent issues of fact and law" to which the last sentence of Article 3.1 refers. It follows that Article 4.2(c) also applies to the competent authorities' demonstration of "unforeseen developments" under Article XIX:1(a).

291. For these reasons, we conclude that the "present[ation of] a logical basis"[202] as understood by the United States, for the conclusions of the competent authorities, does not fulfill the requirements of Article 3.1, last sentence. They must "set forth" a "reasoned conclusion".

292. We turn now to address the arguments the United States advances, under Article 3.1, that relate to the Panel's findings on "unforeseen developments".

293. The Panel stated that "[t]he nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation [relating to unforeseen developments], its extent and its quality are all factors that can affect whether [that] explanation is reasoned and adequate."[203] According to the United States, there is no basis in the *Agreement on Safeguards* "for finding that 'timing' or 'extent' are relevant to whether the competent authorities' explanations are reasoned and adequate."[204]

294. As we see it, the United States appears to equate the word "extent" to the word "length" with a view to implying that the Panel would have required that the competent authority's explanation be of a certain length.[205] Based on our understanding of the relevant section of the Panel Reports, the Panel required no such thing. Rather than requiring that the USITC provide a "longer" explanation, the Panel was, in our view, simply stating that the USITC had not provided a reasoned and adequate explanation of how the "unforeseen developments" resulted in increased imports of the products on which the United States imposed the safeguard measures. In other words, the Panel was merely requiring that the competent authorities—to use our clarification of the requirement in Article 3.1—

[201]United States' response to questioning at the oral hearing.

[202]United States' appellant's submission, para. 60.

[203]Panel Reports, para. 10.115.

[204]United States' appellant's submission, para. 58.

[205]*Ibid*., paras. 60–61.

"give an account of" a "judgement or statement which is reached in a connected or logical manner or expressed in a logical form" on *unforeseen developments* "distinctly, or in detail".

295. The United States further argues that the *Agreement on Safeguards* "do[es] not obligate the competent authorities to present their report in any particular form."[206] As we see it, the United States understands the Panel to have imposed such a requirement by finding that "the USITC failed to provide a reasoned and adequate explanation because the USITC Report did not cite specifically to data or reasoning in another section of the report that supported a particular conclusion."[207] Although we agree with the United States that competent authorities "may choose any structure, any order of analysis, and any format for [the] explanation that they see fit, as long as the report complies"[208] with Article 3.1, we do not agree that the Panel was requiring that a report be in a certain form. Again, the Panel was assessing whether the USITC had provided a reasoned and adequate explanation of how the facts supported the USITC's determination, and was not requiring that the explanation of facts be provided in any particular form in the report.

296. We see no error in the Panel's approach. In our view, it is consistent with our understanding of Article 3.1, last sentence. Further, the Panel's approach is in line with the standard of review for panels that we discussed earlier. As we said in *US – Line Pipe* and in *US – Lamb*, competent authorities must provide a "reasoned and adequate explanation" of how the facts support their determination.[209] In *US – Line Pipe*, we found, further, in clarifying the obligations of WTO Members under the *Agreement on Safeguards*, that:

> … the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms.[210]

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[206]United States' appellant's submission, para. 65.

[207]*Ibid*., para. 66.

[208]*Ibid*., para. 67.

[209]Appellate Body Report, *US – Line Pipe*, para. 217, in the context of a claim under Article 4.2(b) of the *Agreement on Safeguards*; Appellate Body Report, *US – Lamb*, para. 103, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*.

[210]Appellate Body Report, *US – Line Pipe*, para. 217.

297. This was a clarification of the obligation under Article 4.2(b), last sentence, of the *Agreement on Safeguards*. However, as we mentioned earlier, our articulation of this standard of review should not be read as limited to claims under Article 4 of the *Agreement on Safeguards*. Thus, to the extent that the Panel looked for a "reasoned and adequate explanation" that was "explicit" in the sense that it was "clear and unambiguous" and "did not merely imply or suggest an explanation", the Panel was, in our view, correctly articulating the appropriate standard of review to be applied in assessing compliance with Article XIX of the GATT 1994 and the *Agreement on Safeguards*.

298. It bears repeating that a panel will not be in a position to assess objectively, as it is required to do under Article 11 of the DSU, whether there has been compliance with the prerequisites that must be present before a safeguard measure can be applied, if a competent authority is not required to provide a "reasoned and adequate explanation" of how the facts support its determination of those prerequisites, including "unforeseen developments" under Article XIX:1(a) of the GATT 1994. A panel must not be left to *wonder* why a safeguard measure has been applied.

299. It is precisely by "setting forth findings and reasoned conclusions on all pertinent issues of fact and law", under Article 3.1, and by providing "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined", under Article 4.2(c), that competent authorities provide panels with the basis to "make an objective assessment of the matter before it" in accordance with Article 11. As we have said before, a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities.[211] Therefore, the "reasoned conclusions" and "detailed analysis" as well as "a demonstration of the relevance of the factors examined" that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. This is all the more reason why they must be made explicit by a competent authority.

300. In the final analysis, the United States seems to agree with this approach. The United States argues that the *Agreement on Safeguards* does not require an "explanation" and does not employ the terms "adequate" and "explicit". All the same, the United States acknowledges that those terms can be understood as "a shorthand" for the obligations that "*are* in the Agreement", that is, that the published report of the competent authorities must, pursuant to Article 3.1, contain "reasoned

[211]Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.

conclusions" on "all pertinent issues of fact and law" and, under Article 4.2(c), it must also contain "a detailed analysis of the case", including "a demonstration of the relevance of the factors examined."[212]

301. We turn now to the United States' argument that, since "the Panel based many of its findings against the United States on its conclusions that the USITC Report failed to provide a 'reasoned and adequate explanation' of certain findings"[213], it follows that there can only be a violation of Article 3.1, and not also of Articles 2 and 4 of the *Agreement on Safeguards*. The United States adds that a failure to explain a finding does not automatically prove that the USITC had not performed the analysis necessary to make the finding.[214]

302. We recall again our earlier statements on the appropriate standard of review for panels in disputes that arise under the *Agreement on Safeguards*. When the Panel found that the USITC report failed to provide a "reasoned and adequate explanation" of certain findings, the Panel was assessing compliance with the obligations contained in Articles 2 and 4 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. As we said in *US – Lamb*, "[i]f a panel concludes that competent authorities, in a particular case, have not provided a reasoned or adequate explanation for their determination … [that] panel has … reached a conclusion that the determination is inconsistent with the specific requirements of [the relevant provision] of the *Agreement on Safeguards*."[215] Thus, we do not agree with the United States that the lack of a reasoned and adequate explanation does not imply a violation of Articles 2 and 4 of the *Agreement on Safeguards*.

303. Moreover, we cannot accept the United States' interpretation that a failure to explain a finding does not support the conclusion that the USITC "did not actually *perform* the analysis correctly, thereby breaching Article 2.1, 4.2, or 4.2(b) [of the *Agreement on Safeguards*]".[216] As we stated above, because a panel may not conduct a *de novo* review of the evidence before the competent authority, it is the *explanation* given by the competent authority for its determination that alone enables panels to determine whether there has been compliance with the requirements of Article XIX of the GATT 1994 and of Articles 2 and 4 of the *Agreement on Safeguards*. It may well be that, as the United States argues, the competent authorities have performed the appropriate analysis correctly.

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[212]United States' appellant's submission, paras. 59 and 64, and footnote 29 to para. 62, referring to the obligations set out in Articles 3.1 and 4.2(c) of the *Agreement on Safeguards*. (original emphasis)

[213]United States' appellant's submission, para. 73.

[214]*Ibid*., para. 74.

[215]Appellate Body Report, *US – Lamb*, para. 107.

[216]United States' appellant's submission, para. 73. (original emphasis)

However, where a competent authority has not provided a reasoned and adequate explanation to support its determination, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled by that competent authority. Thus, in such a situation, the panel has no option but to find that the competent authority has not performed the analysis correctly.

304. In sum, Members may suspend trade concessions temporarily by applying safeguard measures "*only*" in accordance with Article XIX of the GATT 1994 and with the *Agreement on Safeguards*, including Article 3.1 of that Agreement. The last sentence of the latter provision, as elaborated by Article 4.2(c) of that Agreement, requires that:

(a) the "competent authorities … publish a report";

(b) the report contain "a detailed analysis of the case";

(c) the report "demonstrat[e] … the relevance of the factors examined";

(d) the report "set[ ] forth findings and reasoned conclusions"; and

(e) the "findings and reasoned conclusions" cover "all pertinent issues of fact and law" prescribed in Article XIX of the GATT 1994 and the relevant provisions of the *Agreement on Safeguards*.

305. We examine next the United States' claim that the Panel erred in requiring a demonstration of "unforeseen developments" for each of the safeguard measures at issue.

C. *Is it Necessary to Demonstrate for Each Safeguard Measure at Issue that Unforeseen Developments Resulted in Increased Imports?*

306. The Panel found that, because Article XIX of the GATT 1994 requires a demonstration that "unforeseen developments" have *resulted* in "increased imports", the report of the investigating authorities must "contain *specific* factual demonstrations of unforeseen developments identified to have resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers for each safeguard measure at issue."[217]

[217]Panel Reports, para. 10.44 (original emphasis; underlining added).

307. It is useful to set out the relevant reasoning and findings of the Panel on this issue before analyzing the argument made by the United States. The Panel found first that:

> … at no point in the initial USITC Report is the issue of "unforeseen developments" *per se* mentioned, except, as the complainants have pointed out, in a footnote in the separate view of one commissioner explaining that although such a demonstration is required in WTO law, it is not required by US law. There is otherwise no discussion of the effects of unforeseen developments for the specific safeguard measures at issue.[218] (footnote omitted)

308. Turning to the Second Supplementary Report provided by the USITC, the Panel observed that "the USITC insists on the *overall effects* of the Asian and Russian financial crisis together with the strong US dollar and economy to displace steel to other markets."[219] The Panel found that "although it describes a plausible set of unforeseen developments that may have resulted in increased imports to the United States from various sources, it falls short of demonstrating that such developments actually resulted in increased imports into the United States causing serious injury to the relevant domestic producers."[220]

309. The Panel went on to find that, even if, as the USITC had found, "large volumes of foreign steel production were displaced from foreign consumption,"[221] this did not, in itself, imply that imports *to the United States* increased as a result of "unforeseen developments". The Panel further found that "the USITC did not provide any data to support its general assertion that the confluence of unforeseen developments resulted in the *specific* increased imports at issue in this dispute,"[222] and agreed with the Complaining Parties that "the USITC's explanation relates to steel production in general and does not describe how the unforeseen developments resulted in increased imports in respect of the *specific* steel products at issue."[223]

310. The Panel noted also that the United States referred, in its first written submission to the Panel, "to parts of the USITC Report, which contain footnote references to tables that show imports

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[218]Panel Reports, para. 10.116.

[219]*Ibid*., para. 10.121. (original emphasis)

[220]Panel Reports, para. 10.122.

[221]*Ibid*., para. 10.123.

[222]*Ibid*., para. 10.125. (original emphasis; underlining added)

[223]Panel Reports, para. 10.126. (original emphasis)

by country and by product for the entire period of investigation."[224] The Panel found that, although "these tables contained data that *could* have been used to explain how unforeseen developments resulted in increased imports that caused injury … the competent authority did no such thing."[225] The Panel added that "[i]n fact, the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came."[226] On that basis, the Panel concluded that:

> … the explanation provided by the USITC [on] how unforeseen developments resulted in increased imports causing serious injury is not reasoned and adequate. Moreover, it is not supported by relevant data and it does not demonstrate, as a matter of fact, that such unforeseen developments resulted in increased imports into the United States of the *specific* steel products that are the subject of the safeguard measures at issue.[227] (emphasis added)

311. The Panel found, therefore, that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had *resulted* in increased imports of the *specific* steel products subject to the safeguard measure at issue.[228]

312. The United States objects to this finding by arguing that Article XIX does not specify a particular type of analysis, nor does it require any differentiation by the competent authority of the impact of various "unforeseen developments" on *each* product that is subject to the relevant safeguard measures. The United States submits that "[t]o perform such an analysis, the competent authorities would have to identify the effects of each unforeseen development on subsequent increases in imports of a product"[229] and thus "obligate the competent authorities to evaluate unforeseen developments in the same way as imports themselves".[230] According to the United States, this is "manifestly incorrect" because "[w]hile Article XIX:1(a) requires that increased imports be a 'result of' unforeseen developments, in contrast, it requires that those imports 'cause' serious injury."[231]

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[224]Panel Reports, para. 10.133.

[225]*Ibid*. (emphasis added)

[226]Panel Reports, para. 10.133.

[227]*Ibid*., para. 10.135.

[228]*Ibid*., paras. 10.148, 10.150 and 11.2.

[229]United States' appellant's submission, para. 81.

[230]*Ibid*.

[231]*Ibid*.

313. In considering this argument, we turn first to the text of Article XIX:1(a):

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of <u>such product</u>, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (underlining added)

314. The term "such product" in Article XIX:1(a) refers to the product that may be subject to a safeguard measure. That product is, necessarily, *the product* that "is being imported in such increased quantities". Read in its entirety, Article XIX:1(a) clearly requires that safeguard measures be applied to the product that "is being imported in such increased quantities", and that those "increased quantities" are being imported "as a result" of "unforeseen developments".

315. Turning to the term "as a result of" that is also found in Article XIX:1(a), we note that the ordinary meaning of "result" is, as defined in the dictionary, "an effect, issue, or outcome *from* some action, process or design".[232] The increased imports to which this provision refers must therefore be an "effect, or outcome" of the "unforeseen developments". Put differently, the "unforeseen developments" must "result" in increased imports of the product ("such product") that is subject to a safeguard measure.

316. It is evident, therefore, that not just any development that is "unforeseen" will do. To trigger the right to apply a safeguard measure, the development must be such as to *result* in increased imports of *the product* ("such product") that is subject to the safeguard measure. Moreover, *any* product, as Article XIX:1(a) provides, may, potentially, be subject to that safeguard measure, provided that the alleged "unforeseen developments" *result* in increased imports of that *specific product* ("such product"). We, therefore, agree with the Panel that, with respect to the specific products subject to the respective determinations, the competent authorities are required by Article XIX:1(a) of the GATT 1994 to demonstrate that the "unforeseen developments identified …

[232] *Shorter Oxford English Dictionary*, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2555.

have resulted in increased imports [of the specific products subject to] … each safeguard measure at issue."[233]

317. We find further support for this conclusion in our rulings in *Argentina – Footwear (EC)* and in *Korea – Dairy*. In those appeals, we characterized the term "as a result of" as implying that there should be a "logical connection" between "unforeseen developments" and the conditions set forth in the second clause of Article XIX:1(a). We found that there must be:

> … a logical connection between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – and the conditions [regarding increased imports] set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure.[234]

318. There must, therefore, be a "logical connection" linking the "unforeseen developments" and an increase in imports of the product that is causing, or threatening to cause, serious injury. Without such a "logical connection" between the "unforeseen developments" and *the product* on which safeguard measures may be applied, it could not be determined, as Article XIX:1(a) requires, that the increased imports of "such product" were "a result of" the relevant "unforeseen development". Consequently, the right to apply a safeguard measure to *that product* would not arise.

319. For this reason, when an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that "unforeseen developments" resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. If that could be done, a Member could make a determination and apply a safeguard measure to a broad category of products even if imports of one or more of those products did not increase and did not result from the "unforeseen developments" at issue. Accordingly, we agree with the Panel that such an approach does not meet the requirements of

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[233]Panel Reports, para. 10.44. (underlining added) In the same vein, we further note that, as China argues in paragraph 49 of its appellee's submission, the USTR had, in fact, asked the USITC in its letter dated 3 January 2002, to identify "for each affirmative determination … any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury." (Letter of the USTR to the USITC dated 3 January 2002, question 1). (underlining added)

[234]Appellate Body Report, *Argentina – Footwear (EC)*, para. 92; Appellate Body Report, *Korea – Dairy*, para. 85.

Article XIX:1(a), and that the demonstration of "unforeseen developments" must be performed for *each* product subject to a safeguard measure.[235]

320. The United States suggests that:

> [t]he Panel may have felt that the ITC ought to have issued multiple demonstrations [of unforeseen developments], specific to each product subject to a separate measure, but that did not mean that the Panel could make an across-the-board dismissal of the "plausible" explanation that the ITC provided.[236]

321. However, the Panel did not make an "across-the-board dismissal" of the USITC's "plausible explanations" regarding "unforeseen developments", as the United States claims. Rather, the Panel Reports reveal that the Panel considered whether the "unforeseen developments", on which the USITC's determination relied, resulted in increased imports of the products on which the safeguard measures at issue were applied. The Panel found that the USITC Second Supplementary Report[237] "falls short"[238] in its explanation of how the Asian and Russian financial crises together with the strong United States dollar and economy resulted in increased imports into the United States. The Panel also said that the USITC failed to draw necessary links between market displacements and increased imports to the United States.[239] Furthermore, the Panel pointed out where supporting discussion and data were lacking.[240] The Panel also stated that the USITC's explanation was faulty because it referred to steel production in general and because the explanation did not address how the "unforeseen developments" resulted in increased imports in respect of the specific steel products at

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[235]We note that the United States also alleges that the Panel "mistakenly indicated that a competent authority had to 'differentiate the impact' of various unforeseen developments on the individual industries and even economies of other countries." (United States' appellant's submission, para. 85, referring to Panel Reports, paras. 10.127–10.128). Based on our review of the Panel Reports, we do not understand the Panel to have imposed such a requirement. Instead, as we see it, the Panel merely observed, in paragraph 10.127, that the Asian and Russian crises affected some countries more than others, to support its view that the USITC was required to "explain how the increased imports of the specific steel products subject to the investigation *were linked to and resulted from* the confluence of unforeseen developments." (emphasis added) Previously, in paragraph 10.123 of the Panel Reports, the Panel had stated that "even if 'large volumes of foreign steel production were displaced from foreign consumption', this [did] not, in itself, imply that *imports to the United States* increased as a result of unforeseen developments." (emphasis added)

[236]United States' appellant's submission, para. 83.

[237]It will be recalled that the issue of whether the relevant "unforeseen developments" resulted in increased imports of the products on which the safeguard measures were applied was not addressed in the initial USITC report.

[238]Panel Reports, para. 10.122.

[239]*Ibid*., 10.123, 10.127 and 10.131.

[240]*Ibid*., paras. 10.124–10.125, 10.130–10.131 and 10.145.

issue.[241] In sum, the Panel was of the view that "the complexity of the unforeseen developments pointed to by USITC called for a more elaborate demonstration and supporting data than that provided by the USITC."[242]

322. We also agree with the European Communities that "[i]n the present case where the ITC relied upon macroeconomic events having effects across a number of industries, it was for the ITC to demonstrate the 'logical connection' between the alleged unforeseen development[s] and the increase in imports in relation to each measure, not for the Panel to read into the report linkages that the ITC failed to make."[243] Consequently, we do not find error in the Panel's finding that the USITC was required to provide a reasoned and adequate explanation demonstrating that the alleged "unforeseen developments" resulted in increased imports for *each* product subject to a safeguard measure.

323. Moreover, since the USITC did not provide a "reasoned conclusion" that the "unforeseen developments" resulted in increased imports for each specific safeguard measure at issue, we find no error in the Panel's conclusions, in paragraph 10.150 and the relevant sections of paragraph 11.2 of the Panel Reports, that the application of each of those safeguard measures was inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*.

D. *Alleged Failure by the Panel to "Link" Certain Data to the USITC's Demonstration of how "Unforeseen Developments" Resulted in Increased Imports*

324. Before the Panel, the United States argued that there were data to support the USITC's finding that "unforeseen developments" had resulted in increased imports of the relevant products which "extended beyond consumption data for the most severely affected countries in south east Asia and production and consumption data for the former USSR republics".[244] The United States referred, *inter alia*, to the section of the USITC report dealing with increased imports, which contains footnote

[241]Panel Reports, paras. 10.126 and 10.128.

[242]*Ibid*., para. 10.145.

[243]European Communities' appellee's submission, para. 97.

