

**UNITED STATES - DEFINITIVE SAFEGUARD MEASURES
ON IMPORTS OF CERTAIN STEEL PRODUCTS
WT/DS 249**

**EXECUTIVE SUMMARY OF
THE SECOND WRITTEN SUBMISSION OF THE
GOVERNMENT OF JAPAN**

**GENEVA
3 December 2002**

I. INTRODUCTION

1 The thrust of the U.S. position in this case is that certain steel-producing industries in the United States were so seriously injured in 2001 that the U.S. Government had no choice but to help them by imposing the safeguard measures at issue. The United States also argues that it was entitled to do so under the Agreement on Safeguards because of that Agreement's *protectionist* purpose and lack of explicit disciplines. The problem with this, contrary to the U.S. position, is that the Agreement on Safeguards exists to police the way in which WTO Members justify and apply such measures. There is also a body of WTO jurisprudence that clarified the relevant standards, and that the United States failed to meet in this case. Complainants in this case have presented the Panel with myriad examples of how the U.S. steel safeguard measures fell far short of the standards set forth in the Agreement on Safeguards, as well as GATT 1994.

2 In this second written submission, Japan does not repeat each of its claims, but instead rebuts the arguments regarding those claims as set forth in the U.S. first submission and in its answers to questions posed by the Panel and by other parties. In rebutting the U.S. arguments, we attempt in some instances to clarify and expand, as necessary, the arguments that appeared in our first submission.

3 Japan notes at the outset that none of the claims we have pursued in this case are dependent on any other claims. They all stand on their own. Nonetheless, it is important to recognize that if the Panel agrees with Japan that the U.S. grouping of slab, plate, hot rolled, cold rolled, and corrosion resistant into a single like product is inconsistent with WTO obligations, then it is necessarily also true that each of the other elements of the U.S. decision to impose safeguards on these flat rolled products is also inconsistent with WTO obligations. That being said, we encourage the Panel to address each of the claims we have made in this case, so as to prevent the United States from repeating in the future the same methodological mistakes it made in this case (many of which have already been condemned by the Appellate Body in previous cases).

II. THE UNITED STATES MISUNDERSTANDS THE IMPORTANT ROLE THAT COMPETITION PLAYS IN DEFINING “LIKE” PRODUCTS IN A SAFEGUARD CONTEXT

4 The United States would have the Panel believe that there is no relevant textual or contextual precedent to help discern the proper treatment of “like product” under the Agreement on Safeguards. In the U.S. view, as long as there is a one-to-one relationship between an imported product grouping and the domestic “like” product grouping, a competent authority can define the products as broadly as it likes. The concept of competition between products within those groupings is not relevant to the analysis according to the United States.

5 The United States is wrong, for multiple reasons. First, the slate is not nearly as blank as the United States would have the Panel believe. Relevant jurisprudence exists in *U.S. -- Lamb Meat* in the context of the Agreement on Safeguards itself, and in *U.S. -- Cotton Yarn* in the context of the safeguard provisions of the Agreement on Textiles and Clothing (“ATC”). A careful reading of these reports demonstrates that U.S. efforts to distinguish them must fail. Furthermore, given the purpose of the Agreement on Safeguards -- that is, to prevent abuse of these extraordinary measures -- the jurisprudence concerning like product delineations under Article III of GATT 1994 also is relevant.

6 Despite U.S. arguments to the contrary, the central purpose of the “like or directly competitive” product analysis is to define appropriately the domestic industry whose performance is allegedly hampered by competition with imported products subject to the investigation. The ITC’s decision in turn, to bundle together slab, plate, hot rolled, cold rolled, and corrosion resistant steel into a single certain carbon (and alloy) flat rolled steel (“CCFRS”) grouping was inconsistent with Articles 2 and 4 of the Agreement on Safeguards and Appellate Body jurisprudence concerning this issue.

A. Appellate Body Jurisprudence Supports Japan’s Interpretation of Like Product

7 The obvious starting point for any discussion on like product in a safeguards context is *Lamb Meat*. The United States, however, would have the Panel mostly ignore this jurisprudence. They try first to draw a distinction, arguing that *Lamb Meat* was about the appropriate “domestic industry” definition whereas our arguments concern “like product.” In our view, this is a distinction without a difference. After all, the scope of the like product defines the scope of the relevant domestic industry.

8 The United States further claims that it has complied with *Lamb Meat* because there is a one-to-one relationship between the imported product and the domestic like product in the ITC’s steel safeguard analysis, and because the producers of the domestic like product actually produce the same range of products as the subject imported products. The U.S. theory is flawed. Taken to its logical extreme, a competent authority would be authorized to combine any number of products, regardless of the extent of their likeness. Indeed, if it were true, we see no reason why the United States would not have simply conducted an investigation and imposed a measure on imports of all “steel.”

9 The reason the United States did not impose a measure on “steel” is that it knows there must be some control on the scope of like product definitions under the Agreement on Safeguards. The Appellate Body clarified in *Lamb Meat*, as well as in *Cotton Yarn*, the overarching importance of ensuring that the nexus between imports and their domestic counterparts -- whether like or directly competitive -- is close enough to ensure that a measure is not imposed to protect industries that do not make like or directly competitive products.

10 The Appellate Body in *Lamb Meat* went on to say 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: “If an input product and an end-product are not “like” or “directly competitive”, then it is irrelevant, under the Agreement on Safeguards, that there is a continuous line of production between an input product and an end-product.” *Lamb Meat* therefore underlines the critical importance of the competitive dynamic that must exist between imported and domestic products, including between products that exist along a continuum of production processes.

