UNITED STATES - DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CERTAIN STEEL PRODUCTS
WT/DS249

FIRST WRITTEN SUBMISSION OF THE GOVERNMENT OF JAPAN

GENEVA
30 August 2002

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Ⅰ. INTRODUCTION

1 In a long line of disputes, the Appellate Body has emphasized that safeguard measures are "extraordinary remedies to be taken only in emergency situations."[1] They are extraordinary in the sense that they prevent WTO Members from "enjoying the full benefit of trade concessions under the WTO Agreement" and because they are import restrictions imposed "in the absence of any allegation of an unfair trade practice."[2] In short, although Members have the right under certain circumstances to impose safeguard measures to facilitate industry adjustment to import competition, as stated in the *U.S. – Line Pipe* decision, "the right to apply a safeguard measure … is not unlimited."[3]

2 It is with this overarching principle in mind that Members to the WTO drew up careful guidelines for the imposition of safeguard measures. As set forth in Article XIX:1 of GATT 1994 and detailed in the Agreement on Safeguards, such measures must be supported by the existence of increased imports which are causing serious injury to a domestic industry producing a like or directly competitive product. The measure, in turn, must be applied to all imports, regardless of source (except developing countries under certain conditions), and must be carefully tailored to remedy only that injury caused by the increased imports.

3 In imposing safeguard measures on certain steel products, the United States Government ("USG") ignored virtually all of the most basic WTO requirements for imposing safeguard measures. This action is all the more disturbing since the United States already has been found to violate WTO rules in three prior safeguard challenges. Rather than amend its ways and follow the guidance of these decisions, the United States once again violated its WTO obligations, in many instances committing the same violations as in the three earlier disputes. Japan deeply regrets this disregard of WTO precedents and urges the Panel to send the United States a strong message -- stop ignoring the obligations under the Agreement on Safeguards.

4 Japan sets forth in detail in this submission the violations it has identified in this case. In summary, Japan argues that the measures imposed by the U.S. violate:

- the requirement to define the domestic industry as those producers producing a product *like or directly competitive* with the imported product, particularly with regard to the various flat-rolled products, as set forth in Articles 2.1 and 4.1(c) of the Agreement on Safeguards and Article XIX:1 of GATT 1994, and to make such a decision in a uniform, impartial, and reasonable manner as required by Article X:3(a) of GATT 1994;

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[1] *Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea ("U.S. – Line Pipe")*, WT/DS202/AB/R, 15 Feb. 2002, at para. 80.

[2] *U.S. – Line Pipe* at para. 80; *see also id* at para. 81 (*citing* Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear*"), WT/DS121/AB/R, 14 Dec. 1999, at paras. 93-95 and Appellate Body Report, *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, ("*Korea – Dairy*") WT/DS98/AB/R, 14 Dec. 1999 at paras. 86-88).

[3] *U.S. – Line Pipe* at paras. 83-84.

- the requirement to find that increased imports of tin mill and stainless wire products had caused serious injury to the industries producing those specific products, or to identify a *published report* supporting such decisions, as required by Articles 2.1, 3.1 and 4.2(c) of the Agreement on Safeguards, and to make such a decision in a uniform, impartial, and reasonable manner as required by Article X.3(a) of GATT of 1994;

- the requirement that the measures be imposed only if *increased imports* exist, as set forth in Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1 of GATT of 1994;

- the requirement that increased imports *cause* serious injury to a domestic industry producing a like or directly competitive product, and that such injury is *not* falsely *attributed* to imports, as set forth in Articles 2.1 and 4.2(b) of the Agreement on Safeguards and Article XIX:1 of GATT 1994;

- the requirement that the sources of imports covered by an affirmative injury finding *parallel* the sources against which the measures are imposed, as set forth in Articles 2.1 and 2.2 of the Agreement on Safeguards and Article XIX:1 of GATT 1994;

- the requirement that the measure be applied *only to the extent necessary*, as required by Articles 3.1 and 5.1 of the Agreement on Safeguards and Article XIX:1 of GATT 1994; and

- the requirement that measures be imposed on imports *irrespective of their source*, as set forth in Article 2.2 of the Agreement on Safeguards and Article I:1 of GATT 1994.

5 Japan limits its claims to those set forth above in order not to overburden the Panel, but does not wish to give the impression that these are the only violations committed by the USG. Japan supports most of the additional claims set forth in other complainants' submissions in this dispute, and will express its specific opinions on these claims as necessary.

II. FACTUAL BACKGROUND

6 In this section, Japan provides the Panel with the factual and procedural background that precipitated this dispute, including both the actions taken by the USG and the actions taken before the WTO. We follow this background discussion with an overview of the U.S. steel industry to put the U.S. safeguard measures in this case in their proper context.

A. Background On U.S. Investigations And Measures Imposed

1. Initiation of Safeguard Investigation

7 On 22 June 2001, the United States Trade Representative (USTR), acting on the initiative of President Bush, requested the U.S. International Trade Commission (ITC) to initiate a safeguard investigation under Section 201 of the Trade Act of 1974 to determine whether certain steel products are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the domestic

industry producing products like or directly competitive with the imported products.[4] It is notable that no petition was filed by the domestic industry.

8 Annex I of the USTR's request to the International Trade Commission identified four broad groups of products to be covered by the investigation: (1) certain carbon and alloy flat products, (2) certain carbon and alloy long products, (3) certain carbon and alloy pipe and tube, and (4) stainless steel and alloy tool steel products. Annex II of the request listed numerous specific products that were considered outside the scope of the investigation.

9 The ITC initiated its investigation on 28 June 2001. Public notice of this investigation was published on 3 July 2001,[5] providing for hearings on injury starting on the week of 17 September 2001 and hearings on remedy starting on the week of 5 November 2001 and allowing submissions of pre- and posthearing briefs by interested parties.[6]

10 The initiation of the safeguard investigation was notified to the Committee on Safeguards on 4 July 2001 and this notification was circulated on 9 July 2001.[7]

11 On 26 July 2001, the ITC received a Resolution from the Committee on Finance of the U.S. Senate requesting an investigation of the same four groups of products. It was consolidated with the ongoing investigation.[8]

2. ITC Injury Investigation and Determination

12 Prehearing briefs on injury were filed by 10 September 2001 and hearings took place from 17 September 2001 to 5 October 2001. Posthearing briefs were allowed from 27 September 2001 to 9 October 2001 for the various steel products under investigation.