[244]Panel Reports, para. 10.132. (footnote omitted)

references to tables that show imports by country and by product for the entire period of investigation.[245]

325. As we mentioned earlier, the Panel found that those "tables contained data that *could* have been used to explain how unforeseen developments resulted in increased imports … However, the competent authority did no such thing."[246] The Panel explained that "the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came."[247] The United States acknowledges that the USITC itself did not cite these data in connection with its demonstration of "unforeseen developments", but, nevertheless, it argues that the Panel "was *required* to consider [those data] in evaluating whether the unforeseen developments finding was consistent with Article 3.1 [of the *Agreement on Safeguards*]".[248]

326. Article 3.1 of the *Agreement on Safeguards* requires that the competent authority set out "reasoned conclusions" on all "pertinent issues of fact and law". One of those "issues of law" is the requirement to demonstrate the existence of "unforeseen developments" that have resulted in increased imports causing serious injury. In our view, therefore, it was for the USITC to provide a "reasoned conclusion" on "unforeseen developments". A "reasoned conclusion" is not one where the conclusion does not even refer to the facts that may support that conclusion. As the United States itself acknowledges, "Article 3.1 thus assigns the competent authorities—not the panel—the obligation to 'publish a report setting forth *their* findings and reasoned conclusions reached on all pertinent issues of fact and law.'"[249] A competent authority has an obligation under Article 3.1 to provide reasoned conclusions; it is not for panels to find support for such conclusions by cobbling together disjointed references scattered throughout a competent authority's report.

327. The United States argues that our findings in *EC – Tube or Pipe Fittings* support its view that the Panel was "required" to consider the relevant data to which the USITC refers in other sections

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[245]According to footnote 5009 under paragraph 10.133 of the Panel Reports, the sections of the USITC Report which the United States brought to the attention of the Panel were "pp. 65-66 (CCFRS), 99-100 (hot-rolled bar), 107-108 (cold-finished bar), 115-116 (rebar), 168-170 (certain welded pipe), 178-180 (FFTJ), 213-214 (stainless steel bar), 222-223 (stainless steel rod), 259-260 (stainless steel wire, Commissioner Koplan), 303-305 (carbon flat products and stainless steel wire and wire rope, Commissioner Bragg), 309-310 (tin mill products, Commissioner Miller), 347 (stainless steel wire and wire rope, Commissioner Devaney)."

[246]Panel Reports, para. 10.133. (emphasis added)

[247]Panel Reports, para. 10.133.

[248]United States' appellant's submission, para. 92. (original emphasis)

[249]*Ibid*., para. 55. (original emphasis)

of the USITC report to support the USITC's finding that "unforeseen developments" had resulted in increased imports. The United States explains that "[i]n that dispute, the report of the investigating authority failed to mention one of the factors specifically listed in the Antidumping Agreement at all in its discussion."[250] In that dispute, according to the United States, despite that omission, "the Appellate Body determined, by virtue of a close reading of the remainder of the report, that the investigating authority had in fact 'considered' the enumerated factor."[251] The United States concludes from this that "[i]f this is a permissible analysis of whether the necessary evaluation was performed by national authorities, then the ITC's reliance on data tables actually referenced in the Report (although not in the unforeseen development section) is surely also permissible."[252]

328. The issue in *EC – Tube or Pipe Fittings* was not the obligation contained in Article 3.1 of the *Agreement on Safeguards*. The issue there was, as the United States explains, whether a particular injury factor listed in Article 3.4 of the *Anti-Dumping Agreement* "ha[d] been evaluated, even though a separate record of the evaluation of that factor ha[d] not been made."[253] We found in that appeal that "under the particular facts of [that] case, it was reasonable for the Panel to have concluded that the [competent authorities had] addressed and evaluated"[254] the relevant factor.

329. Unlike the United States, we do not see the two cases as the same. The issue in this case is not whether certain data referred to in the USITC report had, in fact, been "considered" by the USITC. The USITC may indeed have "considered" all the relevant data contained in its report or referred to in the footnotes thereto. However, it did not use those data to *explain* how "unforeseen developments" resulted in increased imports. Rather, as the Panel found, "the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came."[255] Hence, what is wanting here is not the data, but the reasoning that uses those data to support the conclusion. The USITC did not, in our view, provide a conclusion that is supported by facts and reasoning, in short, a "reasoned conclusion", as required by Article 3.1. Moreover, as we have stated previously, it was for the USITC, and not the Panel, to provide "reasoned conclusions". It is not for the Panel to do the reasoning for, or instead of, the competent authority, but rather to assess the adequacy of that

[250]United States' appellant's submission, para. 93.

[251]*Ibid.*, referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 161–163.

[252]United States' appellant's submission, para. 93.

[253]Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.

[254]*Ibid.*

[255]Panel Reports, para. 10.133.

reasoning to satisfy the relevant requirement. In consequence, we cannot agree with the United States that the Panel was "required" to consider the relevant data to which the USITC referred in other sections of its report to support the USITC's finding that "unforeseen developments" had resulted in increased imports; and, for the reasons mentioned, we do not see how our findings in *EC – Tube or Pipe Fittings* support the United States' view to that effect.

330. We, therefore, uphold the Panel's findings, in paragraph 10.150 and the relevant sections of paragraph 11.2 of the Panel Reports, that the ten safeguard measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* because the USITC's report failed to demonstrate, through a reasoned and adequate explanation, that "unforeseen developments" had resulted in increased imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire, causing serious injury to the relevant domestic producers.[256]

VI. Increased Imports

331. As we stated at the outset, under Article 2.1 of the *Agreement on Safeguards*, safeguard measures can be justified "*only*" when, as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. It is "*only*" if these prerequisites set forth in Article XIX:1(a) of the GATT 1994 and the *Agreement on Safeguards* are shown to exist that the right to apply a safeguard measure arises. The fulfilment of each of these prerequisites is a "pertinent issue[ ] of fact and law" for which "finding[s] and reasoned conclusion[s]" must be included in the published report of the competent authorities, as required by Article 3.1 of the *Agreement on Safeguards*. With this in mind, we consider next the Panel's findings relating to one of these prerequisites, namely, the existence of "increased imports".[257]

[256]Panel Reports, paras. 10.150 and 11.2.

[257]We use the term "increased imports" as shorthand to describe the prerequisite set forth in Article XIX:1(a) of the GATT 1994 and in Article 2.1 of the *Agreement on Safeguards*, i.e., a product is being imported "in such *increased* quantities, absolute or relative to domestic production". (emphasis added)

332. The United States appeals the Panel's finding that the USITC failed to provide a reasoned and adequate explanation of how the facts supported its findings that imports of CCFRS, stainless steel rod, hot-rolled bar, tin mill products, and stainless steel wire "increased" within the meaning of Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*.[258]

333. With respect to the first three product categories—CCFRS, hot-rolled bar and stainless steel rod—the United States challenges two aspects of the Panel's findings. First, the United States challenges the Panel's general interpretation of the requirement relating to increased imports in Article 2.1 of the *Agreement on Safeguards*. Secondly, the United States argues that the Panel "erred in its analysis of the import data" for those three product categories.[259]

334. With respect to the other two product categories—tin mill products and stainless steel wire—the United States takes issue with the Panel's finding that the USITC failed to provide a reasoned and adequate explanation because the USITC based its determinations on two sets of explanations which, according to the Panel, could not be reconciled.[260]

335. We will deal with these separate claims in turn, and will first address the Panel's findings with respect to CCFRS, hot-rolled bar, and stainless steel rod.

A. *CCFRS, Hot-Rolled Bar, and Stainless Steel Rod*

336. As we explained previously, with respect to CCFRS, hot-rolled bar, and stainless steel rod, the United States challenges two aspects of the Panel's findings. We examine first the United States' argument concerning the appropriate legal standard to be used to determine whether the requirement in Article 2.1 of the *Agreement on Safeguards* relating to "increased imports" has been met.

[258]United States' appellant's submission, para. 97. The Panel found that the USITC report contained an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" of cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar.

[259]United States' appellant's submission, para. 98.

[260]See Panel Reports, paras. 10.200 and 10.262.

1. Legal Standard to be Used for Determining Whether there are "Increased Imports"

337. Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* read as follows:

> **GATT 1994**
>
> *Article XIX*
>
> *Emergency Action on Imports of Particular Products*
>
> 1. *(a)* If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (underlining added)
>
> **Agreement on Safeguards**
>
> *Article 2*
>
> *Conditions*
>
> 1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. (footnote omitted; underlining added)

338. The Panel found that the use of the present tense in the phrase "is being imported" in both Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* "indicates that it is necessary for the competent authorities to examine recent imports and that the increase in imports was 'recent'."[261] The Panel also found that "increased imports must be 'sudden'"[262] because of the

[261]Panel Reports, para. 10.159.

[262]*Ibid*., para. 10.166.

"unforeseen and unexpected character of the developments resulting in the increased imports as well as the emergency nature of safeguard measures".[263]

339. The Panel agreed with the finding of a previous panel that since Article 2.1 of the *Agreement on Safeguards* speaks of a product that "is being imported … in such increased quantities"[264], it follows, therefore, that imports need not be increasing at the time of the determination. Instead, the requirement is only that "imports *have* increase*d*, if the products continue 'being imported' in (such) increase*d* quantities."[265] The Panel then considered whether a *decrease* in imports at the end of the period of investigation could, in an individual case, prevent a finding of increased imports in the sense of Article 2.1 of the *Agreement on Safeguards*. The Panel observed that this would "depend on whether, despite the later decrease, a previous increase nevertheless results in the product (still) 'being imported in (such) increased quantities'."[266] In that evaluation, according to the Panel, "factors that must be taken into account are the duration and the degree of the decrease at the end of the relevant period of investigation, as well as the nature, for instance the sharpness and the extent, of the increase that intervened beforehand."[267]

340. The Panel also referred to our findings in *Argentina – Footwear (EC)* that the "competent authorities are required to consider the *trends* in imports over the period of investigation,"[268] and that "the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough … to cause or threaten to cause 'serious injury'".[269] The Panel then concluded that "a finding that imports have increased pursuant to Article 2.1 can be made when an increase evidences a certain degree of recentness, suddenness, sharpness and significance."[270] In saying this, the Panel emphasized "that there are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an 'increase' in the sense of Article 2.1 of the Agreement on

[263]Panel Reports, para. 10.166.

[264]*Ibid*., para. 10.162. (underlining added)

[265]Panel Reports, para. 10.162. (original emphasis) This aspect of the Panel Reports was not appealed.

[266]Panel Reports, para. 10.163.

[267]*Ibid*.

[268]*Ibid*., para. 10.165, referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 129. (original emphasis)

[269]Panel Reports, para. 10.167, referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

[270]Panel Reports, para. 10.167.

Safeguards"[271], but added that one cannot conclude "that any increase between any two identified points in time meets the requirements of Article 2.1 of the Agreement on Safeguards."[272]

341. The United States contends that the Panel erred in finding that "the determination that imports have increased pursuant to Article 2.1 can be made only when an increase evidences a certain degree of recentness, suddenness, sharpness and significance."[273] According to the United States, this standard has no basis in Article 2.1 or anywhere else in the text of the *Agreement on Safeguards*. The United States posits that our statement in *Argentina – Footwear (EC)* that the "increase in imports must have been recent enough, sudden enough, sharp enough and significant enough … to cause or threaten to cause serious injury"[274], was a statement about "the entire investigative responsibility of the competent authorities under the Safeguards Agreement"[275], and that "whether an increase in imports has been recent, sudden, sharp and significant enough to cause or threaten serious injury are questions that are answered as the competent authorities … proceed with the remainder of their analysis (i.e., with their consideration of serious injury/threat and causation)."[276] The analysis of these questions need not, therefore, according to the United States, form part of the evaluation of the issue of whether imports have "increased". Rather, the United States contends that "the phrase 'in such increased quantities' simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time."[277]

342. In reply, and in contrast, China, the European Communities, Korea, New Zealand, and Norway argue that the United States is, in effect, asking us to find that "any increase is sufficient" to satisfy the requirement in Article 2.1 of the *Agreement on Safeguards*.[278] The European Communities quotes, in this respect, a passage from the USITC report where it is stated that, for

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[271]Panel Reports, para. 10.168. (original emphasis)

[272]Panel Reports, para. 10.168.

[273]United States' appellant's submission, para. 100, referring to paragraph 10.167 of the Panel Reports. The United States does not quote the Panel's finding accurately. The Panel, in fact, concluded in paragraph 10.167 of the Panel Reports "that a finding that imports have increased pursuant to Article 2.1 can be made when an increase evidences a certain degree of recentness, suddenness, sharpness and significance." The word "only" does not appear in the Panel's conclusion.

[274]Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

[275]United States' appellant's submission, para. 107.

[276]*Ibid*.

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

[278]China's appellee's submission, para. 102; European Communities' appellee's submission, para. 135; Korea's appellee's submission, paras. 6 and 69; New Zealand's appellee's submission, paras. 1.14 and 5.11; Norway's appellee's submission, paras. 19 and 162.

United States domestic purposes, there "is no minimum quantity by which imports must have increased" and "a simple increase is sufficient."[279]

343. The Complaining Parties argue also that, in order to constitute "increased imports" within the meaning of Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*, those increased imports must be "recent" and "sudden"[280]; the European Communities and Norway also argue that the increased imports must be "extraordinary" and "abnormal".[281]

344. As a consequence, we must examine whether there is any *threshold*—qualitative or quantitative—to allow a finding by a competent authority on the existence of "such increased quantities" within the meaning of Article XIX:1(a) and Article 2.1, or whether, as the United States argues, the requirement is "that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time."[282]

345. We examined essentially the same issue in *Argentina –Footwear (EC)* and found there that:

> … the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be "*such* increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".[283] (original emphasis; underlining added; footnotes omitted)

[279]European Communities' appellee's submission, para. 135, referring to USITC Report, Vol. I, p. 278.

[280]Brazil's appellee's submission, paras. 38 and 41; China's appellee's submission, para. 96; European Communities' appellee's submission, paras. 128 and 130; Japan's appellee's submission, paras. 42 and 46; Korea's appellee's submission, para. 73; New Zealand's appellee's submission, para. 5.5; Norway's appellee's submission, para. 145; Switzerland's appellee's submission, paras. 93 and 97.

[281]European Communities' appellee's submission, para. 140; Norway's appellee's submission, para. 158.

[282]United States' appellant's submission, para. 102.

[283]Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

346. We reaffirm this finding. In that appeal, we underlined the importance of reading the requirement of "such increased quantities" in the context in which it appears in both Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*. That context includes the words "to cause or threaten to cause serious injury". Read in context, it is apparent that "there must be 'such increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure."[284] Indeed, in our view, the term "such", which appears in the phrase "such increased quantities" in Articles XIX:1(a) and 2.1, clearly links the relevant increased imports to their ability to cause serious injury or the threat thereof. Accordingly, we agree with the United States that our statement in *Argentina – Footwear (EC)* that the "increase in imports must have been recent enough, sudden enough, sharp enough and significant enough … to cause or threaten to cause serious injury"[285], was a statement about "the entire investigative responsibility of the competent authorities under the Safeguards Agreement"[286], and that "[w]hether an increase in imports is recent, sudden, sharp and significant enough to cause or threaten serious injury are questions that are answered as the competent authorities proceed with the remainder of their analysis (i.e., their consideration of serious injury/threat and causation)."[287]

347. We have observed previously that "the title of Article XIX is: 'Emergency Action on Imports of Particular Products"[288], and that the "words 'emergency action' also appear in Article 11.1(a) of the *Agreement on Safeguards*".[289] Because safeguard measures are "emergency actions", we have noted as well that "when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account."[290] The requirement relating to "increased imports" in Articles XIX:1(a) and 2.1 must, therefore, be read in the context of the "extraordinary nature" of the "emergency action" that is authorized by Article XIX:1(a) of the GATT 1994. Even so, the fact that safeguard actions are "emergency actions", and that the prerequisites for taking such actions should therefore be construed while taking into account the "extraordinary nature" of safeguard measures, does not imply that the prerequisites for taking such actions, *in and of themselves*, must necessarily be "abnormal" or

[284]Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

[285]*Ibid*.

[286]United States' appellant's submission, para. 107.

[287]*Ibid*.

[288]Appellate Body Report, *Argentina – Footwear (EC)*, para. 93.

[289]*Ibid*.

[290]*Ibid*., para. 94.

"extraordinary". The question is one of the "conditions" under which "such" increased quantities of imports occur.

348. In this respect, we note that, contrary to what the European Communities and Norway assert[291], in the single GATT 1947 case that involved Article XIX—the *US – Fur Felt Hats* case—the Working Party did *not* find that increased imports must be "abnormal", *in and of themselves*, to be "increased imports" for purposes of Article XIX. Instead, the Working Party in that case found that:

> There should be an abnormal development in the imports of the product in question *in the sense that*:
>
> (i) the product in question must be imported in increased quantities;
>
> (ii) the increased imports must be the result of unforeseen developments and of the effect of tariff concessions;
>
> (iii) the imports must enter in such increased quantities and under such conditions as to cause or threaten to cause serious injury. (emphasis added)

349. That 1951 Working Party, therefore, used the word "abnormal" to describe the overall conditions under which the increased quantities of imports must occur. The Working Party found that the relevant "development in imports" must be abnormal precisely because the increased quantities of imports, by the very terms of Article XIX:1(a), are "as a result of unforeseen developments and of the effect of tariff concessions" and enter "in such increased quantities and under such conditions as to cause or threaten to cause serious injury."

350. In a similar vein, we said in *Argentina – Footwear (EC)* that "the increased quantities of imports should have been 'unforeseen' or 'unexpected'."[292] In doing so, we were referring to the fact that the increased imports must, under Article XIX:1(a), result from "unforeseen developments" in order to justify the application of a safeguard measure. Because the "increased imports" must be "as a result" of an event that was "unforeseen" or "unexpected", it follows that the increased imports must also be "unforeseen" or "unexpected". Thus, the "extraordinary nature" of the domestic response to

[291]European Communities' appellee's submission, para. 140; Norway's appellee's submission, para. 158.

[292]Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

increased imports does not depend on the absolute or relative quantities of the product being imported. Rather, it depends on the fact that the increased imports were unforeseen or unexpected.

351. We further note that Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* require that the relevant product "is being imported in such increased quantities *and under such conditions* as to cause or threaten to cause serious injury". The question whether "such increased quantities" of imports will suffice as "increased imports" to justify the application of a safeguard measure is a question that can be answered only in the light of "such conditions" under which those imports occur. The relevant importance of these elements varies from case to case.

352. We turn next to examine the United States' argument that, as "the words recent, sudden, sharp or significant"[293] do not appear in Article 2.1, "the phrase 'in such increased quantities' simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time."[294]

353. Article 4.2 of the *Agreement on Safeguards* elaborates on the prerequisites for the application of a safeguard measure that are set out in Article 2.1.[295] Article 4.2(a) provides context for interpreting the meaning of the requirement relating to increased imports in Article 2.1. Article 4.2(a) provides, in relevant part, that:

> In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate…the rate and amount of the increase in imports of the product concerned in absolute and relative terms … . (underlining added)

354. We concluded in *Argentina – Footwear (EC)* that "the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a)."[296] A determination of whether there is an increase in imports cannot, therefore, be made merely by comparing the end points of the period of investigation. Indeed, in cases where an examination does not demonstrate, for instance, a clear and uninterrupted upward trend in import volumes, a simple end-point-to-end-point analysis could easily be manipulated to lead

[293]United States' appellant's submission, para. 101.

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

[295]Appellate Body Report, *US – Line Pipe*, para. 181, quoting *US – Wheat Gluten*, para. 98.

[296]Appellate Body Report, *Argentina – Footwear (EC)*, para. 129. (original emphasis; underlining added)

to different results, depending on the choice of end points. A comparison could support either a finding of an increase or a decrease in import volumes simply by choosing different starting and ending points.

355. For instance, if the starting point for the period of investigation were set at a time when import levels were particularly low, it would be more likely that an increase in import volumes could be demonstrated. The use of the phrase "such increased quantities" in Articles XIX:1(a) and 2.1, and the requirement in Article 4.2 to assess the "rate and amount" of the increase, make it abundantly clear, however, that such a comparison of end points will *not* suffice to demonstrate that a product "is being imported in such increased quantities" within the meaning of Article 2.1. Thus, a demonstration of "any increase" in imports between any two points in time is not sufficient to demonstrate "increased imports" for purposes of Articles XIX and 2.1. Rather, as we have said, competent authorities are required to examine the trends in imports over the entire period of investigation.[297]

356. We, therefore, reject the United States' assertion that "the phrase 'in such increased quantities' simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time."[298] We note, however, that the United States clarified at the oral hearing that it agrees that an examination of trends is required for the purpose of determining whether there are increased imports under Articles XIX and 2.1, and with this we agree.[299]

357. As we explained above[300], the United States argues that the Panel erred in requiring that "a finding that imports have increased … can be made *only* when an increase evidences a certain degree of recentness, suddenness, sharpness and significance."[301] We understand that the United States is submitting in essence that, in so finding, the Panel established an absolute standard in the abstract, applicable irrespective of the facts of the case.[302]

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[297]Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

[298]United States' appellant's submission, para. 102.