11 The United States also tries to distinguish *Cotton Yarn*, in which the Appellate Body considered the transitional safeguard provisions -- Article 6 -- of the Agreement on Textiles and Clothing (“ATC”). But, like *Lamb Meat*, *Cotton Yarn* clearly established the importance of the competitive relationship between imported and domestic products “in order to ensure that the domestic industry is the appropriate industry in relation to the imported product... The degree of proximity between the imported and domestic products in their competitive

relationship is thus critical to underpin the reasonableness of a safeguard action against an imported product.”

12 The Appellate Body therefore clearly recognizes the critical role competition plays in determining whether products are like one another in a safeguard context. The reason it is so important is that this competitive relationship serves as the very foundation for evaluating appropriately the increases in imports, the injury suffered by the domestic industry, and the causal link between the two, in order to “ensure that the domestic industry is the appropriate industry” to receive protection from imports.

13 We should note here that in their Answers to Panel Questions the United States admits that competition is relevant to the relationship between imports and domestic products, but argues that it is irrelevant to the ITC’s consideration of the proper “clear dividing line” among domestic products when defining like products. If this is the case, what is the point of discerning the clear dividing line? In fact, the United States is not discerning the proper dividing line between products, but rather between producers.

14 Once it becomes clear that competition is relevant to the analysis, the next question is where to draw the line. For this inquiry, Japan believes the Appellate Body’s jurisprudence under Article III of GATT 1994 is applicable. The U.S. First Submission desperately tries to convince the Panel to ignore this jurisprudence, relying heavily on its misinterpretation of the *EC – Asbestos* case. But it is clear that these cases are fully relevant context for interpreting the Agreement on Safeguards.

15 First and foremost, the U.S. reliance on *EC-Asbestos* is misplaced. Japan recognizes that the Appellate Body in that case cautioned against transposing the interpretation of the term “like product” from one provision or agreement to another. But, as the Appellate Body already confirmed in *Cotton Yarn*, its interpretation of Article III:2 of GATT 1994 has contextual significance for purposes of interpreting the same term in a safeguard context. Indeed, the Appellate Body specifically dismissed in *Cotton Yarn* the “different provision and different agreement” argument that the U.S. espouses here. As the safeguard provisions under the ATC are very much akin to Article XIX of GATT 1994 and the Agreement on Safeguards, the contextual significance of Article III:2 applies with equal force to the ATC safeguard provisions, GATT Article XIX, and the Agreement on Safeguards.

16 The United States also argues that the Article III jurisprudence is irrelevant because, while Article III’s purpose is to liberalize trade, the Agreement on Safeguards exists to protect domestic industries. Contrary to the U.S. assertion, however, the central teaching of *U.S. – Line Pipe* is that the Agreement exists to prevent Members from abusing their right to protect domestic industries. In confirming the position set forth in its *Argentina – Footwear* report, the Appellate Body clarified in *Line Pipe* that the interpretation of any of the prerequisites for imposing safeguard measures must take into account the fact that such measures are by their nature extraordinary measures against implicitly fair trade. This is further confirmed by the preamble to the Agreement, which states that one of the objectives of the Agreement is to “re-establish multilateral control over safeguards.” The Agreement on Safeguards does not give free reign to protectionist impulses, but rather seeks to rein in such impulses. Therefore, the central tenet of Article III jurisprudence on the question of competition between products considered to be “like” one another is applicable in the safeguard context as well.

17 Assuming then, that the Article III jurisprudence is relevant to the analysis here, we return to the question of how products are most appropriately divided. The Appellate Body held in *Japan - Alcoholic Beverages* and *EC – Asbestos* that the most relevant factors for determining “likeness” are: (1) the physical properties; (2) the end uses; (3) consumers’ perceptions; and (4) tariff classifications. The purpose of these factors is clear: they help discern the extent of competition between products. Only if the products compete with each other are they properly grouped together, whether in an Article III or in a trade remedy context. If the competitive nexus underlying the investigation is blurred, the required analysis to be performed in the injury investigation and in choosing an appropriate remedy becomes meaningless. In turn, the prejudicial effects against which the Appellate Body warned in *Lamb Meat* and *Cotton Yarn* cannot be prevented.

18 The U.S. claim that these cases and their proposed analytic framework are irrelevant in the safeguard context is odd given the ITC’s use of similar factors for delineating like products. In its safeguard cases, the ITC considers physical properties, end uses, marketing channels, production processes, and customs treatment in making its like product determinations. In an AD/CVD context, the ITC also considers customer and producer perceptions of the products and sometimes price. It now claims that customer perceptions are not relevant to discerning the proper dividing line in a safeguard context. Again, we cannot understand what the point of a “clear dividing line” is if it is not to ensure a proper comparison between competitive products. By dismissing from the analysis customer perceptions, the United States ignores a critical tool for understanding competitive dynamics -- and does so in favor of a focus on producers rather than products.

B. The U.S. Decision On Flat Rolled Products Violated The Principles Set Forth By The Appellate Body

19 The overbroad CCFRS grouping necessarily masked the true competitive dynamics in the flat rolled steel markets because the real competitive relationships exist only between imported and domestic products that are both within the same subcomponents of this overbroad grouping -- such as between imported slab and domestic slab, but not between imported slab and domestic corrosion resistant steel. The ITC itself knows this to be true, as it found in this very investigation significant differences in the products’ physical properties, end-uses, customs treatment, and even production processes. Nonetheless, the ITC concluded, in what can only be described as a vast overgeneralization, that these products were like one another because they “share the same physical attributes and are generally interchangeable.” Nonsense. Even the U.S. industry breaks down its marketing and pricing materials distinguishing each subcomponent under the CCFRS. Plate is sold and marketed separately from hot rolled, which is distinct from cold rolled, which is distinct yet again from corrosion resistant steel.