13 For the purpose of data collection, the ITC split the four product categories referred to in the Request of 22 June 2001 into 33 product sub-categories:[9]

- 7 carbon and alloy flat products[10] covering (1) slab, (2) plate, (3) hot-rolled steel, (4) cold-rolled steel, (5) Grain Oriented Electrical Steel (GOES), (6) coated steel, (7) tin mill products;

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4 United States Trade Representative's (USTR) Request to the United States International Trade Commission to initiate a safeguard investigation under Section 201 of Trade Act 1974 **(Exh. CC-1)**.

5 Institution and Scheduling of Investigation, United States International Trade Commission Investigation No. TA-201-73, 66 Fed. Reg. 35267, (3 July 2002) (**Exh. CC-2**).

6 *Id.*

7 Notification under Article 12.1(b) of the Agreement on Safeguards on initiation of an investigation and the reasons for it (doc. G/SG/N/6/USA/10, 9 July 2001) (**Exh. CC-3**).

8 Consolidation of Senate Finance Committee resolution requesting a section 201 investigation with the investigation requested by the United States Trade Representative on 22 June 2001, 66 Fed. Reg. 44158, 22 Aug. 2001.

9 *Certain Steel Products*, Inv. No. TA-201-73, ITC Pub. 3479 (hereinafter "*ITC Report*") at 28 (Dec. 2001) (**Exh. CC-6**).

- 10 carbon and alloy long products[11] comprising (1) billets, (2) hot-rolled bar and light shapes, (3) cold-finished bar, (4) rebar, (5) rails and railway products, (6) heavy structural shapes and sheet pilings, (7) fabricated structural units, (8) wire, (9) nails, staples and woven cloth, (10) strand, rope, cable and cordage;

- 5 carbon and alloy pipe and tube[12] divided into (1) welded pipe, (2) seamless pipe, (3) welded OCTG, (4) seamless OCTG, (5) fittings, flanges and tool joints; and

- 11 stainless steel and alloy tool steel products[13] comprising (1) slabs, (2) plate, (3) bar, (4) rod, (5) wire, (6), cloth, (7) seamless tubular products, (8) welded tubular products, (9) fittings and flanges, (10) tool steel, (11) rope.

14 From the 33 products sub-categories for which data had been collected, the ITC eventually defined 27 separate domestic industries producing "like products" to the relevant imports:

- 3 carbon and alloy flat product groupings covering (1) certain carbon flat-rolled steel (comprising slabs, plate, hot-rolled, cold-rolled and coated products), (2) GOES, (3) tin mill products;[14]

- 10 carbon and alloy long products comprising (1) billets, (2) hot-rolled bar and light shapes, (3) cold-finished bar, (4) rebar, (5) rails and railway products, (6) heavy structural shapes and sheet pilings, (7) fabricated structural units, (8) wire, (9) nails, staples and woven cloth, (10) strand, rope, cable and cordage (including stainless steel rope);[15]

- 4 carbon and alloy pipe and tube products comprising (1) welded pipe, (2) seamless pipe, (3) all OCTG (both welded and seamless), (4) fittings, flanges and tool joints;[16] and

- 10 stainless steel products divided into (1) semi finished products (slabs, blooms, billets and ingots), (2) plate, (3) bar, (4) rod, (5) wire, (6) cloth,

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[10] *Id.* at 9-10, (Descriptions and Harmonized Tariff Schedules (HTS) subheadings). Note that the terms "coated steel" and "corrosion-resistant steel" are used interchangeably by the ITC and the parties in their various documents.

[11] *Id.* at 11-13, (Descriptions and Harmonized Tariff Schedules (HTS) subheadings).

[12] *Id.* at 13-14, (Descriptions and Harmonized Tariff Schedules (HTS) subheadings).

[13] *Id.* at 14-16, (Descriptions and Harmonized Tariff Schedules (HTS) subheadings).

[14] *Id*. at 36.

[15] *Id.* at 79.

[16] *ITC Report* at 147 (**Exh. CC-6**).

(7) seamless tubular products, (8) welded tubular products, (9) fittings and flanges, (10) tool steel.[17]

15 The ITC voted on injury on 22 October 2001 and made "negative" determinations with respect to 15 products:

- for carbon and alloy billets, imports have not increased;[18]

- for 13 products comprising (1) carbon and alloy GOES,[19] (2) rails,[20] (3) heavy structural shapes,[21] (4) fabricated units,[22] (5) wire,[23] (6) nails, staples and woven cloth,[24] (7) strand, rope, cable and cordage (including stainless steel rope),[25] (8) seamless pipe,[26] (9) OCTG,[27] (10) stainless steel slabs,[28] (11) plate,[29] (12) cloth,[30] (13) seamless tubular products[31] and (14) welded tubular products,[32] there was no injury;

These "negative" determinations were notified to the Committee on Safeguards on 26 October 2001 and this notification was circulated on 1 November 2001.[33]

16 The ITC reached "affirmative" determinations for eight products:

- for 7 products, including (1) certain carbon flat-rolled steel,[34] (2) hot-rolled bar,[35] (3) cold-finished bar,[36] (4) rebar,[37] (5) fittings, flanges and

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17 *Id.* at 190.

18 *Id.* at 117.

19 *Id.* at 67.

20 *Id*. at 118.

21 *Id.* at 122.

22 *Id.* at 127.

23 *Id.* at 132.

24 *Id.* at 142.

25 *Id.* at 137.

26 *Id*. at 186.

27 *Id.* at 181.

28 *Id.* at 224.

29 *Id.* at 228.

30 *Id.* at 239.

31 *Id.* at 242.

32 *Id*. at 246.

33 Information to be notified to the Committee where a safeguard investigation is terminated with no safeguard measure imposed (doc. G/SG/N/9/USA/4, 1 November 2001) (**Exh. CC-4**).