[299]United States' response to questioning at the oral hearing.

[300]See *supra*, para. 341.

[301]United States' appellant's submission, para. 98, referring to Panel Reports, para. 10.167. (emphasis added)

[302]United States' response to questioning at the oral hearing.

358. In considering whether the Panel did establish such an absolute standard, we observe[303] that the word "only", although used by the United States in challenging the Panel on this point, is not contained in the Panel's relevant finding. Moreover, based on our review of the Panel's reasoning, we do not understand the Panel to have articulated any absolute standard, in the abstract, for determining whether imports have increased within the meaning of Article XIX:1(a) and Article 2.1. Rather, the Panel explicitly, and pointedly, agreed "with the United States that there are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an 'increase' in the sense of Article 2.1"[304] of the *Agreement on Safeguards*. The Panel noted, however, that "from the absence of *absolute* standards one cannot conclude that there are no standards at all and that any increase between two identified points in time meets the requirements of Article 2.1".[305] The Panel then went on to "agree[ ] with the United States that the inquiry is not whether imports have increased 'recently and suddenly' *in the abstract*."[306] Instead, according to the Panel "[a] *concrete* evaluation is what is called for"[307] and, thus, a "competent authority must conduct an analysis considering all the features of the development of import quantities and that an increase in imports has a certain degree of being recent and sudden."[308] It seems to us, therefore, that the Panel did not find that the degree of "recentness, suddenness, sharpness and significance" had to be assessed by means of an absolute standard that, only if met, could warrant a finding of "increased imports".

359. What is more, the Panel further explained that:

> … a competent authority's findings on increased imports, distinct from its causality and injury findings, *may be informed by the results of its entire investigation*. The competent authority's findings on the first requirement – increased imports – may have effects on the injury findings or on the causation findings, as prescribed by Article 4.2(a). As a competent authority considers the other conditions necessary for imposition of a safeguard, it determines, as directed by the Appellate Body in *Argentina – Footwear (EC)*, whether the increase in imports was recent enough, sudden enough, and significant enough to cause or threaten serious injury to the relevant domestic producers.[309] (emphasis added)

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[303]See *supra*, footnote 273 to paragraph 341.

[304]Panel Reports, para. 10.168. (original emphasis)

[305]*Ibid*.

[306]*Ibid*.

[307]*Ibid*.

[308]Panel Reports, para. 10.168.

[309]*Ibid*., para. 10.171.

360. In our view, this statement is further evidence that the Panel was of the view that the assessment of whether an increase is "recent enough, sudden enough, and significant enough to cause or threaten serious injury" is to be made *on a case-by-case basis* by the competent domestic authority—and is *not*, therefore, a determination that is made in the *abstract*. We agree.

361. For these reasons, we conclude that the Panel did not require, in the abstract, that "a finding that imports have increased … can be made [only] when an increase evidences a certain degree of recentness, suddenness, sharpness and significance."[310] Rather, in our view, the Panel correctly relied on our findings in *Argentina – Footwear (EC)*.

362. We turn next to examine the Panel's findings on increased imports of CCFRS, hot-rolled bar and stainless steel rod.[311]

2. Panel's Findings with Respect to CCFRS, Hot-Rolled Bar, and Stainless Steel Rod

363. As we noted above, the United States argues that the Panel "erred in its analysis of the import data for CCFRS, hot-rolled bar and stainless steel rod."[312] As the United States sees it, the Panel's finding that imports of those products did not "increase" for purposes of Article 2.1 of the *Agreement on Safeguards* resulted from the Panel's application of a legal standard that has no basis in Article 2.1 or anywhere else in the text of the *Agreement of Safeguards*, namely, that an increase in imports must evidence "a certain degree of recentness, suddenness, sharpness and significance."[313]

364. We have examined the Panel's interpretation of the general requirement related to "increased imports" in Article 2.1, and have concluded that we agree with the interpretation advanced by the Panel. We turn now to an examination of the United States' appeal as it relates specifically to "increased imports" of CCFRS, hot-rolled bar, and stainless steel rod in the light of that interpretation. We look first to the United States' arguments concerning CCFRS.

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[310]Panel Reports, para. 10.167.

[311]United States' appellant's submission, para. 98.

[312]*Ibid*.

[313]*Ibid*., para. 109.

(a) CCFRS

365. With respect to "increased imports" of CCFRS, the Panel found that:

> … the USITC's determination on increased imports of CCFRS, as published in its report, does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC recognized that the sharpest increase took place in the period until 1998, and that, since then, imports have decreased, in 1999 and 2000, back to levels nearly as low as the 1996 level. The USITC also noted the significant decrease between interim 2000 and interim 2001 (from 11.5 to 6.9 million short tons), but it did not seem to focus on, or at least account for, this most recent trend in concluding that imports are "still significantly higher … than at the beginning of the period". Given the sharpness and significance of this most recent decrease the Panel does not find that the USITC explanation as published in its report contains an adequate and reasoned explanation of how the facts support the determination CCRFS "is being imported in … increased quantities".[314] (underlining added; footnotes omitted)

366. The United States argues that the Panel's conclusion that the USITC failed to provide a reasoned and adequate explanation of how the facts supported its finding that CCFRS was being imported "in such increased quantities" within the meaning of Article XIX:1(a) and Article 2.1 "rests in large measure on the Panel's determination that the ITC 'did not seem to focus on, or at least account' for the fact that there was a decrease in imports, on both an absolute and a relative basis, from interim 2000 to interim 2001."[315] According to the United States, the Panel gave the change between interim periods "dispositive weight",[316] although the actual requirement in Article XIX:1(a) and Article 2.1—as acknowledged by the Panel—is that "[any product] is being imported … in such increased quantities", and that, therefore, the "imports need not be increas*ing* at the time of the determination; what is necessary is that imports *have* increas*ed*, if the products continue 'being imported' in (such) increas*ed* quantities."[317]

367. We agree with the United States that Article 2.1 does *not* require that imports need to be increasing at the time of the determination. Rather, the plain meaning of the phrase "is being imported in such increased quantities" suggests merely that imports must *have* increased, and that

[314]Panel Reports, para. 10.181.

[315]United States' appellant's submission para. 111, referring to Panel Reports, paras. 10.181 and 10.183.

[316]United States' appellant's submission, para. 111.

[317]*Ibid*., para. 112, referring to Panel Reports, para. 10.162. (original emphasis)

the relevant products continue "being imported" in (such) increased quantities. We also do *not* believe that a decrease in imports at the end of the period of investigation would necessarily prevent an investigating authority from finding that, nevertheless, products continue to be imported "in such increased quantities." [318]

368. We do not agree, however, with the United States' assertion that the Panel's conclusion that there were no "increased imports" of CCFRS, for purposes of Article 2.1, is a result of the Panel giving "dispositive weight" to the decrease in imports that took place from interim 2000 to interim 2001. As we understand it, the Panel's conclusion was based on the Panel's finding that the USITC had not provided *a reasoned and adequate explanation* of how the facts supported its determination that CCFRS "is being imported in … such increased quantities". The reason why the Panel did not find the USITC's *explanation* to be "reasoned and adequate" was the magnitude of the decrease that occurred between interim 2000 and interim 2001 (from 11.5 to 6.9 million short tons). In the words of the Panel, the USITC "did not seem to focus on, or at least account for, [that decrease] … in concluding that imports are 'still significantly higher … than at the beginning of the period'". [319] In the absence of a reasoned and adequate explanation in the USITC report relating to the decrease in imports that occurred at the end of the period of investigation, the USITC could not be said to have adequately explained the existence of "such increased quantities" within the meaning of Article 2.1.

369. We also recall, once more, that "competent authorities are required to examine trends" [320] in imports. Because imports of CCFRS decreased from 1999, and did not recover, the Panel found that the USITC should have focused on, or at least accounted for, this most recent trend. The Panel found that the USITC did not do so, and concluded, therefore, that the USITC had not provided an explanation that CCFRS "is being imported in … such increased quantities". We see no legal error in this finding of the Panel.

370. The lack of a reasoned and adequate explanation relating to the decrease that occurred immediately before the USITC's determination is all the more significant, in our view, because the evidence of that decrease is arguably the most relevant of all the data gathered during the investigation, for purposes of assessing whether a product "*is being imported* in such increased

[318]We note that a decrease at the end of a period of investigation may, for instance, result from the seasonality of the relevant product, the timing of shipments, or importer concerns about the investigation. As we have said, the text of Article 2.1 does not necessarily prevent, in our view, a finding of "increased imports" in the face of such a decline.

[319]Panel Reports, para. 10.181. (footnotes omitted)

[320]Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

quantities". We emphasized in *US – Lamb* "the relative importance, within the period of investigation, of the data from the end of the period, as compared with the data from the beginning of the period".[321] Once more, we do so here.

371. With respect to the timing of the "increased imports" of CCFRS, the Panel found that:

> It may well be that the increase occurring until 1998 could have qualified at the time as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards, but the Panel need not express itself on that point because that increase, in itself, was no longer recent enough at the time of the determination. In other words, the increase occurring until 1998, taken by itself and with the decrease thereafter, is not a sufficient factual basis for supporting a determination in October 2001 that CCFRS "is being imported in … increased quantities".[322] (underlining added)

372. The United States argues that the Panel erred in concluding that the increase in imports that occurred in 1998 "'was no longer recent enough at the time of the determination' to support a finding of increased imports"[323] although "the Panel itself recognized that there are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an 'increase' in the sense of Article 2.1."[324]

373. Based on our review of the Panel's reasoning—in particular, the Panel's conclusions in paragraphs 10.167 – 10.171 of the Panel Reports, where the Panel states that "[a] *concrete* evaluation is called for"[325] and that "the inquiry is not whether imports have increased 'recently and suddenly' *in the abstract*"[326]—we do not understand the Panel to have meant, as the United States appears to suggest, that an increase in 1998 would not, *under any conditions*, have been recent enough to support a finding of increased imports. Instead, the Panel proceeds to explain that "[i]n other words, the increase occurring until 1998, *taken by itself and with the decrease thereafter*, is not a sufficient

[321]Appellate Body Report, *US – Lamb*, footnote 88 to para. 138.

[322]Panel Reports, para. 10.182.

[323]United States' appellant's submission, para. 113, referring to Panel Reports, paras. 10.182 and 10.185.

[324]United States' appellant's submission, para. 113, referring to Panel Reports, para. 10.168. (original emphasis)

[325]Panel Reports, para. 10.168. (original emphasis)

[326]*Ibid*.

factual basis for supporting a determination in October 2001 that CCFRS 'is being imported in … increased quantities'."[327]

374. In our view, what is called for in every case is an *explanation* of how the *trend* in imports supports the competent authority's finding that the requirement of "such increased quantities" within the meaning of Articles XIX:1(a) and 2.1 has been fulfilled. It is this *explanation* concerning the *trend* in imports—over the entire period of investigation—that allows a competent authority to *demonstrate* that "a product is being imported in such increased quantities".

375. Finally, we note that the United States also argues that the USITC conducted a "concrete evaluation" of how the requirement relating to "increased imports" was met, and that that "evaluation" explains, according to the United States, "how the 1998 import surge had long-term effects that were still occurring at the time of the ITC's determination."[328] Unquestionably, the evaluation of the *effects* of increased imports must be appropriately assessed, where a competent authority examines causation and serious injury. We do not, however, see the relevance of such an analysis for purposes of determining whether "a product *is being imported* in such increased quantities".

376. Therefore, we *uphold* the Panel's conclusion, in paragraph 10.186 and the relevant section of paragraph 11.2 of the Panel Reports, that the application of the safeguard measure on CCFRS is inconsistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards*, because the United States failed to provide a reasoned and adequate explanation of how the facts support its determination with respect to "increased imports" of that product.

377. We examine next the USITC's findings on stainless steel rod.

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[327]Panel Reports, para. 10.182. (emphasis added)

[328]United States' appellant's submission, para. 114. The "analysis" that the United States refers to was undertaken by the USITC as part of its causation analysis and determination of serious injury, and not as part of its determination of "increased imports".

(b) Stainless Steel Rod

378. The Panel found that:

> … the USITC's determination on increased imports of stainless steel rod, as published in its Report, does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC relied on the increase occurring between 1996 and 2000, with the largest increase from 1999 to 2000 (25%). The decline between interim 2000 and interim 2001 was acknowledged, but the USITC did not give an explanation why it nevertheless found that there was an increase of imports in absolute numbers. This failure is particularly serious since this decrease (by 31.3%) was sharper than the preceding increase, and, as a matter of proportion, offset the increase of the two preceding years.
>
> The only additional aspect adduced by the USITC in response to the decrease in interim 2001 was the nearly stable market share of imports. The market share, however, is the relative notion of imports *vis-à-vis* domestic sales, and is not related to absolute import volumes. In light of the decrease in the most recent period and the overall developments between 1996 and interim 2001 which can be best described as a double up-and-down movement (returning to the low point at the end), the Panel does not believe that the facts support a finding that, at the moment of the determination, stainless steel rod "is being imported in (such) increased quantities".
>
> It may well be that the increases occurring from 1996 to 1997, or from 1998 to 2000, taken by themselves, would qualify as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards. However, at the time of the determination, the trends of imports showed a significant recent decline, so that these past increases can no longer serve as the basis that stainless steel rod "is being imported in (such) increased quantities". [329] (underlining added; footnotes omitted)

379. With respect to stainless steel rod, the United States makes essentially the same arguments that it made with respect to the Panel's findings on increased imports of CCFRS. In particular, the United States alleges that the Panel "arbitrarily decided that the decline in the first six months of 2001 was more significant than the increase of the prior two years, without considering the different durations and magnitudes of the increases and decrease." [330] According to the United States, the Panel

[329]Panel Reports, paras. 10.267–10.269.

[330]United States' appellant's submission, para. 136, referring to Panel Reports, para. 10.267.

"thereby failed to place data for the end of the investigation period in the context of data from an earlier period."[331]

380. Again, based on our review of the Panel's reasoning, we do not find the Panel to have concluded that the USITC failed to provide a *reasoned and adequate explanation* because it had "arbitrarily decided that the decline in the first six months of 2001 was more significant than the increase of the prior two years".[332] Rather, we understand the Panel to have found that "the USITC did not give an explanation [of] why it nevertheless found that there was an increase of imports in absolute numbers"[333] *despite* the decline that occurred between interim 2000 and interim 2001. Instead of unduly relying on that decline, the Panel, in our view, correctly required that the decline be explained by the United States, particularly since it occurred at the end of the period of investigation and was, in the Panel's words, "sharper than the preceding increase, and, as a matter of proportion, offset the increase of the two preceding years."[334]

381. On stainless steel rod, the United States argues also that the Panel erred in rejecting "the ITC's reasoning as to why the decline in absolute imports in interim 2001 did not outweigh the increases of the previous two years."[335] According to the United States, "there was good reason to discount the significance of [that] decline in absolute imports … because the effect on the U.S. industry in terms of market share was essentially unchanged at the increased level of 1999-2000."[336] On this issue, the Panel found that "[t]he market share … is the relative notion of imports *vis-à-vis* domestic sales, and is not related to absolute import volumes."[337] On appeal, the United States argues that the USITC was "not equating market share with absolute import levels", but, rather, "it was evaluating the significance of the decline in absolute imports in interim 2001 in comparison to the increase in these imports in the previous two years."[338]

382. We do not see how this argument by the United States is relevant for purposes of a determination of whether a product "is being imported in such increased quantities" absolute or relative to *domestic production*. Obviously, "domestic production" and the domestic "market share"

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[331]United States' appellant's submission, para. 136.

[332]*Ibid*.

[333]Panel Reports, para. 10.267.

[334]*Ibid*.

[335]United States' appellant's submission, para. 137.

[336]*Ibid*.

[337]Panel Reports, para. 10.268.

[338]United States' appellant's submission, para. 137.

of the industry of the United States are not identical concepts.[339] In our view, the "share of the domestic market taken by increased imports" is a factor that is relevant under Article 4.2(a) of the *Agreement on Safeguards*, for purposes of examining whether increased imports have caused or are threatening to cause serious injury.

383. Accordingly, we *uphold* the Panel's conclusion, in paragraph 10.277 and the relevant section of paragraph 11.2 of the Panel Reports, that the application of the safeguard measure on stainless steel rod is inconsistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards*, because the United States failed to provide a reasoned and adequate explanation of how the facts support its determination with respect to "increased imports" of that product.

(c) Hot-Rolled Bar

384. With respect to hot-rolled bar, the Panel stated:

> … the USITC's determination on increased imports of hot-rolled bar, as published in its report, does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC relied on the higher amount of imports in 2000 than in any previous year of the period examined and on the "rapid and dramatic increase" from 1999 to 2000. The decline between interim 2000 and 2001 was acknowledged, but the USITC did not give an explanation why it, nevertheless, found that there was an increase of imports in absolute numbers. It did so only with regard to imports relative to domestic production, a finding with which the Panel will deal separately.
>
> This failure to account for the most recent data from interim 2001, as far as absolute imports are concerned, is serious in the view of the Panel. The decrease from interim 2000 (1.34 million tons) to interim 2001 (952,392 tons) represented a decrease by 28.9%, whereas the increase in the year-to-year period before (1999 to 2000) that was characterized as "rapid and dramatic" was merely 11.9%. In light of this decrease in the most recent period, the Panel does not believe that the trend of imports from 1996 to 2000 (an increase by 52.5%) is sufficient to provide a basis for a finding that, at the moment of the determination, hot-rolled bar "is being imported in such increased quantities".

[339]This is, of course, because not all domestic production is necessarily traded in the domestic market.

> In the Panel's view, the trend of absolute imports between 1997 and interim 2001 is best described as an alternation of increases and decreases from year to year. Given this up-and-down movement ending with a decrease of 28.9% (in interim 2001), the Panel does not believe that the facts support a conclusion of increased imports, nor has the USITC provided an explanation to that effect. The Panel acknowledges that, until 2000, there was a net increasing trend, in other words, the two increases in 1998 and 2000 were stronger than the decrease in 1999. However, the picture changes again significantly, when one includes the decrease (by 28.9%) in interim 2001, a fact that the USITC acknowledged, but did not evaluate. Taking into account all qualitative and quantitative features of the trends of imports over the period of examination, the Panel, therefore, finds that the USITC's determination on increased imports of hot-rolled bar, as published in its Report, does not contain a reasoned and adequate explanation of how the facts support a conclusion that hot-rolled bar "is being imported in such increased quantities."[340] (underlining added)

385. The United States appeals the Panel's findings with respect to increased imports of hot-rolled bar both in absolute terms and relative to domestic production.

(i) *Absolute imports*

386. As to absolute imports, the United States argues, in essence, that, in examining absolute levels of imports for hot-rolled bar, the Panel "placed too much reliance"[341] on the decrease from interim 2000 to interim 2001, and "improperly disregarded the nature and magnitude of preceding changes in imports."[342] The argument advanced by the United States here is similar to the United States' argument on increased imports of CCFRS and stainless steel rod.

387. We do not agree with the United States that the Panel "placed too much reliance" on the figures for the most recent period of the investigation. Rather, based on our review of the Panel's reasoning, we understand the Panel to have concluded that the USITC did not provide *a reasoned and adequate explanation* of how the facts supported the USITC's finding concerning "increased imports", because the USITC did *not* address the relevance of the decrease that occurred at the end of the period of investigation in any way in its report. The Panel found, in particular, that "[t]he

[340]Panel Reports, paras. 10.204–10.206.

[341]United States' appellant's submission, heading III.C.3.c.