20 Each of these products has its own end uses. They may be sold to the same industries, but to suggest that steel products have common applications because they are used in a specific industry is to suggest that steel, plastic, and glass should be a single like product because they are all sold to the automotive industry. End use is not the same as end user. The fact is, no one would ever use slab to make a car; nor would hot rolled steel be used for the same car-parts as corrosion resistant steel. They are simply different products, used for different purposes.

21 Furthermore, they each have a base price, reflected in the producers’ price sheets and in the trade literature. There is no such thing as a price for “flat rolled” (as the ITC defined

it). This proves not only that the industry and customers recognize the distinctions, but also that any analysis of this grouping performed by the ITC is meaningless because there is no “flat rolled” price that can be used to determine price effects in a causation analysis. The overbroad grouping therefore also rendered the analysis required by the Agreement on Safeguards entirely meaningless.

22 When, as in this case, overbroad product groupings are used, the **import trends** for one type of product are by definition masked by those of other types of products; **serious injury** is blurred as between the various distinct industries involved; the **causal relationships** between increased imports and the industries’ alleged injury are impossible to untangle; and a **proper remedy** is elusive. Under such circumstances, although a safeguard measure might be justified with respect to a portion of the targeted imports, imposition of a measure against all imports as a group inevitably results in protecting industries that do not deserve protection -- a result the Appellate Body specifically criticized in *Lamb Meat* and *Cotton Yarn*.

23 The United States insists that the more relevant consideration is the “very high overlap in domestic production” or the vertical integration found in the domestic steel industries producing these products. But, the Appellate Body stated in *Lamb Meat* that vertical integration is irrelevant to the question whether subject domestic products are “like products” of imports subject to investigation. Indeed, the reasoning behind the ITC’s like product determination for flat rolled steel products is almost identical to its flawed rationale for combining lamb meat and live lambs into a single like product. Its finding that most finished flat rolled steel products are sold into the automotive and construction markets is analogous to its earlier finding of a “coincidence of economic interests” between producers of live lambs and lamb meat. Its finding that a large percentage of domestic flat rolled steel producers are vertically integrated, producing four of the five flat rolled steel products, is akin to its earlier finding of a “continuous line of production” from live lambs to lamb meat.

24 Putting integration to the side, then, and focusing on the production processes themselves (if these are deemed relevant to the analysis), it is important to note that even the ITC admits that the processes that make the various flat rolled products are distinct and that distinct products come out of them. A slab caster is a process unto itself, entirely separate from the hot rolling and Steckel plate mills. These mills are in turn separate from cold rolling mills, as are the coating lines that make corrosion resistant steel. Each process, in turn, makes a product that can either be used as feedstock for the next stage, or be sold as finished products for end use purposes (except for slab, which is only used to make finished flat rolled steel). The processes which make these products may be located on the same general premises and be owned by the same company, but this does not make the processes’ output “like” one another. The separate facilities in which slab is made as compared with hot rolled, cold rolled and corrosion resistant create separate products used for distinctly different purposes.

25 As the Appellate Body held in *Lamb Meat*: “[i]f an input product and an end product are not ‘like or directly competitive’, then it is irrelevant, under the Agreement on Safeguards, that there is a continuous line of production between an input product and an end-product...or that there is a substantial coincidence of economic interests between the producers of these products.” Rather, the focus must be on “the identification of the products, and their ‘like or directly competitive’ relationship, and not on the processes by which those products are produced.” What matters is the competitive relationship between subject imports and domestic products, which helps to discern whether these products are “like” one another and whether, in turn, it makes sense to conjoin them together.

26 The ITC apparently understood this for other products in this same investigation. The ITC treated tin mill steel separately from corrosion resistant steel, even though these two types of coated products are far more similar to one another than slab is to corrosion resistant steel. It treated welded products as separate like products from certain flat steels, even though welded products are made directly from hot rolled steel, often by the same integrated mills that make the flat products. And it treated semi-finished long and stainless products as separate from their downstream finished products, even though their relationship to one another is no different from the relationship between slab and finished flat products. Indeed, but for flat rolled, the ITC largely adopted the delineations widely accepted by the industry that reflect well the competitive dynamics in the marketplace. It failed to do so for flat rolled, apparently in order to reach a result it could not reach if slab, plate, hot rolled, cold rolled, and corrosion resistant were separate like products.

27 Because the ITC did not find each of the five flat rolled steel products to be “like” the imports under investigation, its determination to combine all flat rolled steel products into a single like product and its consequent decision to define the domestic industry by such combination of products is inconsistent with Articles 2.1 and 4.1(c) of the Agreement on Safeguards and Article XIX of GATT 1994.

III. THE U.S. PRESIDENT’S DECISIONS ON TIN MILL AND STAINLESS WIRE PRODUCTS DID NOT MEET THE STANDARDS REQUIRED BY THE AGREEMENT ON SAFEGUARDS

28 The ITC Commissioners were divided three-to-three in their injury votes on four products. The President treated the tie votes on tin mill products and stainless steel wire as affirmative injury determinations and applied measures to those products. The President treated the other two tie votes -- covering tool steel and stainless fittings/flanges -- as negative injury determinations and imposed no measures on these products.