34 *ITC Report*, at 55 (**Exh. CC-6**).

35 *Id.* at 95.

tool joints,[38] (6) stainless steel bar,[39] and (7) stainless steel rod,[40] imports were a substantial cause of serious injury; and

- for welded pipe, imports were a substantial cause of threat of serious injury.[41]

17 The ITC delivered "divided" determinations[42] for four product groupings:

- for tin mill products, 3 Commissioners found that imports were not a substantial cause of injury,[43] whereas 3 Commissioners ruled the opposite;[44]

- for stainless steel wire, 3 Commissioners found no injury,[45] 2 Commissioners found that imports were a substantial cause of threat of serious injury[46] and 1 Commissioner found that imports were a substantial cause of serious injury;[47]

- for stainless steel fittings and flanges, 3 Commissioners found no injury,[48] but 3 Commissioners found that imports were a substantial cause of serious injury;[49] and

- for stainless steel tool steel, 3 Commissioners found no injury,[50] 2 Commissioners found that imports were a substantial cause of serious

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[36] *Id.* at 104.

[37] *Id.* at 111.

[38] *Id.* at 174.

[39] *Id.* at 208.

[40] *Id.* at 217.

[41] *Id.* at 158.

[42] Under U.S. law, when the ITC vote is equally divided, both the affirmative and the negative determinations are forwarded to the President and he may consider either one to be the determination of the ITC; *see* 19 U.S.C. 1330(d)(1) (**Exh. CC-47**).

[43] *ITC Report*, at 74 (**Exh. CC-6**).

[44] *Id.* at 36 n. 65, 48 n. 163, and 55 n. 224 (dissenting opinion of Commissioner Devaney); at 269 (separate views on injury of Commissioner Bragg); and at 307 (separate and dissenting views of Commissioner Miller on injury with respect to tin mill products).

[45] *Id.* at. 235.

[46] *Id.* at 255 and 258 (separate views of Chairman Koplan on injury), and at 302 (separate views on injury of Commissioner Bragg).

[47] *Id*. at 342 and 345 (separate views of Commissioner Devaney on injury).

[48] *Id*. at 250.

[49] *Id.*at 255 and 266 (separate views of Chairman Koplan on injury); 303 (separate views on injury of Commissioner Bragg); 347 and 350 (separate views of Commissioner Devaney on injury).

[50] *Id*. at 231.

injury[51] and 1 Commissioner found that imports were a substantial cause of threat of serious injury.[52]

18 These "affirmative" and "divided" determinations were also notified to the Committee on Safeguards on 26 October 2001 and this notification was circulated on 1 November 2001.[53]

3. ITC Remedy Investigation and Recommendation

19 Following its 22 October injury findings, the ITC proceeded with its remedy investigation. Prehearing briefs on remedy were filed by 29 October 2001 and hearings on remedy took place from 6 to 9 November 2001. Posthearing briefs were allowed from 13 to 15 November 2001 for the various steel products under investigation.

20 On 19 December 2001, the ITC forwarded its remedy recommendations, together with its injury determinations, in its Report to the U.S. President. For the eight products for which "affirmative" injury determinations had been made, the ITC recommended a 4-year program of tariffs and tariff-rate quotas:[54]

- an additional duty of 20% ad valorem, to be reduced to 17% the second year, 14% the third year and 11% the fourth year for (1) certain carbon and alloy flat (excluding slabs), (2) carbon and alloy hot-rolled bar, (3) carbon and alloy cold-finished bar and (4) stainless steel rod;

- an additional duty of 15% ad valorem, to be reduced to 12% the second year, 9% the third year and 6% the fourth year for (5) stainless steel bar;

- an additional duty of 13% ad valorem, to be reduced to 10% the second year, 7% the third year and 4% the fourth year for (6) carbon and alloy fittings, flanges and tool joints;

- an additional duty of 10% ad valorem, to be reduced to 8% the second year, 6% the third year and 4% the fourth year for (7) carbon and alloy rebar;

- a tariff-rate quota with an additional duty on imports in excess of year 2000 U.S. imports of 20% ad valorem, to be reduced to 17% the second

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[51] *Id*. at 301 (separate views on injury of Commissioner Bragg); at 336 and 340 (separate views of Commissioner Devaney on injury).

[52] *Id.* at 255 and 263 (separate views of Chairman Koplan on injury).

[53] Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports (doc. G/SG/N/8/USA/8, 1 November 2001) (**Exh. CC-5**).

[54] *ITC Report*, at 2-3 (**Exh. CC-6**). Note that these are the remedies "treated as the remedy finding of the Commission for purposes of Section 203 of the Trade Act," which means those remedies recommended by either a majority or plurality of the Commissioners. No such recommendations were provided in instances where the ITC's injury vote was divided, including for tin mill, stainless wire, stainless fittings and flanges, and stainless tool steel. *See also id*. at 19-22.

year, 14% the third year and 11% the fourth year for (8) carbon and alloy welded pipe; and

- a tariff-rate quota with an additional duty of 20% ad valorem on imports in excess of 7 million short tons, to be reduced to 17% for imports in excess of 7.5 million short tons the second year, 14% for imports in excess of 8 million short tons the second year and 11% for imports in excess of 8.5 million short tons the second year for (9) slabs.

In addition, the ITC recommended that the remedy on certain carbon and alloy flat products (including slabs) apply to Mexico but not to Canada; the remedy on carbon and alloy hot-rolled bar, cold-finished bar and stainless steel bar apply to Canada but not Mexico; the remedy on carbon and alloy rebar and stainless steel rod not apply to either Canada or Mexico; and the remedy on carbon and alloy fittings, flanges and tool joints apply to both Canada and Mexico. The ITC recommended that the remedy on carbon and alloy welded pipe should not apply to Mexico but was equally divided concerning Canada.[55]

21 The ITC further recommended that no remedy apply to Israel, Jordan, and beneficiaries of the Caribbean Basin Economic Recover Act and the Andean Trade Preference Act.[56]

22 The ITC finally recommended that the remedy on carbon and alloy welded pipe should not apply to certain large diameter products, as primary producers of these products did not object to such exclusion.[57]

23 Dissenting opinions on remedy from some Commissioners proposed higher additional duty rates (up to 40%)[58] or 3-year program of quotas, as well as other treatments of Canada and Mexico.[59]

4. Actions Taken by USTR

a. Supplementary information

24 Following the ITC Report, the United States submitted to the Committee on Safeguards a supplementary notification regarding the ITC determinations with respect to serious injury or threat thereof to the domestic industry producing certain steel products.[60] In this notification, the ITC recommendations were labelled as "proposed measures."