[342]*Ibid*., para. 127.

decline between interim 2000 and 2001 was acknowledged, but the USITC did not give an explanation why it, nevertheless, found that there was an increase of imports in absolute numbers."[343]

388. As we noted in the context of examining the United States' claim related to imports of CCFRS, we note here also that, in not explaining the "most recent decrease" in absolute imports, the USITC did *not*, in our view, provide an explanation concerning the overall *trend* in imports that occurred during the period of investigation. Again we recall that, in *Argentina – Footwear (EC)*, in clarifying the *Agreement on Safeguards*, we stated that "authorities are required to examine trends".[344] In our view, by failing to address the decrease in imports that occurred between interim 2000 and interim 2001, the United States did not—and could not—provide a reasoned and adequate explanation of how the facts supported its finding that imports of hot-rolled bar "increased", as required by Article 2.1 of the *Agreement on Safeguards*. This failure to account for the decrease in absolute imports is all the more serious in the light of the fact that the intervening trend that was not addressed by the USITC occurred at the very end of the period of investigation. In *US – Lamb*, we found that the competent authority "must assess" the data from the most recent past "in the context of the data for the entire investigative period".[345] As the Panel found, it is, precisely, those most recent data that the USITC failed to account for with respect to absolute imports.

389. Having examined the Panel's findings as they relate to imports in *absolute numbers*, we turn next to examine the Panel's findings concerning imports of hot-rolled bar *relative to domestic production*.

(ii) *Relative imports*

390. As to imports relative to domestic production, we recall once again that Article 2.1 provides that a Member may apply a safeguard measure after a determination that the relevant product is "being imported … in such increased quantities, absolute *or* relative to domestic production … as to cause or threaten to cause serious injury" (emphasis added). Therefore, a determination of either an absolute or relative increase in imports causing serious injury is sufficient to authorize a Member to apply safeguard measures. Accordingly, the increased imports requirement *can* be met not only if there is an absolute increase in imports, but also if there is an increase relative to domestic production.

[343]Panel Reports, para. 10.204.

[344]Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

[345]Appellate Body Report, *US – Lamb*, para. 138.

391. After reviewing the USITC's findings on absolute imports, the Panel examined the explanation provided by USITC with regard to *imports relative to domestic production.*[346] In assessing whether that explanation was reasoned and adequate, the Panel found that:

> The decline in imports in interim 2001 was acknowledged, but according to the USITC "the ratio of imports to US production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level."
>
> The Panel is not convinced by this statement and does not consider it to be a reasoned and adequate explanation supporting the determination of increased imports, given that the ratio of imports to domestic production in the most recent period, interim 2001 (24.6%), not only declined compared with full-year or interim 2000 (27.5% and 27.0% respectively) but was also lower than in 1999 (24.9%) and nearly as low as in 1998 (23.8%). Therefore the facts do not support a conclusion that hot-rolled bar "is being imported in such increased quantities, … relative to domestic production".[347]

392. Here, too, the United States challenges the Panel's interpretation, and advances essentially the same arguments that it does with respect to the Panel's findings on increased imports of hot-rolled bar in absolute terms. In particular, the United States argues that "[a]s with absolute imports, the Panel improperly disregarded the nature and magnitude of changes in relative imports preceding the first half of 2001,"[348] and "focused almost exclusively on a decline in imports in the first six months of 2001 as compared to the first six months of 2000."[349]

393. The Panel acknowledged that the USITC *had provided* an explanation in its report on imports relative to domestic production.[350] Thus, the issue here is *not* whether the USITC did, or did not, provide an "explanation" concerning the decrease that occurred at the end of the period of investigation. The issue here is the sufficiency of that "explanation". The Panel found that the explanation provided by the USITC was not reasoned and adequate because the "facts [did] not support a conclusion that hot-rolled bar 'is being imported in such increased quantities'".[351]

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[346]Panel Reports, para. 10.208.

[347]*Ibid*., paras. 10.208–10.209.

[348]United States' appellant's submission, para. 130.

[349]*Ibid*., para. 129.

[350]Panel Reports, para. 10.204.

[351]*Ibid*., para. 10.209.

394. In reaching this conclusion, the Panel stated that it did not consider the statement of the USITC that "the ratio of imports to US production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level"[352] to be a reasoned and adequate explanation supporting the determination on increased imports. The Panel explained that this was because "the ratio of imports to domestic production in the most recent period, interim 2001 … not only declined compared with full-year or interim 2000 … but was also lower than in 1999 … and nearly as low as in 1998".[353] For these reasons, the Panel concluded that "the facts do not support a conclusion that hot-rolled bar 'is being imported in such increased quantities, … relative to domestic production.'"[354]

395. Based on the facts found by the Panel and in the Panel record, we have some misgivings about the Panel's assessment. As the Panel pointed out, the ratio of imports to domestic production was 18.4 per cent in 1997[355], and 27.5 per cent in 2000—the last full year included in the period of investigation. This represents an increase in 9.1 percentage points. Between interim 2000 and interim 2001, there was a decline in that ratio (2.4 percentage points, being the difference between 27 per cent for interim 2000 and 24.6 per cent for interim 2001). However, the ratio for interim 2001 was still 6.2 percentage points above that for 1997.

396. In addition, as we stated in *US – Lamb*, "data from the most recent past … must [be] assess[ed] in the context of the data for the entire investigative period".[356] In its appellant's submission, the United States points out that the ratio of imports to domestic production of hot-rolled bar increased by 43.23 per cent from 1996 to 2000, and "rose in three out of the four year-to-year comparisons, including a sizable increase from 1999 to 2000".[357] It appears to us that the decline in imports between interim 2000 and interim 2001—from 27 to 24.6 per cent of domestic production—is relatively modest when assessed in the context of the aforementioned 43.23 per cent increase, and *does not necessarily* detract from an overall determination by the USITC that the product is "being imported in such increased quantities".

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[352]Panel Reports, para. 10.208.

[353]*Ibid*., para. 10.209.

[354]*Ibid*.

[355]We note that the ratio of imports to domestic production was 19.2 per cent at the start of the period of investigation in 1996.

[356]Appellate Body Report, *US – Lamb*, para. 138.

[357]United States' appellant's submission, para. 128. That increase was from 24.9 per cent in 1999 to 27.5 per cent in 2000. (Panel Reports, para. 10.208)

397. We are not suggesting that a 43.23 per cent increase between 1996 and 2000 would be, in itself, sufficient to demonstrate "increased imports". The fact of this increase, in itself, does not prove that a product is being imported in "such" increased quantities in the sense of Articles XIX:1(a) and 2.1. As the Panel itself observed, "there are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an 'increase' in the sense of Article 2.1."[358]

398. Our review of the facts suggests to us that they may well support the USITC's conclusion relating to increased imports. Thus, we do not necessarily share the Panel's conclusion about those facts. However, this is not the issue before us. The issue before us here is whether the USITC provided an explanation in its report on whether imports increased relative to domestic production. On that point, we agree with the Panel that the USITC did not explain why, despite the decline that occurred at the end of the period of investigation, the facts nevertheless supported a determination of "increased imports" within the meaning of Article 2.1.[359] Thus, we agree with the Panel, albeit for different reasons, that the USITC failed to provide a reasoned and adequate explanation of how the facts supported its determination.

399. Accordingly, we *uphold* the Panel's finding, in paragraph 10.210 and the relevant section of paragraph 11.2 of the Panel Reports, that the application of the safeguard measure on hot-rolled bar is inconsistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards*, because the United States failed to provide a reasoned and adequate explanation of how the facts support its determination with respect to "increased imports" of that product.

400. We now turn to the United States' appeal against the Panel's findings on tin mill products.

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[358]Panel Reports, para. 10.168. (original emphasis)

[359]The USITC report, in relevant part, states:

> As a ratio to U.S. production, imports declined from 19.2 percent in 1996 to 18.4 percent in 1997, but then rose to 23.8 percent in 1998, 24.9 percent in 1999, and 27.5 percent in 2000. The ratio was lower in interim 2001, at 24.6 percent, than in interim 2000, when it was 27.0 percent.
>
> Imports were higher, both in absolute terms and relative to U.S. production, in 2000 than in any prior year of the period examined and showed a rapid and dramatic increase from the previous year. While imports declined in the interim period comparison, the ratio of imports to U.S. production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level.

USITC Report, Vol. I, p. 92. (footnote omitted)

B. *Tin Mill Products and Stainless Steel Wire*

1. Tin Mill Products

401. The Panel also found that the USITC failed to provide a reasoned and adequate explanation for its determination that imports of tin mill products had increased. The Panel noted that the President of the United States "based his determination [with respect to tin mill products] on the findings of [ ] Commissioners [Bragg, Devaney, and Miller], although those three commissioners did not perform their analysis on the basis of the same like product definition".[360] The Panel went on to find that these findings "cannot be reconciled as a matter of their substance", because they were not based on an identically-defined like product; the Panel concluded that a WTO Member is not permitted, under Articles 2.1 and 3.1 of the *Agreement on Safeguards*, to "base a safeguard measure on a determination supported by a set of explanations each of which is different and impossible to reconcile with the other. Such findings cannot simultaneously form the basis of a determination."[361]

402. The Panel also said that:

> [T]he Panel sees no inconsistency with WTO law in the fact itself that only one commissioner reached affirmative findings with regard to tin mill products as a separate product.
>
> However, if a Member *relies* on the findings made by *three* Commissioners and the findings of those *three* Commissioners constitute the *determination* of the competent authorities in the sense of Article 2.1 of the Agreement on Safeguards, there is a requirement for those findings to provide a reasoned and adequate explanation. A reasoned and adequate explanation is not contained in a set of findings which *cannot* be reconciled one with another.[362] (original emphasis; underlining added)

[360]Panel Reports, para. 10.192.

[361]*Ibid*., para. 10.195. (emphasis added)

[362]Panel Reports, paras. 10.198–10.199.

403. The Panel distinguished the facts before it from the situation that was before us in *US – Line Pipe* by stating:

> The question in *US – Line Pipe* was whether a *determination* could leave open the question whether there was serious injury or threat of serious injury. From the perspective of the Agreement on Safeguards, the conditions of Article 2.1 are satisfied equally by serious injury and by threat of serious injury. The challenge was not that the *underlying report* was split and contained different reasonings that could not be reconciled one with another and that, therefore, there was a violation of Articles 2.1 and 3.1 of the Agreement on Safeguards.[363] (original emphasis)

404. The United States asks us to reverse the findings of the Panel concerning tin mill products. According to the United States, the Panel erred in requiring that the findings of each Commissioner or group of Commissioners be "reconciled".[364] The United States submits that findings based on different product groupings are not intrinsically irreconcilable.[365] Moreover, the United States argues that the "inconsistency" found by the Panel is of no legal relevance, and that the views of the three Commissioners represent alternative findings, which, according to the United States, are consistent with the *Agreement on Safeguards* "so long as the analysis of at least one of the decision makers satisfies the requirements of the Agreement".[366]

405. In our analysis of this issue, we will first briefly consider the structure and functioning of the USITC, as explained by the United States, and will then summarize the relevant findings and determinations of the individual Commissioners and of the USITC in this case; thereafter, we will analyze the merits of the United States' appeal of the Panel's findings.

406. As explained by the United States, the USITC is the United States' competent authority for purposes of the *Agreement on Safeguards*. The USITC is a body that usually consists of six Commissioners. In safeguard investigations, each of the six Commissioners makes an affirmative or negative finding *independently* of each other as to whether a product is being imported in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry. Each Commissioner—independently—defines the like or directly competitive product; the

[363]Panel Reports, para. 10.196.

[364]United States' appellant's submission, para. 370.

[365]*Ibid*., para. 372.

[366]*Ibid*., para. 375.

affirmative or negative vote of a majority of the Commissioners constitutes the overall institutional determination of the USITC.[367] If there is an equal number of affirmative and negative votes, the President of the United States decides which voting group constitutes the overall institutional determination of the USITC.[368]

407. In the present case, for tin mill products, the six Commissioners comprising the USITC did not all define the like or directly competitive product in the same way. Four Commissioners (Chairman Koplan, Vice Chairman Okun, as well as Commissioners Hillman and Miller) defined tin mill products as a distinct and separate product category, and set out their respective "views"[369] on the basis of this product category.[370] The remaining Commissioners (Commissioners Bragg and Devaney) did not consider tin mill products as a separate product category; rather, they considered tin mill products as part of the larger category of carbon and alloy flat products[371], and set out their respective "views" on the basis of this larger product category.[372]

408. Among the four Commissioners who had defined tin mill products as a distinct and separate product category, three reached a negative finding (Chairman Koplan, Vice Chairman Okun, and Commissioner Hillman)[373], and one reached an affirmative finding (Commissioner Miller).[374] Commissioners Bragg and Devaney reached an affirmative finding with respect to the larger product category of carbon and alloy flat products (including tin mill).[375]

409. At the oral hearing, the United States explained that "the USITC combined the results" of the views of Commissioners Bragg, Devaney, and Miller into a "single institutional determination"—an

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[367]United States' appellant's submission, para. 359.

[368]*Ibid*., footnote 469 to para. 359.

[369]At the oral hearing, the United States clarified that it viewed the term "determination" as the legal conclusion that increased imports are a cause of serious injury or threat thereof, and differentiated this term from the findings and reasoned conclusions of the individual decision-makers, which the United States prefers to call the "views" of those particular decision makers.

[370]USITC Report, Vol. I, pp. 71ff and 307ff.

[371]This product category encompasses CCFRS, tin mill, and GOES.

[372]See USITC Report, Vol. I, pp. 272–273 (Commissioner Bragg); USITC Report, Vol. I, footnote 65 on p. 36 (Commissioner Devaney).

[373]See USITC Report, Vol. I, pp. 71–78.

[374]See *ibid*., pp. 307–309.

[375]See *ibid*., pp. 279, 282–283, and 294–295 (Commissioner Bragg); and footnote 368 on p. 71 (Commissioner Devaney).

affirmative finding—on tin mill products.[376] In other words, the fact that two Commissioners considered products other than tin mill products when making their own independent findings did not affect the result with respect to tin mill products alone. The United States explained that this "single institutional determination" of the USITC on tin mill products is supported by the multiple different findings, or "views", of Commissioners Miller, Bragg, and Devaney.[377] The President of the United States chose this affirmative finding as the overall determination of the USITC, over the other "combined results" that reached a negative finding.[378] Accordingly, for purposes of WTO obligations, there is an affirmative determination made by the competent authority of the United States, the USITC, that tin mill products are being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. This determination of the USITC is supported by the views of Commissioners Miller, Bragg, and Devaney; therefore, according to the United States, it is from the views of these three Commissioners that a panel, and we, must find a reasoned and adequate explanation for the USITC's determination.

410. Additionally, and before commencing our analysis, it may be helpful to observe that the issue before us concerns, not the domestic law of the United States, but rather the obligations of the United States *under the WTO Agreement*. As we stated in *US – Line Pipe*, what matters for purposes of WTO dispute settlement is whether the determination, irrespective of how it is decided domestically, meets the requirements of the *Agreement on Safeguards*.[379]

411. Furthermore, it is also important to note that the issue before us, here, is *not* whether the product scope of the *safeguard measure* may or may not be narrower than a competent authority's *determination*—that is, it is not whether certain products included in a determination can subsequently be excluded from the scope of the actual safeguard measure.[380] Instead, the issue before us is, we repeat, whether the USITC's report provided a reasoned and adequate explanation for the USITC's "single institutional determination" that imports of tin mill products had increased within the meaning of Article 2.1 of the *Agreement on Safeguards*. We turn to this issue now.

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[376]See also *ibid*., p. 25, and the United States' appellant's submission, para. 394.

[377]See also United States' appellant's submission, para. 394.

[378]As we explained earlier, because the USITC found that it was "equally divided" with respect to tin mill products, the decision whether the affirmative or rather the negative determination represented the institutional determination of the USITC rested with the President of the United States.

[379]Appellate Body Report, *US – Line Pipe*, para. 158.

[380]We note that this issue was raised before the Panel; the Panel, however, decided to exercise judicial economy with respect to this claim. (Panel Reports, para. 10.700)

412. We note that the Panel did not examine the substance of the findings of the three Commissioners; rather, the Panel noted only that these findings were not based on an identically-defined like product, and concluded that this rendered the findings of the three Commissioners "irreconcilable". From this conclusion, the Panel deduced that these findings could not provide a reasoned and adequate explanation for the USITC's single determination.

413. We have reservations about the Panel's approach. First, as a preliminary matter, we are not persuaded that the findings of the three Commissioners "*cannot* be reconciled".[381] We do not believe that an affirmative finding with respect to a broad product grouping, on the one hand, and an affirmative finding with respect to one of the products contained in that broad product grouping, on the other hand, are, necessarily, mutually exclusive. It may be that they are irreconcilable, but that will depend on the facts of the case. Here, the Panel did not inquire into the details of the findings as they related to increased imports and, hence, was not adequately informed as to whether the three findings were reconcilable or not.

414. Secondly, in any event, we note that Article 3.1 of the *Agreement on Safeguards* requires the competent authority, *inter alia*, to "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". We do not read Article 3.1 as necessarily precluding the possibility of providing multiple findings instead of a single finding in order to support a determination under Articles 2.1 and 4 of the *Agreement on Safeguards*. Nor does any other provision of the *Agreement on Safeguards* expressly preclude such a possibility. The *Agreement on Safeguards*, therefore, in our view, does not interfere with the discretion of a WTO Member to choose whether to support the determination of its competent authority by a single explanation or, alternatively, by multiple explanations by members of the competent authority. This discretion reflects the fact that, as we stated in *US – Line Pipe*, "the *Agreement on Safeguards* does not prescribe the internal decision-making process for making [ ] a determination [in a domestic safeguard investigation]".[382]

415. In the appeal before us, the USITC set out, in its report, three distinct and separate sets of findings. The results were combined into a "single institutional determination". These findings were made on the basis of different product definitions developed by three Commissioners. Although we agree with the Panel that "it makes a difference whether the product at issue is tin mill or a much broader category called CCFRS and containing tin mill products", because "the import numbers for

[381]Panel Reports, para. 10.199. (emphasis added)

[382]Appellate Body Report, *US – Line Pipe*, para. 158.

different product definitions will not be the same"[383], this very difference, as well as the fact that the findings underlying the USITC's determination were set out as distinct and separate in the USITC's report, implies that these findings should *not* be read together, nor should a panel seek to "reconcile" them. Rather, a panel must ascertain whether a reasoned and adequate explanation for the USITC's determination is contained in the report, even if only in one of the Commissioner's individual findings.

416. In our view, in the case before us, the Panel should, therefore, not have ended its enquiry after noting that the conclusions of Commissioners Bragg and Devaney were based on a product definition that differed from that on which Commissioner Miller based her conclusion. After making this correct observation, the Panel should have continued its enquiry by examining the views of the three Commissioners *separately*, in order to ascertain whether one of these sets of findings contained a reasoned and adequate explanation for the USITC's "single institutional determination" on tin mill products.

417. In fact, we note that the approach which, in our view, the Panel should have taken in the context of increased imports, is precisely the approach the Panel adopted in the context of parallelism.[384] In that context, the Panel first reviewed the findings of Commissioner Bragg and subsequently proceeded to review the findings reached by Commissioner Miller.[385] We do not understand why the Panel reviewed the multiple findings separately in the context of parallelism, but declined to do so in the context of increased imports.[386]

418. It bears emphasizing that, in reviewing each of such findings separately, a panel is of course obliged to assess whether that particular finding provides a reasoned and adequate explanation of how the facts support the competent authority's determination. As we held in *US – Lamb*, "panels must [not] simply *accept* the conclusions of the competent authorities"; they must examine these

[383]Panel Reports, para. 10.195.

[384]We note, however, that the Panel also relied on the divergence in product definitions in the context of its causation analysis. (Panel Reports, paras. 10.422 and 10.572)

[385]Panel Reports, para. 10.615.

[386]We are aware that, in the context of parallelism, the Panel did not review the findings of Commissioner Devaney; the Panel explained that "the United States does not rely on findings made by Commissioner Devaney in defence against the claim of violation of parallelism, possibly because this Commissioner appears not to have reached any conclusions about imports other than excluded imports". (Panel Reports, footnote 5677 to para. 10.613)

conclusions "critically" and "in depth".[387] Hence, in examining whether one of the multiple sets of explanations set forth by the competent authority, taken individually, provides a reasoned and adequate explanation for the competent authority's determination, a panel may have to address, *inter alia*, the question whether, *as a matter of WTO obligations*, findings by individual Commissioners made on the basis of a *broad* product grouping can provide a reasoned and adequate explanation for a "single institutional determination" of the USITC concerning a *narrow* product grouping.[388] Accordingly, we do *not* suggest that the product scope of an affirmative finding by an individual Commissioner is *not* relevant for the enquiry whether this finding does or does not provide a reasoned and adequate explanation for the competent authority's determination.[389] Rather, our finding implies that a panel may not conclude that there is no reasoned and adequate explanation for a competent authority's determination by relying merely on the fact that distinct multiple explanations given by the competent authority are not based on an identically-defined like product.[390]

419. In the light of the above, we *reverse* the Panel's finding, in paragraph 10.200 of the Panel Reports, that the USITC report does not contain a reasoned and adequate explanation of how the facts support the determination of increased imports for tin mill products because "the explanation consists of alternative explanations partly departing from each other which, given the different product bases, cannot be reconciled as a matter of their substance."[391]

420. We will discuss later in this Report whether, in the light of this finding, we should complete the analysis with respect to this issue.