29 According to the United States, this is perfectly reasonable, as it is up to the President to decide in such cases which of the evenly divided groups of Commissioners he deems to be the views of the Commission “as a whole.” What the United States fails to comprehend is that for the two products where the President chose the affirmative side, the Commissioners did not agree on the like product definition. The Commission was not, in fact, evenly divided. For both tin mill and stainless wire products, four commissioners out of the six considered them as separate like products respectively. For each of the products, only a single commissioner -- Commissioner Miller for tin mill and Commissioner Koplan for stainless wire -- supported an affirmative injury determination.

30 The United States tries to defend itself by reference to the Appellate Body’s decision in *Line Pipe*, where it found no inconsistency with the Agreement on Safeguards when some members of the ITC ruled affirmatively based on threat of serious injury and others ruled based on current serious injury. The question posed by *Line Pipe*, however, was not merely whether the Commissioners disagreed, but whether their disagreement could be considered consistent with one another. The disagreement as to threat versus current injury in *Line Pipe* was deemed consistent. The disagreement in our case is much different. A safeguard measure cannot be applied to imports of a product without an affirmative injury determination based on an examination of the domestic industry producing the like or directly competitive product. In other words, there must be a one-to-one relationship between the injury determination and the like product definition. Without such a correlation, as was

lacking in this case for tin mill and stainless wire products, a violation of Articles 2.1 and 4.2(b) exists.

31 The United States in this case is effectively asking the Panel to accept a measure on two products that was applied based on a single affirmative injury vote. Given the repeated U.S. statements in this dispute that the ITC -- meaning six Commissioners -- is the "competent authority" in the United States, we fail to see how a single Commissioner, finding no agreement among the other five, and therefore representing a small minority of views, can represent the views of the Commission "as a whole." Furthermore, we do not believe such a minority view, challenged by an overwhelming majority, can be considered a "reasoned and adequate" explanation, as the jurisprudence requires to justify imposing a safeguard measure.

32 Even assuming the President's treatment of the ITC's tin mill and stainless wire products decisions as "equally divided" was legitimate, he treated these "tie" votes as positive determinations, while treating others as negative determinations, without any explanation.

33 The structure of the U.S. decision making process does not relieve the United States of its WTO obligations. Thus, anytime the President makes a decision that departs from or lacks an ITC majority -- as with tin mill and stainless wire -- then he must provide an explanation for the decision as the competent authority. In this case, the President provided no explanation as to why he agreed with those Commissioners voting in the affirmative for tin mill and stainless wire, while agreeing with those voting in the negative for tool steel and stainless flanges and fittings. One might guess that the President implicitly adopted the report of the side with which he agrees. But here, there were more than two reports. For tin mill and stainless wire products there were four different reports, three of which supported affirmative decisions but which disagreed on like product.

34 It is impossible, therefore, to know with whom the President agreed. The President, as a competent authority, failed to state which of the Commission's multiple reports he adopted. Under Article 3.1, the President failed to identify which report "set[s] forth the findings and reasoned conclusions reached on all pertinent issues of law and fact." He therefore also failed, as required by Article 4.2(c), to provide "a detailed analysis of the case under investigation as well as a demonstration of the factors examined."

IV. THE ITC'S CCFRS LIKE PRODUCT DEFINITION AND THE PRESIDENT'S DECISION TO IMPOSE MEASURES ON TIN MILL AND STAINLESS WIRE PRODUCTS ALSO VIOLATE ARTICLE X:3 OF GATT 1994

35 In addition to the arguments set forth above concerning (a) the like product delineations for CCFRS products and (b) the President's decision to impose measures on tin mill and stainless wire products, Japan also made claims concerning these decisions under Article X:3(a) of GATT 1994. The United States seeks to attack Japan's Article X:3(a) claims with the erroneous contention that Japan's arguments support particular outcomes and, thus, are substantive. In the view of the United States, a "substantive" argument or an argument concerning the application of a "substantive" law or regulation cannot be brought under Article X:3.

36 The United States relies on the declaration of the panel in *Argentina-Bovine Hides* that Article X:3(a) only covers measures that are administrative in nature. The United States is incorrect. To the extent that the *Bovine Hides* panel implied that a measure was either administrative (procedural) or substantive, Japan believes this to be erroneous and

unsupported by any Appellate Body precedent. That a substantive measure can be administered in a manner that is not uniform, impartial and reasonable is self-evident. Indeed, GATT Article X:3(a) is meant to address and prevent precisely this type of procedural protectionism.

37 It is indisputable that the international law principles of due process and good faith are embedded in GATT Article X:3(a). Thus, in analyzing how the United States administered its safeguard law in this dispute, the Panel should examine the U.S. conduct closely, with an eye to whether the United States administered its law in a way that respected its due process and good faith obligations.

38 The United States attempts to justify its actions on the ground that uniform, impartial, and reasonable administration of laws requires different outcomes because of different facts. Japan's response to this contention is that different outcomes, when faced with the same or highly similar facts, do not meet the requirements of Article X:3(a).

39 With respect to the **ITC's like product analysis**, the ITC ignored innumerable findings in past AD/CVD proceedings. Plate, hot rolled, cold rolled, and corrosion resistant steel have each traditionally been treated as separate like products by the ITC in other recent trade remedy cases -- one of them, on cold rolled steel, as recent as March 2000, and another, on hot rolled, in August 2001. This is not the appropriate imposition of a uniform legal standard to varying facts. Rather, it is administration of the safeguard law in a manner that is not uniform, impartial and reasonable, thereby contravening GATT Article X:3(a).