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55 *Id*. at 3.

56 *Id*.

57 *Id*. at 3, 378-379.

58 *Id*. at 3-4.

59 *Id*. at 5.

60 Notification under Article 12.1(b) of the *Agreement on Safeguards* on finding a serious injury or threat thereof caused by increased imports (doc. G/SG/N/8/USA/8/Suppl. 1, 7 Jan. 2002) (**Exh. CC-8**).

25 On 3 January 2002, the USTR requested additional information from the ITC on (1) unforeseen developments, (2) economic analysis of remedy options, and (3) injury determination for imports from all sources other than Canada and Mexico for the products for which the ITC recommended the application of the remedy to Canada and/or Mexico.

26 This request for additional information was notified to the Committee on Safeguards on 11 January 2002 and the notification was circulated on 15 January 2002.[61]

27 The ITC produced supplementary information on the economic analysis of remedy options on 9 January 2002[62] and on unforeseen developments and "affirmative" injury determinations for imports from all sources other than Canada and/or Mexico on 4 February 2002.[63]

28 On 14 March 2002, the United States notified the Committee on Safeguards that copies of the public versions of supplementary information provided by the ITC were available for review in the Secretariat of the WTO, this supplementary notification was circulated on 18 March 2002.[64]

b. Trade Policy Staff Committee Actions

29 In addition to the information requested of the ITC, the USTR conducted its own separate investigation through the multi-agency Trade Policy Staff Committee (TPSC). Indeed, on 26 October 2001, before the ITC finished its investigation, the TPSC requested public comments on the potential safeguard action on imports of certain steel products, including domestic producers' written proposals on adjustment actions, requests to exclude products, and what action (if any) the President should take in response to affirmative injury and remedy findings by the ITC.[65] Written comments in response to these submissions were also permitted. In addition, during January 2002, the TPSC held a series of meetings with various parties. The meetings were scheduled informally, via e-mail correspondence, and conducted informally. Unlike the ITC hearings, opposing parties were not present and no formal transcript was maintained. Rather, parties met individually with TPSC staff from as many as fifteen federal agencies to summarize their positions and answer questions.

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[61] Notification under Article 12.1(b) of the *Agreement on Safeguards* on finding a serious injury or threat thereof caused by increased imports (doc. G/SG/N/8/USA/8/Suppl. 2, 15 Jan. 2002) (**Exh. CC-9**).

[62] ITC supplementary information on economic analysis of remedy options on 9 January 2002 (**Exh. CC-10**).

[63] ITC supplementary information on unforeseen developments and "affirmative" injury determination for imports from all sources other than Canada and/or Mexico on 4 February 2002 (**Exh. CC-11**).

[64] Notification pursuant to Article 12.1(c) and Article 9, Footnote 2, of the *Agreement on Safeguards* on taking a decision to apply a safeguard measure (doc. G/SG/10/USA/6/Suppl. 2 and G/SG/11/USA/5/Suppl. 2, 18 Mar. 2002) (**Exh. CC-12**).

[65] *Trade Policy Staff Committee: Public Comments on Potential Action Under Section 203 of the Trade Act of 1974 With Regard to Imports of Certain Steel*, 66 Fed. Reg. 54312, 54323 (26 Oct. 2001) **(Exh. CC-59)**.

5. Presidential Proclamation

30 Under Proclamation 7529, bearing the title "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products" of 5 March 2002,[66] completed by a Memorandum for the Secretary of Treasury, the Secretary of Commerce, and the USTR, the U.S. President imposed definitive safeguard measures on imports of certain steel products.[67]

31 The United States notified these definitive safeguard measures and Proclamation 7529 to the Committee on Safeguards on 12 March 2002 and these notifications were circulated on 14 and 15 March 2002.[68]

32 The products concerned by these definitive safeguard measures are not only those for which the ITC reached "affirmative" determinations, but also two of the four products for which the ITC made "divided" determinations, specifically tin mill products and stainless wire.

33 Accordingly, on 26 March 2002, the United States made a supplemental notification to the Committee on Safeguards under Article 12.1 (b) of the *Agreement on Safeguards* on finding a serious injury or threat thereof caused by increased imports for carbon and alloy tin mill products and stainless steel wire. In the same notification, the United States provided supplemental information to be notified where a safeguard investigation is terminated with no safeguard measure imposed with respect to stainless steel tool steel and stainless steel flanges and fittings.[69]

a. Product-specific measures

34 Proclamation 7529 lists 11 distinct safeguard measures applicable to fifteen steel products. These are:

(a) The ITC product category Certain Flat Steel, which is comprised of slab,[70] plate,[71] hot-rolled steel,[72] cold-rolled steel,[73] and corrosion-resistant steel.[74] The measure applied to these products was divided between:

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[66] *Proclamation 7529, To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products*, 67 Fed. Reg. 10553 (7 Mar. 2002) (*hereinafter* "*Proclamation 7529*, 67 Fed. Reg. 10553 (7 Mar. 2002)") (**Exh. CC-13**).

[67] *Id. at* 10593 (**Exh. CC-13**).

[68] Notifications pursuant to Article 12.1(c) and Article 9, Footnote 2, of the *Agreement on Safeguards* on taking a decision to apply a safeguard measure (doc. G/SG/10/USA/6 and G/SG/11/USA/5, 14 Mar. 2002 and G/SG/10/USA/6/Suppl. 1 and G/SG/11/USA/5/Suppl. 1, 15 Mar. 2002) (**Exh. CC-14**). Two corrigenda were notified on 18 Mar. 2002 (doc. G/SG/N/10/USA/6/Corr.1 and G/SG/N/11/USA/5/Corr.1, 20 Mar. 2002 and G/SG/N/10/USA/6/Corr.2 and G/SG/N/11/USA/5/Corr.2, 25 Mar. 2002) (**Exh. CC-15**).