421. We turn next to stainless steel wire.

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[387]Appellate Body Report, *US – Lamb*, para. 106. (original emphasis)

[388]In this regard, we note that the fact that, pursuant to the domestic law of a WTO Member, a finding made on the basis of a *broad* product grouping is deemed to support a competent authority's determination which relates to a *narrower* product, does not, in and of itself, imply that this conclusion holds true also for the purposes of the *Agreement on Safeguards*.

[389]Indeed, we note that in the context of parallelism, the Panel addressed separately the finding of Commissioner Bragg and found that "findings on a product category other than tin mill products are [not] able to support a measure relating to tin mill products as a separate product category, unless there is a reasoned and adequate explanation relating the two product categories". (Panel Reports, para. 10.615)

[390]We also emphasize that our finding does not address the question whether the USITC and/or individual Commissioners correctly defined the "like product", the "imported product", or the "domestic industry".

[391]Panel Reports, para. 10.200.

2. Stainless Steel Wire

422. As with tin mill products, the United States appeals the Panel's finding that the competent authority did not provide a reasoned and adequate explanation in relation to increased imports of stainless steel wire because the findings of the three Commissioners underlying the USITC's determination were not based on identically-defined like products.[392] We begin by summarizing the relevant findings of the USITC.

423. The six Commissioners of the USITC made divergent findings on the product category stainless steel wire. Four Commissioners (Chairman Koplan, Vice Chairman Okun, as well as Commissioners Hillman and Miller) defined stainless steel wire as a distinct product category and presented their respective views on the basis of this product category.[393] The remaining two Commissioners (Bragg and Devaney) did not consider stainless steel wire as a separate product category; rather, these two Commissioners identified a product category "stainless steel wire products" (Bragg) or "stainless steel wire and wire rope" (Devaney), both composed of stainless steel wire and stainless steel rope, and presented their respective views on the basis of this broader product category.[394]

424. Among the four Commissioners who defined stainless steel wire as a distinct and separate product category, three reached a negative finding (Vice Chairman Okun and Commissioners Hillman and Miller)[395], and one reached an affirmative finding (Chairman Koplan).[396] Commissioners Bragg and Devaney reached an affirmative finding with respect to the larger product category stainless steel wire products/stainless steel wire and wire rope.[397]

425. At the oral hearing, the United States explained that "the USITC combined the results" of the views of Chairman Koplan and of Commissioners Bragg and Devaney into a "single institutional determination"—an affirmative finding—on stainless steel wire.[398] In other words, the fact that two

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[392]United States' appellant's submission, paras. 359–395.

[393]USITC Report, Vol. I, pp. 190 and 234–238.

[394]*Ibid*., pp. 277, 280, 288–289, and 301–302 (Commissioner Bragg); and pp. 335–336 and 342–347 (Commissioner Devaney).

[395]*Ibid*., pp. 234–238.

[396]USITC Report, Separate Views of Chairman Koplan on injury, pp. 256–259.

[397]USITC Report, Vol. I, pp. 280, 288–289, and 301–302 (Commissioner Bragg); and pp. 342–347 (Commissioner Devaney).

[398]See also *ibid*., p. 27; United States' appellant's submission, para. 394.

of the Commissioners considered products other than stainless steel wire did not affect the result with respect to stainless steel wire alone. The United States explained that this "single institutional determination" of the USITC on stainless steel wire is supported by the multiple different findings, or "views", of Chairman Koplan and of Commissioners Bragg and Devaney.[399] The President of the United States chose this affirmative finding as the overall determination of the USITC, over the "combined results" that reached a negative finding.[400] Accordingly, for purposes of WTO obligations, there is an affirmative determination made by the competent authority of the United States, the USITC, that stainless steel wire is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. This determination of the USITC is supported by the views of Chairman Koplan and Commissioners Bragg and Devaney; therefore, according to the United States, it is from the views of these three Commissioners that a panel, and we, must find a reasoned and adequate explanation for the USITC's determination.

426. The Panel found that the USITC failed to provide a reasoned and adequate explanation of how the facts support its determination that imports of stainless steel wire have increased. The Panel first noted that the situation before it "is equivalent to that encountered in the context of tin mill products".[401] The Panel then stated:

> [T]he Agreement on Safeguards does not permit the combination of findings as supporting a determination, if these findings were reached on the basis of differently defined products. If such findings cannot be reconciled one with another (as a matter of substance), they cannot simultaneously form the basis of a determination.[402]

The Panel, moreover, cross-referenced its reasoning set out in the context of its findings on tin mill products.[403]

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[399]See also United States' appellant's submission, para. 394.

[400]As we said earlier, because the USITC found that it was "equally divided" with respect to stainless steel wire, the decision whether the affirmative or rather the negative determination represented the institutional determination of the USITC rested with the President of the United States.

[401]Panel Reports, para. 10.261.

[402]*Ibid*., para. 10.262.

[403]*Ibid.*

427. As with the Panel's findings on tin mill products, the United States argues that, with respect to stainless steel wire, the Panel erred in requiring that the findings of each Commissioner or group of Commissioners be "reconciled".[404] The United States submits that there is "nothing intrinsically irreconcilable about findings based on different product groupings".[405] The United States also argues that alternative findings by a single decision-maker are permitted by the *Agreement on Safeguards*, "so long as the analysis of at least one of the decision makers satisfies the requirements of the Agreement".[406]

428. We note that the structure and format of the USITC's determination with respect to stainless steel wire mirrors the USITC's determination with respect to tin mill products. One Commissioner (Chairman Koplan) made affirmative findings on the product stainless steel wire[407], while two other Commissioners (Bragg and Devaney) made affirmative findings on a broader product group including, as one of the elements of this product group, stainless steel wire.[408] The results of these findings were subsequently combined by the USITC into a single institutional finding concerning stainless steel wire.

429. The facts on stainless steel wire, as well as the findings of the Panel, are, for all relevant purposes, identical to those before us in the context of tin mill products. Therefore, our reasoning with respect to tin mill products is applicable, *mutatis mutandis*, also to stainless steel wire.[409] We therefore *reverse* the Panel's finding, in paragraph 10.263 and in the relevant section of paragraph 11.2 of the Panel Reports, that the USITC report does not contain a reasoned and adequate explanation of how the facts support the determination of increased imports for stainless steel wire because the "explanation consists of alternative explanations departing from each other and which, given the different product bases, cannot be reconciled as a matter of substance."[410]

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[404]United States' appellant's submission, para. 370.

[405]*Ibid*., para. 372.

[406]*Ibid*., para. 375.

[407]USITC Report, Separate Views of Chairman Koplan on injury, pp. 256–259.

[408]USITC Report, Vol. I, pp. 280, 288–289, 301–302 (Commissioner Bragg); USITC Report, Vol. I, pp. 342–347 (Commissioner Devaney).

[409]See *supra*, paras. 413–418.

[410]Panel Reports, para. 10.262.

3. Completing the Analysis

430. In the course of finding that the explanation of the USITC for its determination of increased imports of tin mill products and stainless steel wire was not reasoned and adequate, the Panel did not examine separately the findings of the three Commissioners with a view to determining whether one of these findings, as a matter of substance, contains a reasoned and adequate explanation. As we have reached a conclusion different from the Panel on the interpretation of the *Agreement on Safeguards*, and as the Panel did not undertake a substantive analysis, the question arises whether we should "complete the analysis".

431. In previous appeals, we have, when appropriate, completed the legal analysis with a view to facilitating the prompt settlement of disputes.[411] However, in the dispute before us, we have already upheld the Panel's finding that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994, as well as with Article 3.1 of the *Agreement on Safeguards*, with regard to all ten measures at issue. We also find in the following section of this Report dealing with the issue of "parallelism"[412], that the United States has acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* with respect to all product categories, because the United States failed to establish that imports covered by the safeguard measures, *alone*, satisfy the conditions for the imposition of a safeguard measure. Therefore, the Panel's finding that the safeguard measures applied to tin mill products and stainless steel wire are both "deprived of a legal basis"[413] remains undisturbed. As a result, it is not necessary for us to complete the analysis and determine whether the USITC report provided a reasoned and adequate explanation that imports of tin mill products and stainless steel wire had increased within the meaning of Article 2.1 of the *Agreement on Safeguards*.

432. We take up next the issue of "parallelism".

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[411]See, for instance, Appellate Body Report, *US – Gasoline*, at 18 ff; Appellate Body Report, *Canada – Periodicals*, at 469 ff; Appellate Body Report, *EC – Hormones*, paras. 222 ff; Appellate Body Report, *EC – Poultry*, paras. 156 ff; Appellate Body Report, *Australia – Salmon*, paras. 117 ff, 193 ff and 227 ff; Appellate Body Report, *US – Shrimp*, paras. 123 ff; Appellate Body Report, *Japan – Agricultural Products II*, paras. 112 ff; Appellate Body Report, *US – FSC*, paras. 133 ff; Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43 ff; and Appellate Body Report, *US – Wheat Gluten*, paras. 80 ff and 127 ff.

[412]See *infra*, paras. 433–474.

[413]Panel Reports, para. 10.705.

VII. Parallelism

433. We start by recalling that the United States excluded imports from Canada and Mexico[414], as well as from Israel and Jordan[415], from the scope of application of these safeguard measures. The Panel found that these safeguard measures were inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards* because the United States did not, with respect to any of the product categories at issue, establish explicitly that imports from the sources included in the application of these measures, *alone*, satisfied the conditions for the application of a safeguard measure. The United States challenges these findings of the Panel.[416]

434. In its findings, the Panel began by making some general comments about the requirement of "parallelism"[417], and then reviewed the USITC's findings on a product-specific basis. In these general comments, the Panel noted that:

> [i]ncreased imports from sources ultimately excluded from the application of the measure must … be excluded from the analysis. The increase of these imports and their effect on the domestic industry cannot be used to support a conclusion that the product in question "is being imported in such increased quantities so as to cause serious injury". *This makes it necessary … to account for the fact that excluded imports may have some injurious impact on the domestic industry*.[418] (emphasis added)

435. In its product-specific analysis, the Panel, using similar language, relied on this reasoning in examining the USITC's determination with respect to non-NAFTA imports for nine product categories, namely, CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, and stainless steel wire. For each of these nine product categories, the Panel found that the USITC had not complied with the requirement to demonstrate a causal link between increased imports and serious injury, because it did not account for the effects—existing or possible—

[414]Proclamation, para. 8.

[415]*Ibid*., para. 11.

[416]United States' appellant's submission, paras. 315–358.

[417]Appellate Body Report, *US – Line Pipe*, paras. 178–181.

[418]Panel Reports, para. 10.598.

of excluded imports on the domestic industry.[419] The Panel did not make this finding with respect to the tenth product category, stainless steel rod.[420]

436. For all ten product categories, the Panel found a second flaw in the USITC's analysis after examining its determination concerning non-NAFTA imports. Using virtually identical language for most product categories[421], the Panel stated:

> [T]he Panel notes that the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan. Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

[419]The Panel used the language "to account for the fact that excluded … imports contributed to the serious injury" or "the injury caused by excluded imports must be accounted for" with respect to the product categories CCFRS (Panel Reports, paras. 10.604–10.606), hot-rolled bar (Panel Reports, paras. 10.628–10.630), cold-finished bar (Panel Reports, paras. 10.638–10.640), rebar (Panel Reports, para. 10.650), FFTJ (Panel Reports, paras. 10.664–10.667), and stainless steel bar (Panel Reports, paras. 10.674–10.677). With respect to Commissioner Miller's analysis of the causal link between non-Canadian imports of tin mill products and serious injury, the Panel stated that "[the] findings do not account for the fact that imports other than those from an excluded source are less than those from all sources and that the effects on the domestic producers are, therefore, not the same." (Panel Reports, paras. 10.620–10.621) With respect to welded pipe, the Panel stated that the USITC's finding "does not account for the fact that the threat of serious injury caused by non-NAFTA imports is but a part of the threat of serious injury caused by all imports and does not establish that there is a genuine and substantial relationship of cause and effect." (Panel Reports, para. 10.657) With respect to stainless steel wire, the Panel stated that "the findings [ ] do not take account of the portion of the threat of serious injury caused by NAFTA imports." (Panel Reports, para. 10.688)

[420]With respect to stainless steel rod, the Panel, in reviewing the USITC's finding on non-NAFTA imports, did not refer to the causation or non-attribution requirements. We address the Panel's findings with respect to stainless steel rod in paras. 457–473, below.

[421]The Panel did not include the first paragraph with respect to its findings on tin mill products and stainless steel rod.

> It may well be that imports from Israel and Jordan[422] were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be necessary for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made, it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure. The Panel recognizes that if, as established elsewhere in the report of the competent authorities, imports from an excluded source were [very small or (virtually) non-existent], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.[423] (original emphasis, footnotes omitted)

437. The Panel made separate and distinct findings on parallelism for each of the ten product categories. The United States asks us to reverse the findings of the Panel on parallelism for all these ten product categories. The United States argues that, although the Panel "purported to conduct a product-by-product examination of the parallelism claims, its basis for rejecting the ITC's parallelism analysis varied little from product to product."[424] The United States contends that the Panel "asserted two general conclusions in its introductory analytical section that served as the basis for its product-specific analyses".[425] According to the United States, the first of these two "general conclusions" of the Panel is a requirement to "account for the fact that excluded imports may have some injurious impact on the domestic industry"—to which the United States refers as the "excluded sources accounting requirement".[426] As the United States describes it, the second of these two "general conclusions" of the Panel is a requirement to establish "explicitly" that imports from included sources satisfy the conditions for the imposition of a safeguard measure, a standard which the United States argues the Panel misconstrued to require the competent authority to make "redundant findings".[427]

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[422]For tin mill products, the Panel referred to imports from Mexico, Israel and Jordan.

[423]Panel Reports, paras. 10.607–10.608; see also Panel Reports, paras. 10.622, 10.631–10.632, 10.641–10.642, 10.651–10.652, 10.658–10.659, 10.668–10.669, 10.678–10.679, 10.689–10.690, and 10.698.

[424]United States' appellant's submission, para. 316.

[425]*Ibid*.

[426]*Ibid*., paras. 318 and 321–333.

[427]*Ibid*., paras. 334–344.

438. On appeal, the United States explicitly acknowledges that it "does not dispute that the ITC's parallelism analysis *did not satisfy the standards articulated by the Panel*".[428] However, the United States considers this to be "irrelevant"[429], because it contends that these requirements are not contained in the *Agreement on Safeguards*.

439. We begin our analysis by reviewing the relevant treaty provisions. The word "parallelism" is not in the text of the *Agreement on Safeguards*; rather, the requirement that is described as "parallelism" is found in the "parallel" language used in the first and second paragraphs of Article 2 of the *Agreement on Safeguards*. Article 2 of the *Agreement on Safeguards* stipulates:

> *Conditions*
>
> 1. A Member[1] may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
>
> 2. Safeguard measures shall be applied to a product being imported irrespective of its source. (underlining added)
>
> ---
>
> [1] A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

[428]United States' appellant's submission, para. 358. (emphasis added)

[429]United States' appellant's submission, para. 358.

440. In *US – Wheat Gluten,* we said that:

> The same phrase – "product … being imported" – appears in *both* … paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in both Articles 2.1 and 2.2. To 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. In the usual course, therefore, 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.[430] (original emphasis; underlining added)

441. Thus, where, for purposes of applying a safeguard measure, a Member has conducted an investigation considering imports from *all* sources (that is, *including* any members of a free-trade area), that Member may not, subsequently, without any further analysis, exclude imports from free-trade area partners from the application of the resulting safeguard measure. As we stated in *US – Line Pipe*, if a Member were to do so, there would be a "gap" between, on the one hand, imports covered by the investigation and, on the other hand, imports falling within the scope of the safeguard measure.[431] In clarifying the obligations of WTO Members under the "parallel" requirements of the first and second paragraphs of Article 2 of the *Agreement on Safeguards*, we explained in *US – Line Pipe* that such a "gap" can be justified under the *Agreement on Safeguards* only if the Member establishes:

> … "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*."[432]

442. We further explained, in that same appeal, that, in order to fulfill this obligation in Article 2, "establish[ing] explicitly" signifies that a competent authority must provide a "reasoned and adequate

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[430]Appellate Body Report, *US – Wheat Gluten*, para. 96.

[431]Appellate Body Report, *US – Line Pipe*, para. 181.

[432]*Ibid*., quoting *US – Wheat Gluten*, para. 98.

explanation of how the facts support their determination"[433], adding 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."[434]

443. In considering the investigation by the competent authority in the case before us, we note that the USITC relied on data for imports from *all* sources. The USITC report states that "[i]n determining whether imports have increased, the Commission considers imports from all sources".[435] We observe also that, in the examination of whether increased imports were a cause of serious injury, the USITC also relied on data for all imports for each product category. It is undisputed by the United States that, in its investigation, the USITC considered imports from *all sources—including* imports from Canada, Israel, Jordan, and Mexico. Nevertheless, imports from Canada, Israel, Jordan, and Mexico were *excluded* from the application of the safeguard measures at issue. Therefore, there is, in these measures, a gap between the imports that were taken into account in the investigation performed by the USITC and the imports falling within the scope of the measures as applied.

444. It was thus incumbent on the USITC, in fulfilling the obligations of the United States under Article 2 of the *Agreement on Safeguards*, to justify this gap by establishing explicitly, in its report, that imports from sources covered by the measures—that is, imports from sources *other than* the excluded countries of Canada, Israel, Jordan, and Mexico—satisfy, *alone*, and in and of themselves, 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*. Further, and as we have already explained, to provide such a justification, the USITC was obliged by the *Agreement on Safeguards* to provide a reasoned and adequate explanation of how the facts supported its determination that imports from sources *other than* Canada, Israel, Jordan, and Mexico satisfy, *alone*, and in and of themselves, the conditions for the application of a safeguard measure.

445. As we have explained, the United States argues that the Panel articulated two aspects of the requirement of "parallelism" on which it subsequently relied in its product-specific findings. We will discuss each of these aspects in turn. We turn first to the Panel's findings to which the United States refers as establishing an "excluded sources accounting requirement".[436]

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[433]Appellate Body Report, *US – Line Pipe*, para. 181, quoting *US – Lamb*, para. 103.

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

[435]USITC Report, Vol. I, p. 32.

[436]United States' appellant's submission, paras. 318 and 321–333.

A. *The Need to Account for the Effects of Imports from Excluded Sources*

446. The United States claims that the Panel erred in concluding that the competent authorities are required to account for the fact that excluded imports may have some injurious impact on the domestic industry. The United States submits that, in so far as the Panel indicated that parallelism requires authorities to focus separately on imports from sources that are not excluded from the measure, the Panel's statements "accurately reflect[ ] what the Appellate Body said in [*US –] Line Pipe*".[437] However, the United States asserts that the Panel went "further" and established a requirement for a separate analysis of imports from sources not subject to the safeguards measure, according to which the competent authority must "affirmatively account for the effect of such imports."[438] The United States contends that the requirement articulated by the Panel has no basis in the text of the *Agreement on Safeguards*.[439]

447. The United States relies on statements made by the USITC in both its original report and the Second Supplementary Report, as establishing that the imports from sources covered by the safeguard measures applied by the United States, *alone*, satisfy the conditions for the application of those measures. The United States acknowledges that, in doing so, the USITC did not "account for the fact that excluded imports may have some injurious impact on the domestic industry", as the Panel required.[440] The United States argues, however, that the Panel, by requiring the competent authority to "account for the fact that excluded imports may have some injurious impact on the domestic industry", "insert[ed] … an extra analytical step with respect to parallelism".[441] The United States maintains that nothing in the *Agreement on Safeguards* requires a distinct or explicit analysis of imports from sources *not* subject to the measure.[442]

448. We note, first, that the United States agrees that the "Appellate Body has read th[e] language ['such product … being imported' in Article 2.1] to refer to only *imports from sources which are subject to a safeguards measure*".[443] The United States also agrees that Article 2.1, as read

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[437]United States' appellant's submission, para. 324.