40 The U.S. violation of Article X:3 with respect to like product is not limited to the lack of uniformity vis-à-vis these past cases, but within this very case itself. While the ITC lumped semi-finished flat steels -- or slabs -- into the same like product as finished flat steels, it decided to treat semi-finished long products and semi-finished stainless products as separate like products, apart from finished products. Carbon billets, which bear the same relationship to carbon long products as does carbon slab to carbon sheet products in that both are the input for further rolling into the next stage product, were found to be a separate like product from finished long products. Stainless slab, which bears the identical relationship to stainless plate and other flat rolled products as carbon slab bears to finished carbon flat products, was found to be a different like product than stainless plate and other flat rolled stainless products. Likewise, within the flat rolled category, although both tin mill products and corrosion resistant products use a cold rolled substrate, they were treated as separate like products. Such treatment was not uniform, reasonable or impartial.

41 With respect to the **President's measures on tin-mill and stainless wire**, the violation of Article X:3(a) is attributable to the way in which the President treated the affirmative votes of individual Commissioners based on differing views about the proper scope of the like product definitions. Absent a common basis for the affirmative votes, the United States cannot contend that the President administered the law in a uniform, impartial and reasonable manner.

42 The U.S. argument is, in essence, that the absence of standards and criteria in a law renders it impossible to find that the law was administered in a non-uniform, partial and unreasonable manner. To the contrary, the unfettered ability to apply different standards is as massive a violation of the requirements of GATT Article X:3(a) as can be imagined. The treatment of some so-called tie votes as affirmative and others as negative is not only obviously non-uniform, but also partial and unreasonable, particularly without any

explanation from the President as the competent authority, as to why he made inconsistent decisions. Furthermore, the decision to rely on three affirmative votes when only one of those votes agreed with the President's like product delineations is clearly unreasonable.

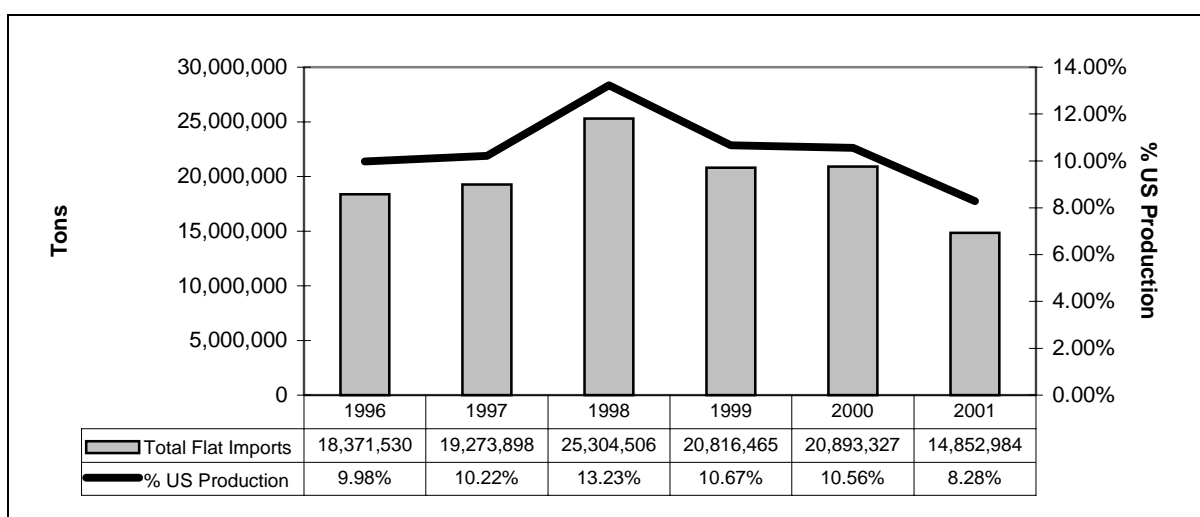
V. THE UNITED STATES MISCONSTRUES THE INCREASED IMPORTS STANDARD IN A MANNER THAT WOULD EVISCERATE THE APPELLATE BODY'S RULING IN ARGENTINA-FOOTWEAR

43 The United States asserts, erroneously in effect, that the increased import requirement -- set forth in Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of GATT 1994 -- is merely a component of the causation analysis required under Article 4.2(b) of the Agreement on Safeguards.

44 The panel in *Argentina – Footwear* found that the increased imports requirement is a “basic prerequisite” for the application of a safeguard measure. The Appellate Body did not dispute this finding. Moreover, the Appellate Body in *Argentina – Footwear* said that the provisions of Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX(a) of the GATT 1994 stand for the proposition that increased imports must be “sudden and recent.” Thus, the requirement has a temporal element. Moreover, increased imports must be “recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten ‘serious injury’” to the domestic industry producing the like product under investigation. This second element indicates that a comparison is required, not so much to determine the *effect* of increased imports in a causal sense, but to determine the *existence* of increased imports in light of the relative trends in imports. The comparison is made between recent import trends, which are at the heart of the increased imports inquiry, and import trends over the entire period of investigation. It serves as a litmus test to determine if an emergency exists and, therefore, if emergency action is required. The failure to establish either one of these elements renders a safeguard measure invalid.

45 Applying this understanding to the facts of this case, imports of CCFRS fail the increased imports requirement. One need only look at the data before the ITC and the President to reach this conclusion. In particular, it is notable that, as is evident from the figure below, imports have been decreasing continuously and significantly since 1998, down well below the 1996 level by end of year 2001.

Total Flat Imports (Aggregate of Slab, Plate, Hot Rolled, Cold Rolled, Coated) and as Percent U.S. Production



The same is true for each product considered separately, as should have been done if the appropriate like product analysis had been performed.