[69] Notification under Article 12.1(b) of the *Agreement on Safeguards* on finding a serious injury or threat thereof caused by increased imports and Information to be notified to the Committee where a safeguard investigation is terminated with no safeguard measure imposed (doc. G/SG/N/8/USA/8/Suppl. 3 and G/SG/N/9/USA/4/Suppl. 1, 28 Mar. 2002) (**Exh. CC-16**).

[70] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.72.30 through 9903.72.48 in the Annex to the Proclamation) (**Exh. CC-13**).

- a 30% tariff on imports plate, hot-rolled Steel, cold-rolled steel, and corrosion-resistant steel; and

- a tariff rate quota (TRQ) on imports of slab, with the in-quota volume set at 5.4 million short tons and the out-of-quota tariff at 30%.

(b) A tariff of 30% on imports of Hot-Rolled Bar;[75]

(c) A tariff of 30% on imports of Cold-Finished Bar;[76]

(d) A tariff of 15% on imports of Rebar;[77]

(e) A tariff of 15% on imports of Certain Tubular Products;[78]

(f) A tariff of 13% on imports of Carbon and Alloy Fittings and Flanges;[79]

(g) A tariff of 15% on imports of Stainless Steel Bar;[80]

(h) A tariff of 15% on imports of Stainless Steel Rod;[81]

(i) A tariff of 30% on imports of Tin Mill Products;[82] and

(continued)

[71] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.72.50 through 9903.72.60 in the Annex to the Proclamation) (**Exh. CC-13**).

[72] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.72.62 through 9903.72.77 in the Annex to the Proclamation) (**Exh. CC-13**).

[73] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.72.80 through 9903.72.98 in the Annex to the Proclamation) (**Exh. CC-13**).

[74] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.72.99 through 9903.73.14 in the Annex to the Proclamation) (**Exh. CC-13**).

[75] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.73.28 through 9903.73.38 in the Annex to the Proclamation) (**Exh. CC-13**).

[76] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.73.39 through 9903.73.44 in the Annex to the Proclamation) (**Exh. CC-13**).

[77] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.73.45 through 9903.73.50 in the Annex to the Proclamation) (**Exh. CC-13**).

[78] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.73.51 through 9903.73.62 in the Annex to the Proclamation) (**Exh. CC-13**).

[79] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.73.66 through 9903.73.72 in the Annex to the Proclamation) (**Exh. CC-13**).

[80] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.73.74 through 9903.73.81 in the Annex to the Proclamation) (**Exh. CC-13**).

[81] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.73.83 through 9903.73.89 in the Annex to the Proclamation) (**Exh. CC-13**).

(j) A tariff of 8% on imports of Stainless Steel Wire.[83]

35 The safeguard measures were effective from 20 March 2002 at 12:01 AM, EST.[84] Nonetheless, the President instructed the Secretary of Treasury to prescribe by regulation a date at which estimated duties shall be deposited.

36 Accordingly, on 20 March 2002, the U.S. Customs Services published a notice[85] indicating that the deposit of estimated duties on imports would be deferred until 19 April 2002. This notice, however, did not affect collection of duties with effect from the entry into force of Proclamation 7529. This notice was notified to the Committee on Safeguards on 26 March 2002 and was circulated on 27 March 2002.[86]

b. Country exclusions

37 On the basis of the Supplementary Report of the ITC of 4 February 2002, the U.S. President decided to exclude imports from Canada and Mexico from all the safeguard measures.[87] Imports from Israel and Jordan were also excluded[88] (but no basis was given for this decision).

38 Imports from developing Members of the WTO, whose individual share of total imports allegedly did not exceed 3% and whose collective share of total imports allegedly did not exceed 9%, are not subject to the safeguard measures either. While this exempted several countries from the measure, the following imports from developing Members were not excluded from the safeguard measures on the ground that they exceeded the percentage ceilings:[89]

- Slabs and certain flat steel from Brazil;
- Carbon and alloy fittings and flanges from India, Romania, and Thailand;

(continued)

[82] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.73.15 through 9903.73.27 in the Annex to the Proclamation) (**Exh. CC-13**).

[83] *Proclamation 7529*, 67 Fed. Reg. 10553, 10558-10592 (7 Mar. 2002) (As defined in the superior text to subheadings 9903.73.91 through 9903.73.96 in the Annex to the Proclamation) (**Exh. CC-13**).

[84] *Proclamation 7529*, 67 Fed. Reg. 10553, 10557 (7 Mar. 2002) at clause (8) (**Exh. CC-13**).

[85] Notice on payment of duties on certain steel products, 67 Fed. Reg. 12860 (20 March 2002).

[86] Notifications pursuant to Article 12.1(c) and Article 9, Footnote 2, of the Agreement on Safeguards on taking a decision to apply a safeguard measure (doc. G/SG/10/USA/6/Suppl. 3 and G/SG/11/USA/5/Suppl. 3, 27 Mar. 2002) (**Exh. CC-17**). This notification also comprised technical corrections to the Annex to Proclamation 7529.

[87] *Proclamation 7529*, 67 Fed. Reg. 10553, 10557 para 8 (7 Mar. 2002) (**Exh. CC-13**).

[88] *Id*. at para. 11.

[89] *Proclamation 7529*, 67 Fed. Reg. 10553, 10555 at para. 12 and Annex to the Proclamation, para. 11. (d) (7 Mar. 2002) (**Exh. CC-13**).

- Carbon and alloy rebar from Moldova, Turkey, and Venezuela; and
- Certain tubular products from Thailand.

B. WTO Procedures

1. Consultations under Article 12.3 of the Agreement on Safeguards

39 In its notification under Article 12.1(b) of the *Agreement on Safeguards* on finding serious injury or threat thereof caused by increased imports of 28 December 2001, the United States offered to consult with Members of the WTO having a substantial interest as exporters of one or more of the products covered by the investigation.