[438]*Ibid*., para. 327.

[439]We note that Canada, in its third participant's submission, also argues that the Panel erred in reading *US – Line Pipe* to mean that parallelism necessarily requires the competent authority to account for the fact that excluded imports may have some injurious impact on the domestic industry. (Canada's third participant's submission, para. 35)

[440]United States' appellant's submission, para. 358.

[441]*Ibid*., para. 326.

[442]*Ibid*., paras. 326 and 329.

[443]*Ibid*., para. 327. (emphasis added)

by the Appellate Body, requires the competent authority to "establish explicitly that increased imports from [sources included in the safeguard measure] alone" satisfy the conditions for a safeguard measure. The United States does not contest these requirements in this appeal.[444]

449. Secondly, as we have indicated previously, in *US – Line Pipe*, the conditions set forth in Article 2.1 are further elaborated in Article 4.2.[445] Article 4.2(b) requires that a determination that increased imports have caused or are threatening to cause serious injury to the domestic industry, as required by Article 4.2(a), can be made only where an investigation by a competent authority demonstrates the existence of a "causal link" between "increased imports" and either serious injury or the threat of serious injury. Article 4.2(b), last sentence, stipulates also, for the purposes of determining the existence of such a "causal link", that "[w]hen 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." This obligation is sometimes described as the "non-attribution requirement".[446]

450. As a result, the phrase "increased imports" in Articles 4.2(a) and 4.2(b) must, in our view, be read as referring to the same set of imports envisaged in Article 2.1, that is, *to imports included in the safeguard measure*. Consequently, imports *excluded* from the application of the safeguard measure must be considered a factor "other than increased imports" within the meaning of Article 4.2(b). The possible injurious effects that these excluded imports may have on the domestic industry must not be attributed to imports included in the safeguard measure pursuant to Article 4.2(b). The requirement articulated by the Panel "to account for the fact that excluded imports may have some injurious impact on the domestic industry"[447] is, therefore, not, as the United States argues, an "extra analytical step"[448] that the Panel added to the analysis of imports from all sources. To the contrary, this requirement necessarily follows from the obligation in Article 4.2(b) for the competent authority to ensure that the effects of factors other than increased imports—a set of factors that subsumes *imports excluded from*

[444]United States' appellant's submission, para. 324. The United States also states, in its appellant's submission, that to the extent the Panel's findings on this issue "indicate[] that parallelism requires authorities to focus separately on imports from sources that are not excluded from the measure, [they] accurately reflect[ ] what the Appellate Body said in [*US –] Line Pipe*." (United States' appellant's submission, para. 324)

[445]Appellate Body Report, *US – Line Pipe*, para. 181; Appellate Body Report, *US – Wheat Gluten*, para. 98.

[446]Appellate Body Report, *US – Lamb*, para. 179.

[447]Panel Reports, para. 10.598.

[448]United States' appellant's submission, para. 326.

the safeguard measure—are not attributed to imports included in the measure, in establishing a causal link between imports included in the measure and serious injury or threat thereof. [449]

451. The non-attribution requirement is part of the overall requirement, incumbent upon the competent authority, to demonstrate the existence of a "causal link" between increased imports (covered by the measure) and serious injury, as provided in Article 4.2(b). Thus, as we found in *US – Line Pipe*, "to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports". [450]

452. In order to provide such a reasoned and adequate explanation, the competent authority must explain how it ensured that it did not attribute the injurious effects of *factors other than included imports*—which subsume "excluded imports"—to the imports included in the measure. As we explained in *US – Line Pipe* [451] in the context of Article 3.1 and "unforeseen developments" in this Report [452], if the competent authority does not provide such an explanation, a panel is not in a position to find that the competent authority ensured compliance with the clear and express requirement of non-attribution under Article 4.2(b) of the *Agreement on Safeguards*.

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[449] We recall that in *US – Lamb*, we stated, in this respect:

> As part of th[e] determination [of the existence of a causal link], Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports "shall not be attributed to increased imports." In a situation where *several factors* are causing injury "at the same time", a final determination about the injurious effects caused by *increased imports* can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it *assumes* that the other causal factors are *not* causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.

(Appellate Body Report, *US – Lamb*, para. 179) (original emphasis; underlining added)

[450] Appellate Body Report, *US – Line Pipe*, para. 217.

[451] *Ibid*., para. 107.

[452] See *supra*, paras. 278 and 302.

453. As a result, we are of the view that, in this dispute, the Panel did not err by requiring the competent authority to "account for the fact that excluded imports may have some injurious impact on the domestic industry", to ensure that the effects of these excluded imports are not attributed to the imports included in the safeguard measure.[453] Rather, as we see it, the Panel correctly interpreted the causation and non-attribution requirements under Articles 2 and 4 of the *Agreement on Safeguards*.

454. We note that the United States' appeal of the Panel's findings in this regard is explicitly limited to the Panel's articulation of the requirement itself. The United States acknowledges that, in making its determinations concerning imports of nine of the ten product categories from sources other than Canada and Mexico, the USITC did not comply with the requirement set forth by the Panel, that is, to "account for the fact that excluded imports may have some injurious impact on the domestic industry".[454]

455. Accordingly, we see no reason to disturb the Panel's findings for those nine product categories for which the Panel found that the United States did not account for the effect of imports excluded from the safeguard measures.[455] For those nine product categories, as the Panel found, the United States has failed to comply with the parallelism requirement, because it did not establish that imports covered by the safeguard measures at issue, *alone*, satisfy the requirements for the imposition of a safeguard measure, and the United States has, in effect, acknowledged that it has failed to do so. As this flaw in the USITC's analysis on parallelism affects the United States' right to exclude imports from the scope of the measures at issue, there is, in our view, no need for us to address, with respect to these nine product categories, the Panel's statement that the USITC's parallelism analysis was also flawed because the USITC did not "actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan".[456]

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[453]We note that, in its causation analysis, the USITC found for every product a causal link between *all* imports and serious injury; this implies that the subsequently-excluded imports were contributing to the total injurious effects attributed to all imports. Moreover, the USITC or individual Commissioners stated, for certain products (CCFRS, hot-rolled bar, cold-finished bar, welded pipe, FFTJ, stainless steel bar, and tin mill products), that imports from some sources excluded from the measures contributed "importantly" to serious injury. (USITC Report, Vol. I, pp. 66, 100, 108, 166–167, 178-180, 213, 309–310)

[454]United States' appellant's submission, para. 358. The only product category not covered by this admission is stainless steel rod, a product category which we consider separately, below.

[455]They are: CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, FFTJ, welded pipe, stainless steel bar, and stainless steel wire.

[456]Panel Reports, paras. 10.608, 10.622, 10.632, 10.642, 10.652, 10.659, 10.669, 10.679, and 10.690.

456. We, therefore, *uphold* the Panel's findings, in paragraphs 10.609, 10.623, 10.633, 10.643, 10.653, 10.660, 10.670, 10.680, 10.692, and the relevant sections of paragraph 11.2 of the Panel Reports, with respect to CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, FFTJ, welded pipe, stainless steel bar, and stainless steel wire, that the United States acted inconsistently with its obligations under Articles 2.1 and 4.2 of the *Agreement on Safeguards* because, in establishing whether imports included in the safeguard measure satisfy, *alone*, the requirements for the imposition of a safeguard measure, it did not account for the possible injury caused by imports from excluded sources.

B. *Conclusions with Respect to Stainless Steel Rod*

457. We now turn to the Panel's findings concerning the one remaining product category for which the Panel made somewhat different findings relating to parallelism, stainless steel rod.

458. On stainless steel rod, the Panel, in addressing the USITC's finding on non-NAFTA imports, did not refer to the causation or non-attribution analysis. Instead, it stated:

> The Panel agrees with the United States that in a case where excluded imports account for less than 0.08% of total imports, it would normally be possible to reach the conclusion that imports from other sources satisfy the same requirements as all imports do. However, the Panel is unable to identify … the required findings that establishes explicitly, with a reasoned and adequate explanation, that imports from other sources than Canada, Mexico, Israel and Jordan satisfy the conditions of Article 2.1 as elaborated by Article 4.2 of the Agreement on Safeguards. In particular, the rather implicit statement made that imports other than Canadian and Mexican imports have increased and that they have caused serious injury to the domestic industry, does not relate to imports covered by the measure which are imports from sources other than Canada, Mexico, Israel and Jordan.[457] (footnote omitted)

459. The Panel also found a second flaw with the USITC's analysis on stainless steel rod. After examining the USITC's determination on non-NAFTA imports, the Panel went on to state:

[457]Panel Reports, para. 10.697.

> Also, it may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure. The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent" or "small and non-existent" and "non-existent", it is very likely that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.[458] (original emphasis; underlining added; footnotes omitted)

460. The United States claims that the Panel "misconstrued" our clarification of the requirement that findings must be "explicit" in a way that would require the USITC to make "redundant findings".[459] The United States contends that the USITC's reasoning with respect to imports from Israel and Jordan was "complete, clear, and unambiguous", because "imports from Israel and Jordan were too small to affect the data on which the ITC relied for its conclusions."[460]

461. As we said earlier, a "gap" between imports covered under an investigation and imports falling within the scope of a measure can be justified under Article 2, as elaborated in Article 4.2, 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".[461] Also, as we have recalled previously, we stated, in *US – Line Pipe*, that "'establish[ing] explicitly' implies that the competent authorities must provide a *'reasoned and adequate explanation* of how the facts support their

[458]Panel Reports, para. 10.698.

[459]United States' appellant's submission, heading III.E.3.

[460]*Ibid*., para. 340.

[461]Appellate Body Report, *US – Wheat Gluten*, para. 98; Appellate Body Report, *US – Line Pipe*, para. 181. We recall that Article 2.1 of the *Agreement on Safeguards* requires a determination that: (1) a product is being imported "in such quantities and under such conditions"; (2) "as to cause"; (3) serious injury or the threat of serious injury to domestic producers. (Appellate Body Report, *Argentina – Footwear (EC)*, para. 92)

determination"'.[462] Moreover, we also stated in that same appeal that, in order to 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."[463]

462. For the measures before us, the USITC made a determination on the basis of an investigation of imports from *all* sources, and concluded from this investigation that imports from all sources satisfied the conditions for the application of these safeguard measures. The USITC then made additional findings, which, according to the United States, established that imports from those sources included in these safeguard measures—that is, imports from sources *other than* Canada, Israel, Jordan, and Mexico—satisfied, on their own, the conditions of the *Agreement on Safeguards* for the application of a safeguard measure.

463. The USITC made several references to the excluded countries in several parts of its report. With respect to stainless steel rod, the USITC stated, in footnote 1437 of its report:

> We also have considered whether the exclusion of imports of stainless rod from Mexico or Canada from our injury analysis would have affected our finding that imports were a substantial cause of serious injury to the stainless rod industry. Because imports of stainless rod from Mexico and Canada each accounted for an extremely small percentage of total imports during the period of investigation, INV-Y-180 at Table G-25, we find the exclusion of these volumes does not change our volumes or pricing analysis in a significant manner. Accordingly, our injury analysis would not be changed in any way by their exclusion.[464] (underlining added)

464. In its "Views on Remedy", the USITC observed that "[i]mports of stainless steel rod from Jordan are not a substantial cause of serious injury or threat of serious injury because there have been no imports of stainless steel rod from Jordan during the period of investigation".[465] Moreover, in its "Views on Remedy", the USITC indicated, with respect to stainless steel rod, that imports from Israel, as well as from certain other sources, "accounted for a small or non-existent percentage of total imports and had a minimal share of the domestic rod market during the period of investigation."[466] In addition, the USITC stated, in its Second Supplementary Report, that "in accord with its findings in

[462]Appellate Body Report, *US – Line Pipe*, para. 181, referring to Appellate Body Report, *US – Lamb*, para. 103. (original emphasis)

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

[464]USITC Report, Vol. I, p. 223 and footnote 1437 thereto.

[465]*Ibid*., p. 405 and footnote 268 thereto.

[466]*Ibid*., p. 405.

the Views on Remedy, … exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[467]

465. These are all the comments by the USITC on which the United States relies as satisfying the parallelism requirement.[468] At no point did the USITC make a determination on whether imports from those sources that were ultimately included in the safeguard measure—that is, imports from those sources *other than* Canada, Israel, Jordan, and Mexico—satisfied, *alone*, in and of themselves, the conditions for the application of a safeguard measure. Instead, the USITC made *two separate determinations*—one determination that the exclusion of imports from *Canada and Mexico* would not change the "injury analysis"[469] of the USITC, and another *separate* determination that the exclusion of imports from *Israel and Jordan* would not change the conclusions of the USITC.[470]

466. The requirement of the *Agreement on Safeguards* to establish explicitly that imports from sources covered by a measure, *alone*, satisfy the conditions for the application of a safeguard measure cannot be fulfilled by conducting a *series of separate and partial* determinations. For example, where a WTO Member seeks to establish explicitly that imports from *sources other than A and B* satisfy the conditions for the application of a safeguard measure, if that Member conducts a separate investigation, and makes a separate determination, on whether imports from sources *other than A* satisfy the relevant conditions, and then, subsequently, conducts *another* separate and

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[467]USITC Second Supplementary Report, p. 4. (footnote omitted) In footnote 26 to this statement, the USITC makes reference to its own and the individual Commissioners' "Views on Remedy" on all product categories at issue.

[468]With respect to Israel and Jordan, the United States relies, for all product categories, on product-specific findings made by the USITC in the views expressed on remedy in its original report. (United States' appellant's submission, para. 335) The United States also relies on the general statement of the USITC, contained in the Second Supplementary Report, that "exclusion of imports from Israel and Jordan would not change the conclusion of the Commission or of individual Commissioners." (United States' appellant's submission, para. 338) With respect to non-NAFTA imports, the United States references its arguments before the Panel on product-specific statements by the USITC (United States' appellant's submission, para. 351 and footnote 460 thereto; para. 354 and footnote 463 thereto; para. 355 and footnote 464 thereto); in the case of stainless steel rod, the United States relied, before the Panel, on footnote 1437 of the USITC's report. (Panel Reports, para. 7.1846) We note that, on appeal, the United States does not argue that the Panel failed to examine the relevant USITC's findings; rather, the United States disagrees with the conclusions that the Panel derived from its review of these findings.

[469]USITC Report, Vol. I, p. 223, footnote 1437.

[470]We note that the USITC provided these two separate findings with respect to almost all product categories at issue. For one product category—tin mill products—*three* separate findings were provided—one finding for imports from sources other than Canada, one finding for imports from sources other than Mexico, and one finding that the "exclusion of imports from Israel and Jordan would not change the conclusions of the USITC or individual Commissioners". (USITC Report, Vol. I, p. 310, footnotes 28 and 29; USITC Second Supplementary Report, p. 4)

distinct investigation, and makes a separate determination, on whether imports from sources *other than B* satisfy the relevant conditions, then these *two separate* determinations, in our view, do not demonstrate that imports from sources other than *A and B together* satisfy the requirements for the imposition of a safeguard measure. By making these two separate determinations, that Member will, logically, for each of them, be basing its determination, in part, either on imports from A or on imports from B.[471] If this were permitted, a determination on the application of a safeguard measure could be easily subjected to mathematical manipulation. This could not have been the intent of the Members of the WTO in drafting and agreeing on the *Agreement on Safeguards*.

467. We are, therefore, of the view that the Panel raised a valid methodological concern when it stated that "it would … be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan."[472]

468. It may not have made a practical difference in the application of the safeguard measures at issue in this appeal, in as much as, on the facts, the quantity of imports from the excluded countries was negligible or virtually non-existent.[473] However, we are of the view that, rather than making *two separate determinations*—excluding either Canada and Mexico, or, alternatively, Israel and Jordan—from the underlying data on which it based its overall determination, the USITC should have, as the Panel found[474], provided *one single joint* determination, supported explicitly by a reasoned and adequate explanation, on whether imports from sources *other than Canada, Israel, Jordan, and Mexico*, by themselves, satisfied the conditions for the application of a safeguard measure.

469. The United States argues that "[i]n the context in which [the USITC's statement concerning Israel and Jordan] appeared, [its] meaning [ ] was clear: imports from Israel and Jordan were either

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[471]Clearly, where a Member examines imports from sources *other than A*, it will be *including*, in its analysis, imports from B; conversely, when examining imports from sources *other than B*, the Member will be *including* in its analysis imports from A. Thus, at each step of the investigation, the Member will be including the effects of some of the excluded imports in its analysis.

[472]Panel Reports, para. 10.622.

[473]We note that we are *not* addressing the question of the appropriate interpretation, in this respect, of the parallelism requirement in circumstances where imports from Israel and Jordan were *zero* in every year of the period of investigation. We note that, for the product category at issue, stainless steel rod, contrary to the United States' assertion in paragraphs 337 and 342 of its appellant's submission, according to the data tables contained in the USITC report and referenced in paragraph 336 of the United States' appellant's submission, imports from Israel during the period of investigation were *not zero* in every year. (USITC Report, Appendix E, Table E-3, p. E-5)

[474]Panel Reports, para. 10.698.

non-existent or so small that the Commission's conclusions for imports from sources other than Canada and Mexico were also applicable to imports from sources other than Canada, Mexico, Israel and Jordan."[475] The United States also submits that "[t]he Panel appears to believe that it was not enough for the ITC to state that the findings that it made with respect to non-NAFTA imports were equally applicable to non-FTA imports. Instead, the ITC apparently had to repeat the findings word for word in a section specifically addressing non-FTA imports."[476] The United States argues that such a finding would have been "redundant".[477] The United States also points out that, in the case of stainless steel rod, the Panel accepted that "it is adequate for an authority to state that, because the volume of imports is *extremely small*, the authority's conclusions with respect to *all imports* are also applicable to imports from *all sources other than excluded sources*".[478] The United States contends that the Panel should have adopted the same analytical approach when reviewing the USITC's finding on imports from sources other than Israel and Jordan.

470. We are not persuaded by these arguments of the United States. First, we do not find any explicit statement in the USITC's report that the USITC's findings relating to imports from sources other than *Canada and Mexico* were also applicable to imports from sources other than *Canada, Israel, Jordan, and Mexico*.[479] Secondly, with respect to the Panel's findings on the exclusion of

[475]United States' appellant's submission, para. 339. The United States appears to be suggesting that the statement of the USITC that the "exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners" refers to the conclusions concerning *non-NAFTA* imports (rather than to the conclusions concerning *all* imports). However, the USITC did not explicitly make this point and this reading of the USITC's finding is not evident to us. Moreover, the United States bases this suggested reading of the USITC's statement on the fact that "this statement immediately preceded the ITC's parallelism analysis for imports from sources other than Canada and Mexico." (United States' appellant's submission, para. 339) However, we note that, for stainless steel rod, the USITC's findings on non-NAFTA imports are contained in the original report, whereas the statement with respect to the exclusion of imports from Israel and Jordan is contained in the Second Supplementary Report. Consequently, the statement concerning the exclusion of imports from Israel and Jordan did not "immediately prece[de]" the USITC's analysis of non-NAFTA imports of stainless steel rod. Therefore, we read the statement that the "exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners", as far as stainless steel rod is concerned, as referring not to the USITC's conclusions concerning non-NAFTA imports, but rather to the USITC's conclusions concerning *all* imports.

[476]United States' appellant's submission, para. 343.

[477]*Ibid*., para. 343. At the oral hearing, the United States stated that the combination of particular findings of the USITC provides the finding that is required concerning imports from all excluded sources.

[478]United States' appellant's submission, para. 341. (emphasis added)

[479]We note, moreover, that in its statement, contained in the Second Supplementary Report, that "the exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or individual Commissioners", the USITC explicitly refers to its findings under the section of the original report entitled "Views on Remedy of the Commission"; in that section, for stainless steel rod, under the heading "Country Exclusion", the USITC mentions Canada and Mexico, as well as Israel and Jordan, separately, and, in our view, does not discuss any connection between imports from these four sources and does not refer to these four sources together. (USITC Report, Vol. I, p. 405 and footnote 268 thereto)

Canada and Mexico for stainless steel rod, the Panel did, indeed, state that "in a case where excluded imports account for less than 0.08% of total imports, it would normally be possible to reach the conclusion that imports from other sources satisfy the same requirements as all imports do".[480] The United States does not mention, however, that the Panel, after the quoted sentence, immediately went on to state that it was "unable to identify … the required finding that establishes explicitly … that imports from other sources than Canada, Mexico, Israel and Jordan satisfy the conditions of Article 2.1".[481] In other words, in its findings on the USITC's determination on imports of stainless steel rod from sources other than Canada and Mexico, the Panel raised the same valid methodological concern that it did with respect to the USITC's finding on imports from sources other than Israel and Jordan—namely, that, instead of a single determination concerning all included imports, the USITC made two separate determinations, excluding, in each of these determinations, only some of the non-covered sources. For this reason, we do not see any inconsistency in the Panel's logic.