VI. THE UNITED STATES FAILED TO ENSURE BOTH THAT THE RELATIONSHIP BETWEEN INCREASED IMPORTS AND AN INDUSTRY'S INJURY IS GENUINE AND SUBSTANTIAL AND THAT THE EFFECTS OF OTHER CAUSES ARE NOT ATTRIBUTED TO IMPORTS

46 The ITC has yet to reconcile its analytic framework -- or lack thereof -- with the causation standard as set forth in the Agreement on Safeguards and as clarified by the Appellate Body. This is now the fourth U.S. safeguard measure to be disputed before the WTO. The three prior challenges were successful and there is nothing substantively new about Co-Complainants' claims on this matter to set it apart from the three prior disputes.

47 Ultimately, the U.S. argument can be reduced to one simple objective: preserving the status quo at the ITC, whose treatment of causation has consistently been found flawed by the Appellate Body. The United States evidently believes that the causation requirement applies only limited obligations on a Member before imposing a measure, and that the ITC's approach is more demanding and rigorous than required. This flawed view is based on an erroneous reading of the Agreement and Appellate Body jurisprudence, as well as a failure to appreciate fundamental economic relationships and principles.

48 Under the plain meaning of the Agreement text, and with clarification by the Appellate Body, a two-step analysis is envisioned. First, at a minimum, the authority must establish a coincidence of, or at least some compelling correlation between, increased imports and serious injury. But while a correlation between increased imports and serious injury is relevant and necessary, it is by itself insufficient evidence for imposing safeguards measures. The second sentence of Article 4.2(b) recognizes that other factors may be causing declines in domestic industry performance. Thus, authorities must take the added step of investigating other possible causes, and the injury from those alternative causes "shall not be attributed" to imports. A reasoned and adequate explanation must be offered, explicitly establishing how this was accomplished.

49 The ITC's report fails to live up to these requirements. U.S. arguments to the contrary do little more than distract from this obvious conclusion.

A. The United States Failed To Demonstrate A Genuine And Substantial Causal Link Between Increased Imports Of Flat Rolled Steel Products And Serious Injury To The Domestic Industries Making the Like Products

50 The United States attempts to distract the Panel by suggesting that Complainants propose that imports must be the sole cause of serious injury under Article 4.2(b). Japan never made such an argument. Japan recognizes that there can be some interplay of factors, but it also appreciates that imports must contribute *substantially* to bringing about serious injury. As the Appellate Body noted in *U.S. -- Wheat Gluten*, there must be a "genuine and substantial relationship of cause and effect between increased imports and serious injury." This is precisely why establishing a causal link, including a correlation between increased

imports and serious injury, as well as performing an adequate non-attribution analysis, is necessary.

51 In any event, even before an authority addresses the question of other causes and non-attribution, it must establish the initial basis for finding a genuine and substantial causal link - that is, a coincidence between increased imports and a decline in the relevant industry performance factors. In our view, the ITC failed even to establish this threshold causal connection. The U.S. response is that Japan and other Complainants focused on an overly narrow time period to make their case. The United States also suggests that Japan and others relied on an examination of a “limited and selective” set of industry trends to make the case that no coincidence or correlation existed. These claims are misplaced.

52 Japan’s arguments consider the entire period of investigation, but the analysis must begin with the period in which the increased imports occurred. Interpreting the first sentence of Article 4.2(b), the Appellate Body in the *Argentina – Footwear* dispute stated that if causation is present, increased imports “normally should coincide” with a decline in the relevant injury factors. The term “coincide” implies a very tight correlation between increased imports and injury within a narrow period of time.

53 With respect to CCFRS, Japan has demonstrated that there was no *coincidence* of increased imports and serious injury to the domestic industry in 1998, the critical year for the ITC. Moreover, after 1998, imports declined as industry performance declined, reaching levels by the first half of 2001 that were well below import levels in 1996 on an annualized basis.

54 Japan appreciates that it might still be possible to support a finding of causation absent a coincidence of increased imports and a decline in the relevant injury factors, provided there is a “very compelling” analysis of why causation was still present. Japan takes this to mean that, at a minimum, some level of demonstrable, relevant and “compelling” correlation between increased imports and serious injury must exist. The United States did not offer a “compelling analysis” in this case. Its argument for a “correlation” relies largely on exaggerations and misstatements. Moreover, for all of its talk about the need to consider numerous factors, the U.S. defense of the ITC focuses on the same few factors as the ITC decision itself: import volume, import price, and domestic industry profits.

55 The United States argues that the lingering effects of increased imports in 1998 impacted the industry even as long as two years after the increase. Yet an analysis of inventories and pricing proves this is false. No significant overhang of inventories was ever shown to exist. And even if the small inventories (perhaps enough for one month of sales) were taken into consideration, domestic prices -- not imports -- were shown to lead prices up and down during the latter half of the investigation period. This is not the “compelling analysis” the Appellate Body had in mind. It defies reason to conclude that imports in 1998, whether in terms of volume or price, continued to have an effect in 2000 and 2001.

B. The United States Failed To Perform A Reasoned And Adequate Non-Attribution Analysis With Respect To Flat Rolled Products

56 Even if the requisite correlation between increased imports and industry performance existed, and even if the ITC had demonstrated the requisite correlation, the ITC improperly failed to ensure that it did not attribute to imports the effects of other causes. Rather than

provide an explicit and well-reasoned rationale for separating and distinguishing alternative causes, the ITC simply stated conclusions.

57 Interested parties in this case presented the ITC with evidence and economic analysis that showed how myriad other factors were impacting the domestic industries making flat rolled steel products. We address the three which in our view were primarily to blame for the industry's troubles -- declining demand, domestic capacity increases, and intra-industry competition. We also explain why the ITC's analysis failed to ensure that the effects of these other causes were not blamed on imports. No effort at all was made to actually separate and distinguish causes, as is required under well-settled WTO jurisprudence.