40 In Proclamation 7529, the U.S. President instructed the USTR to conduct, prior to the date of effective application of the definitive safeguard measures, consultations under Article 12.3 of the *Agreement on Safeguards* with any Member of the WTO having a substantial interest as an exporter of a products subject to the safeguard measures.[90]

41 On 6 March 2002, Japan requested consultations with the United States under Article 12.3 of the *Agreement on Safeguards*.[91] These consultations took place in Washington, D.C. on 14 March 2002.

2. Dispute settlement consultations

42 On 20 March 2002, the Government of Japan requested dispute settlement consultations under Article 4 of Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of GATT 1994 and Article 14 of the Agreement on Safeguards.[92]

43 Prior to this request by Japan, on 7 March 2002, the European Communities was the first of many Members to request dispute settlement consultations with the United States.[93] Joint consultations took place in Geneva on 11 and 12 April 2002 with the EC as well as Korea, China, Switzerland and Norway, which had also requested dispute settlement consultations against the U.S. safeguard measures.

44 These consultations addressed the issues raised in the above requests for the consultations. However, since these consultations failed to solve the dispute, on 21 May

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[90] *Proclamation 7529*, 67 Fed. Reg. 10553, 10596 (7 Mar. 2002) (**Exh. CC-13**).

[91] *United States – Imposition of a safeguard measure on imports of certain steel products*, Request for consultations from Japan (doc. G/SG/40/Suppl. 7, 8 March 2002) (**Exh. CC-23**).

[92] *United States – Definitive Safeguard Measures of Imports of Certain Steel Products*, Request for Consultations by Japan (doc. WT/DS249/1 and G/L/529 and G/SG/D21/1, 26 March 2002) (**Exh. CC-24**).

[93] *United States – Definitive Safeguard Measures of Imports of Certain Steel Products*, Request for Consultations by the European Communities (doc. WT/DS248/1 and G/L/527 and G/SG/D20/1, 13 Mar. 2002) (**Exh. CC-24**).

2002, Japan presented a request for the establishment of a Panel against the U.S. safeguard measures.[94]

45 This request appeared on the agenda of the special meeting of the Dispute Settlement Body of 3 June 2002. At this meeting of the Dispute Settlement Body, the United States opposed the establishment of the Panel. This request was considered again at the special meeting of the Dispute Settlement Body of 14 June 2002 and the Panel was then established.

3. Single Panel under Article 9.1 of the DSU

46 Following joint dispute settlement consultations, held in Geneva on 11-12 April 2002, the EC, requested the establishment of a panel on 7 May 2002. This panel was established at the special meeting of the Dispute Settlement Body of 3 June 2002 when it was requested for the second time. When the Panel was established upon request by Japan as well as Korea at the above-mentioned DSB meeting on 14 June 2002, the Panel was integrated as a single Panel under Article 9.1 of the DSU to consider the requests presented by the EC, Japan, and Korea.

47 The requests for the establishment of panels by China, Switzerland and Norway, which had requested their dispute settlement consultations with the United States respectively on 26 March, 3 and 4 April 2002, were accepted on 24 June 2002. Under Article 9.1 of the DSU, these requests were referred to the single Panel already established to consider the requests presented by the European Communities, Japan, and Korea.

48 New Zealand and Brazil also requested dispute settlement consultations with the United States respectively on 14 and 21 May 2002. These consultations took place in Geneva on 13 June 2002.

49 A procedural agreement was concluded on 27 June 2002 between the European Communities, Japan, Korea, China, Switzerland, Norway, and New Zealand on the one hand and the United States on the other hand. Under this procedural agreement, the United States accepted the shortening of the 60-day period for consultations under Article 4.7 of the DSU and the establishment of the panel pursuant to the first request presented by New Zealand, as well as the establishment of a single panel under Article 9.1 of the DSU for all the complainants involved. In return, the complainants accepted not to request the Director General to appoint the panelists before 15 July 2002 and agree on longer time limits for submissions.

50 New Zealand requested the establishment of a panel on 28 June 2002. The United States accepted this first panel request at the special meeting of the Dispute Settlement Body of 8 July 2002. Under Article 9.1 of the DSU, this request was also referred to the single Panel already established to consider the requests presented by the European Communities, Japan, Korea, China, Switzerland, and Norway.

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[94] *United States – Definitive Safeguard Measures of Imports of Certain Steel Products*, Request for the Establishment of a Panel by Japan (doc. WT/DS249/6, 24 May 2002) (**Exh. CC-25**).

51 On 18 July 2002, Brazil presented its request for establishment of a panel. On the same day a procedural agreement was concluded between Brazil and the United States, under which the United States accepted the shortening of the 60-day period for consultations and the establishment of the panel pursuant to Brazil's request. Both Brazil and the United States also accepted that, in accordance with Article 9.1 of the DSU, their dispute be referred to the panel already established to consider the requests of the European Communities, Japan, Korea, China, Switzerland, Norway, and New Zealand. This was accepted at 29 July 2002 DSB meeting, and the dispute was referred to the panel already established.

52 The complainants requested the Director-General to determine the composition of this single Panel with reference to Article 8, paragraph 7 and 10 of the DSU on 15 July 2002. On 25 July 2002, the Director-General appointed as Chairman of the Panel Ambassador Stefan Jóhannesson (Iceland) and as members of the Panel Mr. Mohan Kumar (India) and Ms. Margaret Liang (Singapore).

C. Overview of the United States Steel Industry

53 While the ITC report in this case provides some background on the make-up of the steel industry in the United States, it fails to present a full picture of the industry. For the Panel to place this dispute in proper context, we set forth below an overview of the critical conditions of competition facing the U.S. steel industry.