471. As for the argument that the USITC's findings on imports from sources other than Canada and Mexico should have been read by the Panel as applying simultaneously to imports from sources other than Canada, Israel, Jordan, and Mexico *by virtue of the small import volumes at issue*, we observe that the *Agreement on Safeguards* does not provide for any different application of the parallelism requirement based on the volume of imports.[482] With this argument, the United States is asking us to read something into the *Agreement on Safeguards* that is not there, and this we cannot do.[483]

472. As we explained in *US – Wheat Gluten* and *US – Line Pipe*, a competent authority must establish, unambiguously, with a reasoned and adequate explanation, and *in a way that leaves nothing merely implied or suggested*, that imports from sources covered by the measure, *alone*, satisfy the requirements for the application of a safeguard measure. We are *not* suggesting that very low imports volumes, either from some, or from all, of the excluded sources at issue, are irrelevant for a competent authority's findings or the reasoned and adequate explanation underpinning such findings. We recognize that, where import volumes from excluded sources are very small, it is quite possible that the explanation underpinning the competent authority's conclusion need not be as

[480]Panel Reports, para. 10.697. (footnote omitted)

[481]*Ibid.*

[482]Some of the Complaining Parties suggested that the United States was, in effect, seeking to invoke a *de minimis* exception. (European Communities' appellee's submission, para. 347; Norway's appellee's submission, para. 219) At the oral hearing, the United States argued that it was not invoking a *de minimis* principle, but rather a "principle of explanation".

[483]Appellate Body Report, *India – Quantitative Restrictions*, para. 94; Appellate Body Report, *India – Patents (US)*, para. 45.

extensive as in circumstances where the excluded sources account for a large proportion of total imports. Nevertheless, even if an explanation need not necessarily be extensive, the requisite explicit finding *must still be provided*. That finding must be contained in the authority's report, must be supported by a reasoned and adequate explanation, and—as we stated above—must address imports from all covered sources, excluding *all* of the non-covered sources. Nowhere in the *Agreement on Safeguards* is there any indication that these important principles can be disregarded in circumstances where imports from some or all sources are at low levels.

473. For these reasons, we do not agree with the United States that the Panel required the USITC to make "redundant findings".[484] Rather, the Panel correctly noted that the USITC had not provided the requisite finding, supported by a reasoned and adequate explanation—namely, whether the exclusion of *all* non-covered sources would change the USITC's conclusion about the prerequisites for the application of a safeguard measure. The Panel was certainly aware—as we are—of the very small import volumes at issue. However, the USITC had not made the requisite finding, and, as panels may not conduct *de novo* reviews, the Panel could not make the determination for the competent authority, even if the data needed for making such determination could be gleaned from the competent authority's report. Therefore, we cannot fault the Panel for having applied faithfully the requirements of the *Agreement on Safeguards*, as clarified by us in our previous reports. Similarly, the mere fact that import volumes were low—however low such import volumes may be—cannot entitle the Panel to make a finding that should have been made by the USITC. For these reasons, we do not reverse the Panel's findings on stainless steel rod.

474. We, therefore, *uphold* the Panel's findings, in paragraph 10.699, and in the relevant section of paragraph 11.2 of the Panel Reports, with respect to stainless steel rod that the United States acted inconsistently with its obligations under Articles 2.1 and 4.2 of the *Agreement on Safeguards* because it failed to establish explicitly, with a reasoned and adequate explanation, that imports included in the safeguard measure satisfy, *alone*, the requirements for the imposition of a safeguard measure.

[484]United States' appellant's submission, heading III.E.3.

VIII. Causation

475. We next address the issue of causation. On this issue, the Panel found that, for nine product categories[485], the USITC failed to provide a reasoned and adequate explanation demonstrating that a "causal link" existed between increased imports and serious injury, as required by Articles 2.1, 4.2(b) and 3.1 of the *Agreement on Safeguards*.

476. For seven of those product categories—CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar—the Panel found that the USITC's "causal link" determination was "inconsistent with Articles 4.2(b), 2.1 and 3.1 of the Agreement on Safeguards".[486]

477. For the other two product categories—tin mill products and stainless steel wire—the Panel found that the USITC report did not contain "a reasoned and adequate explanation of how the facts support" the "causal link" determination, "as required by Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards", because the determination was based on alternative explanations given by different Commissioners that, in the Panel's view, could not be reconciled.[487]

478. The United States claims that the Panel erred in making these findings on causation, and requests that we reverse all nine findings of the Panel. However, given the different grounds articulated by the Panel for, on the one hand, tin mill products and stainless steel wire, and, on the other hand, the other seven products, the United States makes two separate claims. The United States addresses tin mill products and stainless steel wire in one claim[488], and the other seven products in another claim.[489] We will consider the two claims separately.

A. *CCFRS, Hot-Rolled Bar, Cold-Finished Bar, Rebar, Welded Pipe, FFTJ, and Stainless Steel Bar*

479. For the seven products other than tin mill products and stainless steel wire, we begin by recalling that Members may apply safeguard measures "*only*" when, as a result of unforeseen

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[485]CCFRS (see Panel Reports, para. 10.419); tin mill products (see Panel Reports, para. 10.422); hot-rolled bar (see Panel Reports, para. 10.445); cold-finished bar (see Panel Reports, para. 10.469); rebar (see Panel Reports, para. 10.487); welded pipe (see Panel Reports, para. 10.503); FFTJ (see Panel Reports, para. 10.536); stainless steel bar (see Panel Reports, para. 10.569); stainless steel wire (see Panel Reports, para. 10.573).

[486]Panel Reports, paras. quoted in footnote 485.

[487]*Ibid*.

[488]United States' appellant's submission, section F, paras. 359–396; see also literal C in para. 397.

[489]United States' appellant's submission, section D, paras. 139–314; see also literal D in para. 397.

developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. It is "*only*" if these prerequisites set forth in Article XIX:1(a) of the GATT 1994 and in the *Agreement on Safeguards* are shown to exist that the right to apply a safeguard measure arises.

480. Furthermore, *all* of these prerequisites must be established in the investigation for products being imported from sources included in the application of the measure, as "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" of the *Agreement on Safeguards*.[490]

481. In this case, the Panel decided to exercise judicial economy with respect to all claims on "serious injury".[491] Consequently, the Panel made no findings on whether the USITC had demonstrated that the domestic industry in the United States was suffering "a significant overall impairment".[492] The Panel also decided to exercise judicial economy with respect to all claims relating to the appropriate definition of the "imported product", the "like product", and the "domestic industry".[493] For this reason, the Panel relied on a number of assumptions[494] in assessing whether the USITC's "investigation demonstrate[d], on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof".[495]

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[490]Appellate Body Report, *US – Wheat Gluten*, para. 96.

[491]Panel Reports, para. 10.700.

[492]Article 4.1(a) of the *Agreement on Safeguards*.

[493]Panel Reports, para. 10.700.

[494]In paragraph 10.278 of the Panel Reports, the Panel stated that it "assumed for the purposes of its consideration of the issue of causation", that the relevant domestic producers had been correctly defined and that serious injury or threat thereof existed. We note that the Panel found no "increased imports" for five product categories – CCFRS, hot-rolled bar, stainless steel rod, tin mill, and stainless steel wire. However, the Panel must also have assumed, tacitly, that, for the purposes of its causation analysis, imports had increased for those five products. We do not see anything improper *per se* in panels making such assumptions, especially when doing so enables panels to make findings they otherwise would not have made, thereby facilitating appellate review. We are mindful that the volume and complexity of this case may have prompted the Panel to exercise judicial economy on several issues and to rely on the corresponding inter-dependent assumptions. We note, however, that the cumulation of several inter-related assumptions could have affected our ability to complete the Panel's legal analysis had we pursued a ruling on causation.

[495]Article 4.2 (b) of the *Agreement on Safeguards*. We note that "serious injury" is the purported effect that should be causally linked by the competent authority to "increased imports". When the determination of "serious injury" is challenged, a panel may only conclude definitively that "the existence of the causal link" has been adequately demonstrated *after* having established that "increased imports" *and* "serious injury" were adequately determined in the investigation.

482. We have found earlier[496] that the ten measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*, and, in consequence, we have upheld the Panel's finding that the USITC failed to provide a reasoned and adequate explanation demonstrating that the alleged "unforeseen developments" *resulted* in imports of the ten products to which the measures at issue apply. Also, on the issue of "parallelism", we have found[497] that the ten measures at issue are inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, and, in consequence, we have upheld the Panel's finding that the USITC failed to demonstrate that imports from sources covered by the safeguard measures at issue, *alone*, were being imported into the territory of the United States "in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products", as required in Article 2.1 and further developed in Article 4.2 of the *Agreement on Safeguards*.

483. As we have already found that the measures before us are inconsistent with Article XIX:1(a) of the GATT 1994 and with Articles 2.1, 3.1, and 4.2 of the *Agreement on Safeguards*, it is unnecessary, for the purposes of resolving this dispute, to rule on whether the Panel was correct in finding that the United States also acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* because the USITC report failed to demonstrate the existence of a "causal link" between increased imports from *all* sources (that is, imports covered by the measures *and* imports not covered by the measures) and serious injury to the domestic industry. We, therefore, decline to rule on the issue of causation. Accordingly, and as we have not examined the Panel's findings on causation for the seven products that are the focus of this claim by the United States—CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar—we neither reverse nor uphold those findings.

484. At the oral hearing in this appeal, none of the participants appeared to disagree that, if we were to uphold the Panel's findings on "unforeseen developments", parallelism, and/or increased imports, it would not be *necessary* for us to rule on the claims raised on causation. Nevertheless, several participants expressed an interest in having us rule on causation as it would provide guidance to Members on applying safeguard measures in the future consistently with their WTO obligations. The United States expressed a strong preference for us to rule on causation, stating that "[it would] be

[496]See *supra*, para. 330.

[497]See *supra*, para. 456.

important for us in terms of understanding what our obligations are under the *Agreement [on Safeguards]* and what we have to do to comply with them".[498]

485. Guidance may be found in our previous rulings. In *US – Line Pipe*, for example, we interpreted Article 4.2(b) of the *Agreement on Safeguards* as establishing:

> … two distinct legal requirements for competent authorities in the application of a safeguard measure. First, there must be a *demonstration* of the "*existence* of the causal link between increased imports of the product concerned and serious injury or threat thereof". Second, the injury caused by factors other than the increased imports must not be attributed to increased imports.[499] (emphasis added)

486. Moreover, in *US – Lamb*, when examining the requirement of Article 4.2(b) that the determination as to increased imports must be "on the basis of objective evidence", we explained that "objective evidence" means "objective data".[500] Thus, Article 4.2(b) requires a "demonstration" of the "existence" of a causal link, and it requires that this demonstration must be based on "objective data". Further, this "demonstration" must be included in the report of the investigation, which should "set[ ] forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c)" of the *Agreement on Safeguards*.[501]

487. In *US – Line Pipe*, we also found that, in the context of "non-attribution", competent authorities: (i) "must '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*'"[502]; and (ii) must provide a "reasoned and adequate explanation of how the facts support their determination".[503]

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[498]United States' response to questioning at the oral hearing.

[499]Appellate Body Report, *US – Line Pipe*, para. 208.

[500]Appellate Body Report, *US – Lamb*, para. 130.

[501]Appellate Body Report, *US – Line Pipe*, para. 236.

[502]We first made this assertion in *US – Wheat Gluten*, in the context of a discussion on parallelism. (Appellate Body Report, *US – Wheat Gluten*, para. 98) In *US – Line Pipe*, we explained that the same reasoning would apply to Article 4.2(b), last sentence. (Appellate Body Report, *US – Line Pipe*, para. 216)

[503]We made this assertion originally in *US – Lamb* in the context of a discussion of a claim under Article 4.2(a) of the *Agreement on Safeguards*. (Appellate Body Report, *US – Lamb*, para. 103) In *US – Line Pipe*, we explained that the same reasoning would apply to Article 4.2(b), last sentence. (Appellate Body Report, *US – Line Pipe*, para. 216)

488. In *US – Wheat Gluten*, we found that "the term 'causal link' denotes … a relationship of cause and effect"[504] between "increased imports" and "serious injury". The former—the purported cause—contributes to "bringing about", "producing" or "inducing" the latter[505]—the purported effect. The "link" must connect, in a "genuine and substantial"[506] causal relationship, "increased imports", and "serious injury".

489. In sum, the *Agreement on Safeguards*—in Article 2.1, as elaborated by Article 4.2, and in combination with Article 3.1—requires that competent authorities demonstrate the *existence* of a "causal link" between "increased imports" and "serious injury" (or the threat thereof) on the basis of "objective evidence". In addition, the competent authorities must provide a reasoned and adequate explanation of how facts (that is, the aforementioned "objective evidence") support their determination. If these requirements are not met, the right to apply a safeguard measure does not arise.

490. In *EC – Tube or Pipe Fittings*, we found that the non-attribution language of Article 3.5 of the *Anti-Dumping Agreement* does not require, *in each and every case*, an examination of the *collective* effects of other causal factors, in addition to an examination of the *individual* effects of those causal factors.[507] We explained there that an assessment of the collective effects of other causal factors "is *not always* necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors."[508] We acknowledged, however, that "there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports".[509] We explained further that "an investigating authority is not required to examine the collective impact of other causal factors, *provided that*, under the specific factual circumstances of the case, it fulfils its obligation not to attribute to dumped imports the injuries caused by other causal factors".[510]

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[504]Appellate Body Report, *US – Wheat Gluten*, para. 67.

[505]*Ibid.*

[506]*Ibid.*, para. 69.

[507]Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 190.

[508]*Ibid.*, para. 191. (emphasis added)

[509]Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192.

[510]*Ibid.* (emphasis added)

491. Lastly, it may be useful to refer to our finding in *EC – Tube or Pipe Fittings* in respect of the relevance of factors that "had effectively been found not to exist".[511] In that case, the competent authority had found, contrary to the submissions of the exporters, that the difference in costs of production between the imported product and the domestic product was virtually non-existent and thus did not constitute a "factor other than dumped imports" causing injury to the domestic industry under Article 3.5 of the *Anti-Dumping Agreement*. Consequently, we found that there was no reason for the investigating authority to undertake the analysis of whether the alleged "other factor" had any *effect* on the domestic industry under Article 3.5[512] because the alleged "other factor" "had effectively been found *not* to exist".[513] In other words, we did not rule that minimal (or not significant) factors need not be considered by the competent authorities in conducting non-attribution analyses. Rather, we ruled that only factors that have been found to exist need be taken into account in the non-attribution analysis.

B. *Tin Mill Products and Stainless Steel Wire*

492. We turn now to the two other products on which the Panel found that the USITC failed to provide a reasoned and adequate explanation of how the facts supported its determination that a "causal link" existed between increased imports and serious injury to the domestic industry that produces like or directly competitive products. The Panel based its findings on causation for tin mill products and stainless steel wire on the Panel's previous conclusion that the United States was not entitled to apply safeguard measures to imports of those two products because the relevant determinations made by the USITC were supported by findings of different Commissioners that could not be reconciled.[514] We have already reversed those findings.[515]

493. Accordingly, we also *reverse* the Panel's findings on causation made, respectively, in paragraphs 10.422, 10.573, and the relevant sections of paragraph 11.2 of the Panel Reports, that the USITC report does not contain a reasoned and adequate explanation of how the facts support the determination that increased imports of tin mill products and stainless steel wire *caused* serious injury to the relevant domestic industry as required by Articles 2.1, 4.2(b), and 3.1 of the *Agreement on Safeguards* because the determination was based on different findings by the USITC

[511]Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 178.

[512]*Ibid.*, para. 177.

[513]*Ibid.*, paras. 178. (original emphasis)

[514]Panel Reports, paras. 10.422 and 10.572–10.573.

[515]See *supra*, paras. 419 and 429.

Commissioners. This is not to say that we find that a causal link *has been* established with respect to tin mill products and stainless steel wire. We are simply saying that the reasoning used by the Panel to find that the USITC failed to establish a causal link for these products is flawed, and does not support the Panel's conclusion that no such link was established. We make no finding on whether or not a causal link has been established for these products. In the light of our other findings in this Report that all ten safeguard measures are inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1 and 4.2 of the *Agreement on Safeguards*, it is not necessary, for purposes of resolving this dispute, to make further rulings on causation related to tin mill products and stainless steel wire.

IX. Article 11 of the DSU

494. In its Notice of Appeal, the United States alleged that the Panel "acted inconsistently with Article 11 of the DSU in that it failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with GATT 1994 and the Safeguards Agreement."[516] In its appellant's submission, the United States' arguments under Article 11 are intermingled with its arguments on the Panel's findings on "unforeseen developments"[517] and with its arguments on the Panel's causation analysis.[518]

495. Article 11 of the DSU provides:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

[516]Notice of Appeal, WT/DS248/17, WT/DS249/11, WT/DS251/12, WT/DS252/10, WT/DS253/10, WT/DS254/10, WT/DS258/14, WT/DS259/13, 14 August 2003, p. 4, para. 6.

[517]United States' appellant's submission, paras. 77–79.

[518]*Ibid.*, paras. 160–161. The United States clarified during the oral hearing that it was not pursuing its claim, set out in paragraph 6 of its Notice of Appeal, that the Panel had failed to meet its obligations under Article 11 because it had made self-contradictory findings.

496. In response to our questioning during the oral hearing, the United States stated that it was not making any "specific claims under Article 11", and that it was for us to decide whether a ruling on Article 11 of the DSU was necessary.[519] The United States asserted that the Panel's allegedly incorrect conclusions with respect to Articles 2.1, 3.1, and 4 of the *Agreement on Safeguards* and Article XIX of the GATT 1994 "resulted partly from its failure to observe its obligations under Article 11."[520] Therefore, the United States said that it did not make a claim under Article 11 that is "separate and distinct"[521] from its claims with respect to the substance of the Panel's analysis.

497. As we have stated previously, "not every failure by the Panel in the appreciation of the evidence before it can be characterized as failure to make an objective assessment of the facts."[522] Similarly, not every error of law or incorrect legal interpretation attributed to a panel constitutes a failure on the part of the panel to make an objective assessment of the matter before it.

498. A challenge under Article 11 of the DSU must not be vague or ambiguous. On the contrary, such a challenge must be clearly articulated and substantiated with specific arguments. An Article 11 claim is not to be made lightly, or merely as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement.[523] A claim under Article 11 of the DSU must stand by itself and be substantiated, as such, and not as subsidiary to another alleged violation.

499. The United States' arguments on Article 11 of the DSU are mentioned only in passing in its appellant's submission. Nowhere do we find a clearly articulated claim or specific arguments that would support such a claim. Moreover, the United States did not clarify its challenge under Article 11 of the DSU during the oral hearing. In sum, the United Stated has not substantiated its claim that the Panel acted inconsistently with Article 11 of the DSU, and this claim must therefore fail.

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[519]United States' response to questioning at the oral hearing.

[520]*Ibid.*

[521]*Ibid.*

[522]Appellate Body Report, *Japan – Agricultural Products II*, para. 141.

[523]The United States further clarified during the oral hearing that if we were to conclude that the Panel erred in its findings on Article 4.2(b) of the *Agreement on Safeguards*, it would not be necessary for us to reach its claim under Article 11.

X. Article 12.7 of the DSU

500. The United States also contends that the Panel acted inconsistently with its obligations under Article 12.7 of the DSU by failing to provide "the basic rationale" for its findings and conclusions, in the context of its analysis of "unforeseen developments" under Article XIX:1(a) of the GATT 1994.[524]

501. The United States argues that the Panel did not articulate, "except in conclusory fashion", the reasons for finding that the USITC did not provide "reasoned conclusions" as required by Article 3.1 of the *Agreement on Safeguards*.[525] The United States maintains that the Panel merely concluded that the USITC's demonstration of "unforeseen developments" was "plausible, but … not sufficiently supported and explained", without pointing to any evidence that undermined any of the USITC's conclusions, or providing any alternative explanation.[526] Accordingly, the United States submits that "the Panel failed to set forth explanations and reasons sufficient to disclose its justifications for its findings and recommendations."[527]

502. Article 12.7 of the DSU reads, in relevant part:

> … the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.