58 One method of doing this would have been to rely on econometrics. The United States argues that: (a) the Appellate Body has stated that a Member is not necessarily required to quantify causes of injury; and (b) the undertaking is supposedly too complex. Japan's response is that the Agreement on Safeguards may not mandate detailed economic studies in every case, but when the data permits such studies, and the parties undertake the studies, the authorities have an obligation to take them seriously. Difficulty is no excuse for omission. The Appellate Body in *U.S. - Hot-Rolled Steel* clarified that although the task of non-attribution may be a difficult one, it is the price paid to justify application of trade remedy measures and it is a task which Members of the WTO agreed to undertake.

59 Japan is not advocating that, because interested parties submitted a comprehensive econometric analysis, that analysis must form the basis for any ITC conclusions. However, the data used in the analysis, if found to be reliable, should have been examined and tested, whether on the basis of the econometric models submitted by the parties or based on the authority's own analysis of the data. To pinpoint an alleged flaw in an analysis and simply throw away all of the valuable underlying data is unreasonable. Furthermore, developing economic and econometric models to explain price levels is an extremely common and well understood task. Competition authorities regularly employ them. Authorities need not create a single complex model to explain everything. Rather, authorities can isolate key issues in a particular case – such as distinguishing the role of different factors in explaining declining domestic prices – and use mainstream econometric techniques to understand better those key issues.

VII. BECAUSE THE ITC FAILED TO ENSURE THAT IT DID NOT ATTRIBUTE TO IMPORTS THE EFFECTS OF OTHER CAUSES, IT ALSO FAILED TO ENSURE THAT ITS MEASURE WAS IMPOSED “ONLY TO THE EXTENT NECESSARY” TO ADDRESS THE EFFECTS OF INCREASED IMPORTS

60 The United States does not appear to disagree completely with our argument that a measure must be supported by analysis demonstrating that it is no more restrictive than necessary to remedy serious injury caused by increased imports. Indeed, in its responses to the Panel's questions, the United States concurs that, absent such an analysis, which can be borrowed from the non-attribution analysis required by Article 4.2(b) or undertaken independent of that analysis, a measure does not meet the requirements of Article 5.1. In this regard, as set out in our discussion of causation, the ITC failed to abide by the non-attribution requirement of Article 4.2(b).

61 The United States, however, continues to argue that the remedy envisioned under Article 5.1 is in fact additive, and may be used to prevent or remedy serious injury *plus* facilitate adjustment. This is contrary to the Appellate Body's treatment of Article 5.1. The

United States also argues that Article 3.1 does not require Members to offer an explanation of the findings and reasoned conclusions supporting the *actual* measure imposed. This contradicts the United States' admission that an analysis justifying the measure, whether generated by Article 4.2(b) or generated independently, is required.

62 The Appellate Body in *Line Pipe* noted the link between Article 3.1 and Article 5.1 for purposes of clearly explaining and justifying the extent of the application of the measure. While Article 5.1 itself may not require an explanation, the link between Articles 3.1 and 5.1 reflects the assumption by the Appellate Body, as implied by the text of the Agreement, that a Member will perform and publish a proper non-attribution analysis under Articles 3.1 and 4.2 before taking a measure, and by doing so will provide the necessary justification of the measure under Article 5.1.

63 The United States interprets Article 5.1 as being additive, allowing a Member to prevent or remedy serious injury *plus* facilitate adjustment beyond the adjustment to increased imports. This is inconsistent with the rationale in *Line Pipe* linking the Article 4.2(b) non-attribution analysis to the extent of the measures under Article 5.1.

64 The United States also has not explained or justified why the President can circumvent the requirements of Articles 5.1 and 3.1 simply because the United States employs a bifurcated process that leaves the ultimate decision on the extent and scope of the measure imposed to the President. We repeat our arguments that, even if the ITC's findings pursuant to Article 5.1 were acceptable, which they are not, the President's action in imposing the safeguards measures still violates Article 3.1, given the higher tariffs imposed by the President, and the different group of countries to which the tariffs applied. No attempt was made by the President to explain or justify his measures. Where the President makes a decision that is inconsistent with the ITC's recommendation, it is no longer supported by the ITC's explanation. In that case, the President's imposition of such measures contradicts the premise of the Agreement that a measure taken after an investigation pursuant to Article 3.1, and consistent with that investigation, must be justifiable under Article 5.1.

VIII. THE UNITED STATES FAILED TO APPLY THE MEASURES IN THIS CASE "IRRESPECTIVE OF SOURCE", AS REQUIRED BY ARTICLE 2.2 OF THE AGREEMENT ON SAFEGUARDS AND BY THE MFN REQUIREMENT UNDER ARTICLE I:1 OF GATT 1994

65 The President's decision to exempt Canada, Mexico and Israel from the steel safeguard measures due to the existence of free-trade agreements between the United States and those nations violated the requirement in Article 2.2 of the Agreement on Safeguards and Article I:1 of GATT 1994 to apply the measures to imports irrespective of their source. Safeguard measures are intended to be global in nature. Provisions within free-trade agreements permitting the exclusion of FTA partners cannot justify departure from the non-discrimination principle. Moreover, even if they could, in some circumstances, justify departure, the United States does not meet the conditions that would justify non-application of the measures.