1. Characteristics of the United States steel industry

54 The United States steel industry produced 112 million tons of raw steel in 2000, the industry's highest level of output over the past 10 years and a 27 percent increase over 1991. A 9 percent dip in capacity between 1991 and 1994 was completely erased by over 20 million tons of new capacity brought on line between 1994 and 2000, representing an increase of over 18 percent.[95] This increase made the United States the third-largest steel-producing nation in the world.[96]

55 The expansion of the U.S. steel industry's capacity during the 1990s is explained by the industry's concomitant fragmentation between two competing segments: the "integrated" mills and the "minimills." The differences between these two segments are best defined according to their production processes and inputs. Integrated producers – of which there were 13 in 2000 -- rely on an older, more capital-intensive production process that includes the smelting of iron ore in a blast furnace to produce molten iron. The molten iron is subsequently poured into a basic oxygen furnace. The hot metal is processed into steel when oxygen is blown into the metal bath. Minimill producers – of which there were 65 in 2000 -- rely on newer technology, producing molten steel by melting steel scrap in an electric arc furnace ("EAF"), thereby missing the initial smelting stage.[97]

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[95] *ITC Report* at OVERVIEW 25.

[96] *Id*. at OVERVIEW 25

[97] *Id*. at OVERVIEW 7-8.

56 Initially, integrated mills benefited from the fact that technology constrained minimills to the low-quality product segment of the market. The first minimills began producing the least sophisticated kinds of long products (such as concrete reinforcing bars) in the 1960s. In the 1970s, minimills diversified into more sophisticated long products (wire rods and structural shapes) and raw steel production from minimills increased.

57 Steady expansion in U.S. minimill capacity left the minimills in complete control of domestic long product production. With long products effectively eliminated from the integrated industry product line, integrated producers focused on the only remaining product line where they enjoyed any advantage over their minimill competitors -- flat-rolled steel. The flat-rolled advantage, however, was short lived. By the late 1980s EAF technology coupled with thin-slab casting provided minimills an entrée into the integrated segment's last mainstay. As the ITC found, "This new technology was demonstrated in 1989 and was quickly adopted, particularly in the United States."[98]

58 With the adoption of thin-slab casting, U.S. minimills soon produced hot-rolled steel flat products. Production subsequently extended to higher value-added products including cold-rolled and corrosion-resistant sheet, all at the expense of integrated producers. In fact, the ITC's period of investigation captured the most prolific period of minimill expansion. To illustrate, Nucor installed the first thin-slab minimill capable of producing flat products in 1989, with an initial capacity of just 1 million tons.[99] Other mills would follow, with minimill share of U.S. flat product production increasing from just 10 percent in 1995 to 26 percent by 2000.[100]

59 Minimills were therefore taking a greater share of country's raw steel production, as well as entering into the integrated producers' flat-rolled mainstay, as the two figures below depict:

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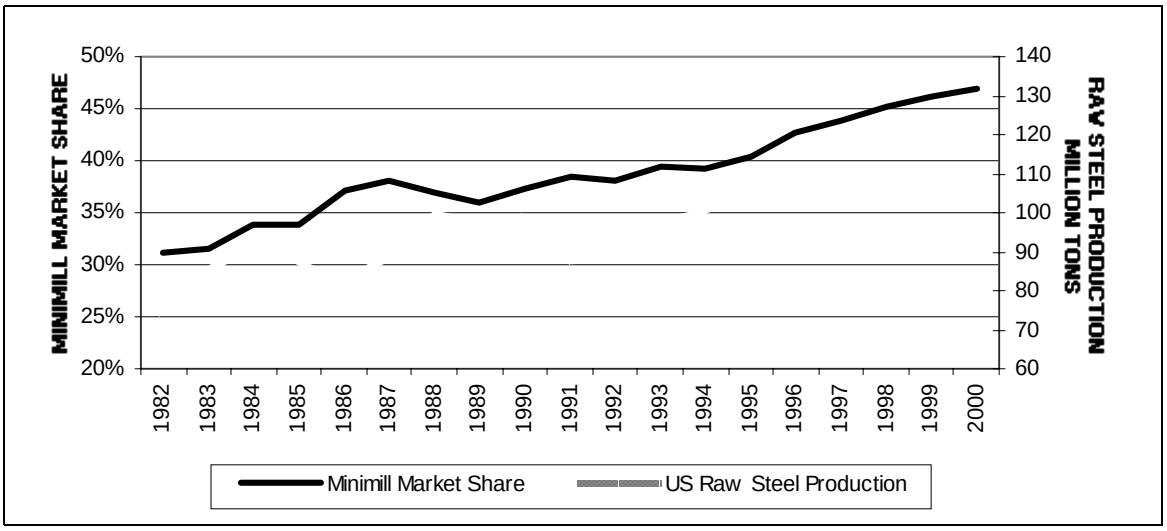
[98] *Id*. at OVERVIEW 20.

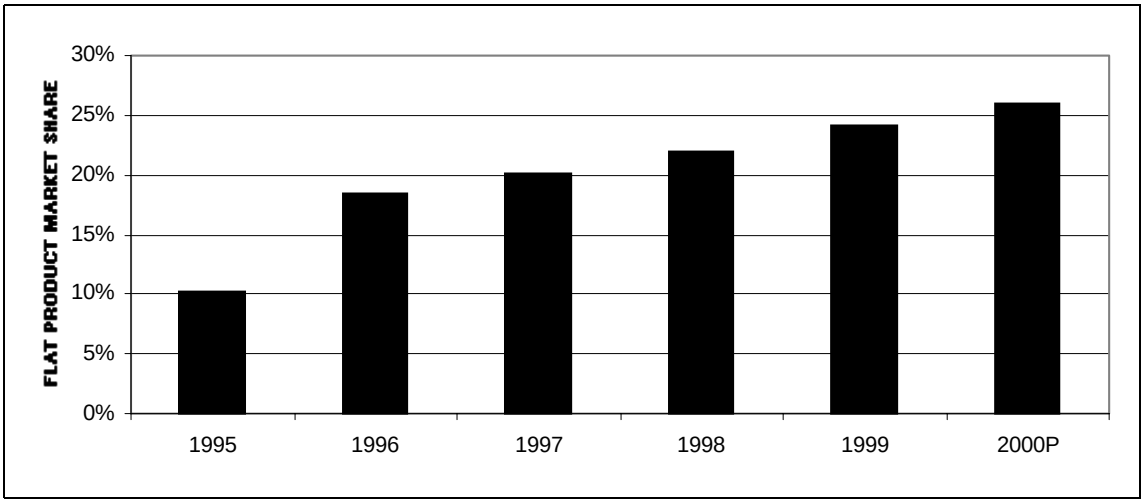
[99] *See* Charles Yost, "Thin-Slab Casting / Flat-rolling: New Technology To Benefit U.S. Steel Industry," Industry Trade and Technology Review, ITC Pub. 3004 (Oct. 1996) at 27. This ITC report provided a detailed analysis of on thin-slab casting in 1996 covering Nucor's commercial initiation of the technology in 1990, adoption by others, and the competitive effects of thin-slab technology (**Exh. CC-66**).