503. We have already reviewed the Panel's findings on the USITC's analysis of "unforeseen developments". Based on our review of the Panel's reasoning, it appears to us that the Panel considered in detail the evidence that was before the USITC, and provided detailed explanations of how and why it concluded that the USITC had failed to demonstrate, through a reasoned and adequate explanation, that the alleged "unforeseen developments" *resulted* in increased imports of *each* product subject to a safeguard measure.[528] The Panel explains, for instance, that, although the USITC report "describes a plausible set of unforeseen developments that *may have resulted* in increased imports to the United States from various sources, it falls short of demonstrating that such

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[524]In its Notice of Appeal, the United States made a general claim that the Panel acted inconsistently with Article 12.7 of the DSU. Although in its appellant's submission the United States made reference to Article 12.7 in the context of its claims regarding "unforeseen developments", "causation", as well as "parallelism", in response to questioning at the oral hearing, the United States clarified that its claim under Article 12.7 related exclusively to the Panel's findings on "unforeseen developments".

[525]United States' appellant's submission, para. 95.

[526]*Ibid.*

[527]*Ibid.*

[528]The Panel's reasoning is explained, in particular, in Panel Reports, paras. 10.121-10.150.

developments *actually resulted* in increased imports into the United States causing serious injury to the relevant domestic producers."[529] The Panel then goes on to say that:

> … even if "large volumes of foreign steel production were displaced from foreign consumption" this does not, in itself, imply that imports to the United States increased as a result of unforeseen developments. Article XIX of GATT, however, requires a demonstration that the unforeseen development resulted in *increased imports into* the United States. In our view, the USITC's explanation failed to link these steel market displacements to the increased imports *into the United States* at issue.[530] (original emphasis)

504. In our view, in making these statements, the Panel has sufficiently set out in its Reports the "basic rationale" for its finding that the USITC failed to explain how, though "plausible", the "unforeseen developments" identified in the report in fact *resulted* in increased imports of the specific products subject to the safeguard measures at issue.

505. The United States also argues that the Panel did not explain why the USITC failed to demonstrate that the alleged "unforeseen developments" resulted in increased imports of each of the products to which the safeguard measures apply, but rather "simply assumed that the ITC's demonstration, which focused on macroeconomic events and relied on broad economic indicators, could not suffice as a demonstration for any specific measure."[531]

506. In our view, the Panel did not simply *assume*, but rather clearly pointed to, a deficiency in the USITC's reasoning. The Panel reviewed the USITC's findings and found that the USITC failed to demonstrate that the "plausible" unforeseen developments did, in fact, result in increased imports of the specific products subject to the safeguard measures at issue. Because the USITC, according to the United States, relied on macroeconomic events having effects across the respective industries, it was for the USITC to show how those events were relevant to each product covered by each of the safeguard measures at issue. As the United States itself acknowledges, "Article 3.1 assigns the competent authorities – not the panel – the obligation to 'publish a report setting forth *their* findings and reasoned conclusions reached on all pertinent issues of fact and law'."[532] Therefore, it was for the USITC, and not for the Panel, to explain how the facts supported its determination with respect to "unforeseen developments". The argument of the United States in this appeal seeks to shift the

[529]Panel Reports, para. 10.122 (emphasis added)

[530]Panel Reports, para. 10.123. (original emphasis; footnote omitted)

[531]United States' appellant's submission, para. 82.

[532]*Ibid*., para. 55 (original emphasis).

burden of this demonstration to the Panel, whose function, in this regard, is confined to assessing the adequacy of the "reasoned conclusions" put forward by the competent authority. We agree with the Panel that the USITC's demonstration was insufficient, and we find no error in the Panel's explanation of that finding.

507. Although the United States may not agree with the rationale provided by the Panel for its findings, we find that the Panel set out, in its Reports, a "basic rationale" consistent with the requirements of Article 12.7 of the DSU. Accordingly, we reject the United States' claim relating to the Panel's alleged failure to provide a "basic rationale" for its finding concerning Article XIX:1(a) of the GATT 1994.

XI. Conditional Appeals

508. The Complaining Parties request us to find that the United States acted inconsistently with Articles 2.1, 4.1(c), and 5.1 of the *Agreement on Safeguards*. China also requests us to find that the United States acted inconsistently with Article 9.1 of the *Agreement on Safeguards*. These requests, however, are conditional. To reach these claims we would, first, need to reverse the finding made by the Panel, in paragraph 10.705 of the Panel Reports, that all ten safeguard measures imposed by the United States "were deprived of a legal basis".[533] We have not done so.

509. In a previous section of this Report[534], we found that the ten measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*, and we consequently upheld the Panel's finding that the USITC failed to provide a reasoned and adequate explanation demonstrating that the alleged "unforeseen developments" *resulted* in increased imports of the ten products to which the measures at issue apply.

510. Likewise, in examining the issue of "parallelism", we also found[535] that the ten measures at issue are inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, and we consequently upheld the Panel's relevant findings that the USITC failed to demonstrate that imports from sources covered by the safeguard measures at issue, *alone*, were being imported into the territory of the United States "in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that

[533]Brazil, Japan, and Korea formulated their conditional appeal in different terms, which will be described and addressed in the paragraphs below.

[534]*Supra*, para. 330.

[535]See *supra*, paras. 456 and 474.

produces like or directly competitive products", as required by Article 2.1 and further elaborated in Article 4.2 of the *Agreement on Safeguards.*

511. Consequently, we do not disturb the finding made by the Panel, in paragraph 10.705 of the Panel Reports, that all ten safeguard measures imposed by the United States "were deprived of a legal basis". Therefore, the condition on which some of the Complaining Parties request us to rule on the question of whether the United States, by imposing the safeguard measures at issue, acted inconsistently with its obligations under Articles 2.1, 4.1(c), 5.1, and 9.1 of the *Agreement on Safeguards*, does not arise. In these circumstances, there is no need for us to examine these conditional appeals.[536]

512. Finally, we note that, in addition, Brazil, Japan, and Korea, in their joint appellants' submission, condition their cross-appeal with respect to Article 5.1 of the *Agreement on Safeguards* on the event that we uphold or modify the Panel's findings on causation. In this event, these parties request us to complete the analysis "regarding the failure of the United States to adequately analyze causation and to find that the United States failed to ensure that its safeguard measures were limited to the extent necessary, as required by Article 5.1."[537] Similarly, in the event that we uphold the Panel's findings on causation, New Zealand requests us to find that the United States failed to comply with Article 5.1 of the *Agreement on Safeguards*. Alternatively, in the event that we reverse the Panel's findings with respect to increased imports and causation, Brazil, Japan, and Korea request us to examine whether the safeguard measures, as explained by the United States in its "*ex post* economic analysis and model"[538], comply with Article 5 of the *Agreement on Safeguards*. In a previous section of this Report, we decided not to rule on the findings made by the Panel on causation[539] with respect to CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar. Consequently, the aforementioned conditions do not arise for those seven products. As for the two remaining products, namely, tin mill products and stainless steel wire, we reversed the Panel's

[536]We note that Brazil, Japan, and Korea, in their conditional appeal on whether the USITC acted inconsistently with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* by "grouping [ ] CCFRS products into a single like product" (see Brazil's, Japan's, and Korea's other appellants' submission, para. 4), request that we address this claim in the event that we (i) disagree with the Panel's finding that the safeguards measures are "deprived of a legal basis"; (ii) reverse an aspect of any of the Panel's findings against the United States with respect to CCFRS; or (iii) conclude that the Panel should have issued a like product ruling to support its CCFRS causation finding. We note that, in the light of our rulings, none of the conditions listed by Brazil, Japan, and Korea arises.

[537]Brazil's, Japan's, and Korea's other appellants' submission, para. 2.

[538]*Ibid*., para. 3.

[539]See *supra*, para. 483.

findings on both "increased imports" and causation.[540] However, as we have found that the measures applied to those two products are inconsistent with Article XIX:1(a) of the GATT 1994 and with Articles 2.1, 3.1, and 4.2 of the *Agreement on Safeguards*, it is, in our view, not necessary, for the purposes of resolving this dispute, to rule on whether, in applying these measures, the United States also acted inconsistently with its obligation under Article 5.1 of the *Agreement on Safeguards.*

XII. Findings and Conclusions

513. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports concerning the complaints of China, the European Communities, New Zealand, Norway, and Switzerland[541], that the application of all safeguard measures at issue in this dispute is inconsistent with the requirements of Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* because "the United States failed to provide a reasoned and adequate explanation demonstrating that 'unforeseen developments' had resulted in increased imports causing serious injury to the relevant domestic producers";

(b) upholds the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports, that the application of the safeguard measures on imports of CCFRS, stainless steel rod and hot-rolled bar is inconsistent with the requirements of Articles 2.1 and 3.1 of the *Agreement on Safeguards* because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to 'increased imports'";

(c) reverses the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports, that the application of the safeguard measures on imports of tin mill products and stainless steel wire is inconsistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards* because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to 'increased imports', since the explanation given consisted of alternative explanations

[540]See *supra*, para. 493.

[541]In upholding claims on "unforeseen developments", the Panel refers to claims made by China, the European Communities, New Zealand, Norway, and Switzerland.

partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance"; and finds it unnecessary to complete the analysis to decide whether the determination with respect to "increased imports" for tin mill products and stainless steel wire is consistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards*;

(d) reverses the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports, that the application of the safeguard measures on imports of tin mill products and stainless steel wire is inconsistent with Articles 2.1, 4.2(b), and 3.1 of the *Agreement on Safeguards* because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a 'causal link' between any increased imports and serious injury, since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance"; and finds it unnecessary to complete the analysis to decide whether the determination with respect to a "causal link" for tin mill products and stainless steel wire is consistent with Articles 2.1, 4.2(b), and 3.1 of the *Agreement on Safeguards*;

(e) upholds the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports, that the application of all safeguard measures at issue in this dispute is inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards* because "the United States failed to comply with the requirement of 'parallelism' between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure";

(f) finds it unnecessary, for purposes of resolving this dispute, to rule on whether the Panel was correct in finding that, with respect to CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar, the United States acted inconsistently with Articles 2.1, 3.1 and 4.2(b) of the *Agreement on Safeguards* because the USITC report failed to demonstrate the existence of a "causal link" between increased imports from all sources and serious injury to the domestic industry, and neither reverses nor upholds the Panel's findings on causation;

(g) finds that the United States did not substantiate the claim raised under Article 11 of the DSU;

(h) finds that the Panel satisfied its duty, under Article 12.7 of the DSU, to set out a "basic rationale behind [its] findings" with respect to Article XIX:1(a) of the GATT 1994; and

(i) declines to rule on the conditional appeals of the Complaining Parties relating to Articles 2.1, 4.1(c), 5.1, and 9.1 of the *Agreement on Safeguards*.

514. The Appellate Body *recommends* that the DSB request the United States to bring its safeguard measures, which have been found in this Report, and in the Panel Reports as modified by this Report, to be inconsistent with the *Agreement on Safeguards* and the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original at Geneva this 23rd day of October 2003 by:

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James Bacchus
Presiding Member

_____ _____

Georges Abi-Saab
Member

John Lockhart
Member

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS248/17
WT/DS249/11
WT/DS251/12
WT/DS252/10
WT/DS253/10
WT/DS254/10
WT/DS258/14
WT/DS259/13
11 August 2003
(03-0000)

Original: English

UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CERTAIN STEEL PRODUCTS

Notification of an Appeal by the United States
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 11 August 2003, sent by the United States to the Dispute Settlement Body (DSB), is circulated to Members. This notification also constitutes the Notice of Appeal, filed on the same day with the Appellate Body, pursuant to the *Working Procedures for Appellate Review*.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Reports on *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R and WT/DS259/R) and certain legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the application of safeguard measures on imports of certain carbon flat-rolled steel ("CCFRS"); tin mill; hot-rolled bar; cold-finished bar; rebar; welded pipe; fittings, flanges, and tool joints ("FFTJ"); stainless steel bar; stainless steel rod; and stainless steel wire is inconsistent with Articles XIX:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 3.1 of the *Agreement on Safeguards* ("Safeguards Agreement")[542] on the grounds that the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports of each of these products causing serious injury to the relevant domestic industry.

[542]Unless indicated otherwise, reference to articles with Arabic numerals are to articles of the Safeguards Agreement and references to articles with Roman numerals are to articles of GATT 1994.

(Paras. 10.148-10.150 and 11.2.) These findings are in error, and are based on erroneous findings on issues of law and related legal interpretations, including, for example,

(a) that the Panel could not consider data on the record of the U.S. International Trade Commission ("USITC") and cited in other sections of the USITC report in evaluating whether the competent authorities provided their findings and reasoned conclusions with regard to unforeseen developments in accordance with Article 3.1 (paras. 10.133-10.135 and 10.145);

(b) that the USITC was obliged to explain why the specific products under examination were affected individually by the confluence of unforeseen developments (paras. 10.127 and 10.147); and

(c) that the USITC did not sufficiently support and explain its conclusion that the displacement of steel on world markets led to increased imports to the United States from all sources (paras. 10.122-10.123, 10.125, 10.143-10.144 and 10.146).

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the application of safeguard measures on imports of CCFRS, hot-rolled bar, and stainless steel rod is inconsistent with Articles 2.1 and 3.1, on the grounds that the United States failed to provide a reasoned and adequate explanation of how the facts supported its determinations with respect to increased imports of these products. (Paras. 10.181, 10.183, 10.186-10.187, 10.204, 10.208, 10.210, 10.267, 10.271, 10.277, and 11.2.) These findings are in error, and are based on erroneous findings on issues of law and related legal interpretations, including, for example,

(a) that increased imports must be "sudden," and must "evidence[] a certain degree of recentness, suddenness, sharpness and significance" (paras. 10.159 and 10.166-10.167);

(b) that in light of the decrease in imports of CCFRS, hot-rolled bar, and stainless steel rod between interim 2000 and interim 2001, the USITC report did not contain an adequate and reasoned explanation of how the facts support its determinations regarding the absolute and relative increases in imports of these products (paras. 10.181, 10.184, 10.204, 10.208, 10.267, and 10.271); and

(c) that an increase in imports in 1998 (for CCFRS) and in 2000 (for hot-rolled bar and stainless steel rod) was not recent enough at the time of the USITC determination to support a finding under Article 2.1 that imports of CCFRS, hot-rolled bar, or stainless steel rod are "being imported in . . . increased quantities" (paras. 10.181-10.182, 10.185, 10.207, 10.269).

3. The United States seeks review by the Appellate Body of the Panel' s legal conclusion that the determinations regarding both increased imports of tin mill and stainless steel wire and also the causal link between these increased imports and serious injury to the corresponding domestic industry are inconsistent with Articles 2.1, 3.1, and 4.2(b) on the grounds that the explanations given for these determinations consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance. (Paras. 10.200, 10.262, 10.422, 10.573, and 11.2.) These findings are in error, and are based on erroneous findings on issues of law and related legal interpretations, including, for example,

(a) that findings by the competent authorities that are based on differently defined products are impossible to reconcile (paras. 10.194, 10.262, 10.422, and 10.572); and

(b) that a reasoned and adequate explanation is not contained in a set of findings by the competent authorities that rests on more than one like product definition (paras. 10.194, 10.262, 10.422, and 10.572).

4. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the application of safeguard measures on imports of CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar is inconsistent with Articles 2.1, 3.1, and 4.2(b) of the Safeguards Agreement, on the grounds that the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury or threat of serious injury to the relevant domestic producers with respect to increased imports of these products. (paras. 10.418-10.419, 10.444-10.445, 10.468-10.469, 10.486-10.487, 10.502-10.503, 10.535-10.536, 10.568-10.569, and 11.2) These findings are in error, and are based on erroneous findings on issues of law and related legal interpretations, including, for example,

(a) that the USITC failed to provide a reasoned and adequate explanation of its finding that there was a causal link between increased imports of CCFRS and the serious injury suffered by the domestic industry; more specifically that:

(i) the USITC failed to provide a reasoned and adequate explanation of its finding that there was a coincidence in import and industry trends during the period (paras. 10.374-10.376); and

(ii) that the USITC failed to provide a compelling explanation of why the "conditions of competition in the CCFRS market established a causal link between imports and industry trends (para. 10.381);

(b) that the USITC's definition of CCFRS as a like product prevented the application of a causation analysis consistent with Article 4.2(b) for the industry producing that product (paras. 10.378, 10.380, 10.416-10.417);

(c) that the USITC failed to provide a compelling explanation that a causal link existed between increased imports of cold-finished bar and the serious injury suffered by the domestic industry (para. 10.458);

(d) that the USITC's non-attribution analysis failed to separate and distinguish the injurious effects of particular factors other than increased imports so that the injury caused by these factors, together with other factors, was not attributed to increased imports of CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar (paras. 10.389, 10.396, 10.401, 10.407-10.410, 10.418-10.419, 10.440, 10.443-10.444, 10.467-10.468, 10.484-10.486, 10.496, 10.499-10.501, 10.529, 10.533-10.535, 10.560, and 10.565-10.568);

(e) that, in addition to an individual assessment of the effects of other factors causing injury to the domestic industry, Article 4.2(b) calls for "an overall assessment of such 'other factors'" (para. 10.332) or for an evaluation of the "cumulative effects of individual factors" causing injury (paras. 10.409 and 10.567);

(f) that a competent authority may be required, in certain circumstances, to use an economic modeling analysis to quantify the amount of injury caused by imports and other factors causing injury as part of its causation analysis under Articles 2.1, 3.1, and 4.2(b) (paras. 10.340-10.342); and

(g) that the explanation of the competent authorities must be "clear and unambiguous" and "establish explicitly" that injury caused by factors other than increased imports is not attributed to increased imports (para. 10.330).

5. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the application of safeguard measures on imports of CCFRS, tin mill, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire is inconsistent with Articles 2.1 and 4.2, on the grounds that the United States failed to comply with the requirement of "parallelism" because it had not established that imports from sources subject to the safeguard measure satisfied the conditions for application of a safeguard measure. (Paras. 10.609, 10.615, 10.623, 10.633, 10.643, 10.653, 10.660, 10.670, 10.680, 10.685, 10.692, 10.699, and 11.2) These findings are in error, and are based on erroneous findings on issues of law and related legal interpretations, including, for example,

(a) that Articles 2.1 and 4.2 make it necessary to account for the fact that excluded imports may have some injurious impact on the domestic industry and that the USITC analysis failed to account for this impact (paras. 10.598, 10.605-10.606, 10.621, 10.629-10.630, 10.639-10.640, 10.650, 10.657, 10.666-10.667, 10.676-10.677, and 10.688);

(b) that the USITC's findings regarding imports from Israel and Jordan did not establish explicitly or provide a reasoned and adequate explanation that imports from sources not excluded from the measure satisfied the conditions for application of a safeguard measure (paras. 10.607-10.608, 10.622, 10.631-10.632, 10.641-10.642, 10.651-10.652, 10.658-10.659, 10.668-10.669, 10.678-10.679, 10.689-10.690, and 10.698);

(c) that the views of Commissioner Bragg did not meet the requirements of parallelism with regard to tin mill and stainless steel wire because she "reached findings on the broader category of CCFRS" and "on a broader category including stainless steel wire" (paras. 10.615 and 10.685); and

(d) that Commissioner Koplan's parallelism analysis regarding stainless steel wire does not contain the required findings that establish explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel, and Jordan satisfy the conditions of Article 2.1 as elaborated by Article 4.2 (para. 10.688).

6. The United States seeks review of the Panel's findings referenced above on the grounds that the Panel acted inconsistently with Article 11 of the DSU in that it failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with GATT 1994 and the Safeguards Agreement. As particular examples,

(a) the Panel found that the USITC's demonstration of unforeseen developments was not sufficiently supported and explained, even though the Panel found the explanation plausible, cited no alternative explanation, and found no error in the USITC's reasoning or the data used to support that reasoning (paras. 10.145-10.150); and

(b) made self-contradictory findings (including in paragraphs 10.173, 10.182, 10.192, 10.225, 10.433-10.437, 10.442, and 10.519).

7. The United States also seeks review of the Panel's findings referenced above on the grounds that the Panel acted inconsistently with Article 12.7 of the DSU, in that its report did not set out the basic rationale behind its findings and recommendations.