66 In its First Written Submission, the United States erroneously argues that GATT Article XXIV provides an exception to the general MFN principle. This argument is incorrect because the plain meaning of Article 2.2 requires that once a Member conducts an investigation and reaches an affirmative determination, any safeguard measure imposed must be applied to imports from all sources, absent an exception, such as special treatment of

customs union members and developing countries, and even then, only in certain circumstances.

67 The U.S. assertion that footnote 1 to Article 2 of the Agreement on Safeguards does not disturb the exceptions permitted by GATT Article XXIV is misguided. The United States both misreads footnote 1 and misinterprets prior decisions on this issue.

68 First, footnote 1 is inapplicable to free-trade areas (or their members). It does not define a “Member” as a free-trade area or a country belonging to one; nor does it mention free-trade areas in any other way. The United States claims, in essence, that the last sentence of footnote 1 has nothing to do with the rest of the footnote, and that it covers free-trade areas as well as customs unions. If the Members meant for the same rules to apply to both customs unions and free-trade areas, they would have said so quite clearly.

69 Nevertheless, even assuming that the last sentence of footnote 1 could be read on its own, divorced from the first two sentences, textual analysis and precedent indicate that this sentence does not excuse the non-application by the United States of the safeguard measures to its FTA partners -- Canada, Mexico, and Israel.

70 Use of the Article XXIV exception is strictly conditioned with respect to customs unions, as the Appellate Body in *Argentina – Footwear* confirmed, citing *Turkey – Textiles*. It would be anomalous, indeed, if free-trade areas and their members (which are not even mentioned in footnote 1) were subject to no restrictions conditioning their ability to use the defense of Article XXIV while customs unions (which are specified in the text) could benefit from the defence only in limited circumstances.

71 Moreover, even if one assumes that the last sentence of footnote 1 applies to free-trade areas, the Article XXIV defense is not available to the United States. The use of “are eliminated” in Article XXIV:8(b) makes clear that a general exception from safeguard measures must be written into an FTA in order for the Article XXIV exception to be applicable. Safeguard measures were not eliminated as a *general* exception in either FTA.

72 The *conditional* exemption in certain cases when certain subjective conditions are satisfied does not meet the requirements for asserting Article XXIV:8(b) as a defense to Article 2.2 of the Agreement on Safeguards and GATT Article I:1. Moreover, if the U.S. contention in its first submission that it must eliminate safeguard measures as a “restrictive regulation of commerce” because they are not among the measures that Article XXIV:8(b) permits an FTA member to retain were true, then it must also eliminate other measures that are not enumerated, particularly AD/CVD measures. However, the United States has not eliminated –and clearly has no intention to eliminate – AD/CVC measures against Canada, Mexico and Israel.

73 Japan reiterates that this claim is a separate and distinct claim from the Article 2.2 and 2.1 “parallelism” claim. It also notes that, with regard to the exclusion of imports from Israel, this is Japan’s only claim. Therefore, Japan submits that exercise of judicial economy with respect to this claim would not be appropriate because, as stated by the Appellate Body in *Australia – Salmon*.

IX. THE UNITED STATES FAILED AGAIN TO ABIDE BY THE PRINCIPLE OF PARALLELISM AS BETWEEN THE SOURCES OF IMPORTS SUBJECT TO THE ITC'S INJURY INVESTIGATION AND THE SOURCES SUBJECT TO THE MEASURE

74 In addition to the MFN claim set forth above, Japan has also argued that the U.S. measures failed to meet the parallelism standard established by the Appellate Body in *Wheat Gluten* and *Line Pipe*. The United States has violated Articles 2 and 4 of the Agreement on Safeguards by including Canada and Mexico in the analysis of whether increased imports caused or threatened to cause serious injury, but excluding these countries from the application of the safeguard measure without providing a reasoned and adequate explanation establishing explicitly that imports from non-NAFTA sources alone satisfied the conditions for the application of a safeguard measure.

75 The United States does not challenge the parallelism requirement *per se*, but claims to have complied with the requirement as it has been interpreted by the Appellate Body. The problem, however, is that the ITC did not provide -- for any of the products subject to the measure -- the required *reasoned and adequate explanation establishing explicitly* that imports from non-NAFTA sources *alone* satisfy the conditions for applying the measures. Indeed, the United States admits its faulty interpretation of the parallelism requirement when it says that the Agreement on Safeguards “does not require separate findings specific to non-NAFTA imports for all Article 4.2 factors.” On the contrary, this is precisely what the Appellate Body has decided is required. The ITC's mere conclusory statements that non-NAFTA imports alone satisfy the conditions for applying safeguard measures cannot substitute for the required explanation of such findings, including the results of each step of the analytical process leading to that conclusion. This is particularly true for the causation analysis, which the ITC entirely ignored in the cursory non-NAFTA analysis it performed.

76 Japan does not, however, join the Co-Complainants that have argued that parallel treatment applies equally to products exclusions. In Japan's view, Article 2.2 and the jurisprudence on parallelism limit the concept's scope to the sources of imports rather than to specific products. Indeed, product exclusions, which apply on an MFN basis, are consistent with the intent of Article 5.1 -- to ensure that the measure is no more restrictive than necessary. Article 5.1 provides merely the maximum limit of the protection. Moreover, Article 3.1 allows Members to exercise discretion to take into consideration the public interest, under which the competent authority has discretion to exclude, for instance, products essential to the national economy from the safeguard measure.

X. CONCLUSION

77 For the reasons discussed above and in our other submissions, Japan respectfully requests that the Panel to find that the U.S. safeguard measures on certain steel products are inconsistent with the Agreement on Safeguards and GATT 1994 and to recommend that the United States bring its certain steel safeguard measures into conformity with the Agreement on Safeguards and GATT 1994.