[100] Donald F. Barnett, "Double Ought-Naught," Presentation at World Steel Dynamics / American Metal Market Steel Survival Strategies XV, June 19-21, 2000 at Table 3, *cited in* Joint Prehearing Brief of Respondents: Product Group G01, Slab, Sept. 11, 2001 at 18, Figure 1. **(Exh. CC-51).**

U.S. Minimill Share of U.S. Raw Steel Production[101]



U.S. Minimill Share of U.S. Flat Product Production[102]



60 According to the ITC, this minimill expansion was the result of "heavy investment in new, greenfield electric arc furnace plants and in capacity increases in existing plants."[103] The ITC record reveals no comparable investment made by integrated mills. Rather, the record reflects an integrated industry mainly shutting down raw steel capacity in the face of

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[101] *See ITC Report* at OVERVIEW 25-26, Figure OVERVIEW 9, *citing* AISI, "Annual Statistical Report," 2000. The ITC chart listed production between 1991 and 2000. Additional data provided from 1982 and 1990 eds. of the "Annual Statistical Report," provided in this chart. (**Exh. CC- 62**).

[102] *Id.*

[103] *Id.* at OVERVIEW-20.

rising maintenance and environmental costs, and minimill competition, while squeezing as much production as possible out of fewer and fewer steel facilities.[104]

61 Indeed, as noted by the ITC, minimills utilizing thin-slab technology account for most of the increase in U.S. industry capacity during the 1990s.[105] Though the ITC did not disclose any breakouts of questionnaire data, based on the foregoing statement it is reasonable to assume that minimills reported the bulk of the 8 million tons of net additional slab capacity, 3 million tons of net additional plate capacity, over 9 million tons of net additional hot-rolled capacity, and over 5 million tons of net additional cold-rolled capacity brought on line by the U.S. industry between 1996 and 2000.[106] This assumption is supported by publicly available information.[107]

2. Cost structures drive investment in the minimill segment and drive out investment in the integrated segment

62 Respondent submissions before the ITC in this case painstakingly documented and established the reasons for this fundamental shift and expansion in minimill production. Though they were largely ignored by the ITC in its Report, the ITC was well aware of this commercial reality. In an article covering the proliferation of thin-slab minimills, the ITC reported as early as 1996 findings by industry experts that between 3 and 6 million tons of integrated capacity would have to close because of the escalating costs of running such plants.[108] Simply put, minimills enjoyed and continue to enjoy substantial cost advantages over integrated mills for myriad reasons.[109] Looking at the flat-rolled segment, where significant competition still exists between the two segments, minimills hold as much as a $32 per ton cost advantage over integrated mills through the slab stage of production. Raw material costs were also lower for minimills over the period of investigation, with pricing for scrap and virgin iron inputs such as pig iron declining as much as 50 percent.[110]

63 Labor costs and productivity were superior among minimills, with leading U.S. minimills needing as little as 0.33 man hours to produce a ton of steel compared to 4.1 man hours or even more at some integrated mills. Many U.S. integrated producers were also found to be operating small, inefficient blast furnaces incapable of achieving economies of

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[104] *See, e.g.*, Joint Prehearing Brief of Respondents: Product Group, G01, Slab Steel, (11 Sept. 2001) at 31-41, 60-65 and Exhibits 3, 5, and 6. (**Exh. CC-51**).

[105] *ITC Report* at OVERVIEW-20 (**Exh. CC-6**).

[106] *Id*. at FLAT at-C-2, 3, 4, and 5.

[107] *See, e.g.*, Donald F. Barnett, "Survive or Prosper: Steel in 2002,"" Presentation at World Steel Dynamics/ American Metal Market Steel Survival Strategies XVII, June 17-19, 2002 (excerpted Table 5) (**Exh. CC-67**).

[108] *See* Charles Yost, "Thin-Slab Casting / Flat-rolling: New Technology To Benefit U.S. Steel Industry," Industry Trade and Technology Review, ITC Pub. 3004 (October 1996) (excerpted p. 27, 30-31.) (**Exh. CC-66**).

[109] Joint Prehearing Brief of Respondents: Product Group, G01, Slab Steel, (11 Sept. 2001) at 31-41. (**Exh. CC-51**). Indeed, it was the testimony of executives from Nucor Steel, the largest minimill flat-rolled producer, that it was their duty to shareholders to exploit this advantage. *ITC Injury Hearing Transcript* at 1014 (20 Sept. 2001). (**Exh. CC-58).**

[110] *See* Joint Prehearing Brief of Respondents: Product Group G01, Slab, 11 Sept. 2001 at 31-38. (**Exh. CC-51).**

scale in the current competitive environment. Maintenance and repair costs for integrated producers dwarf those of minimills. Finally, minimills enjoyed much lower market entry costs, equating to only $200 per annual ton of greenfield production capacity compared to $1,000 per annual ton for integrated mills according to the ITC's own findings.[111]

3. Restructuring in the integrated segment: successes and impediments in the quest to compete more effectively with minimills

64 Not all integrated mills resigned themselves to these severe competitive handicaps. At the opening of the ITC's period of investigation, some integrated mills had already made or were in the process of making tough restructuring decisions to compete more effectively. This led to the adoption of new business models to reduce production costs and/or vacate markets dominated by minimill producers. Two successful models emerged within the industry: one focused on jettisoning all raw steel capacity in favor of an exclusive slab purchasing strategy (pioneered by California Steel Industries), the other focused on reducing raw steel capacity to baseline levels, sourcing semifinished steel to meet peak demand for finished steel, and emphasizing higher value added products in markets not yet penetrated by the minimills (epitomized by AK Steel).

65 Though acknowledging these two restructuring approaches, [112] the ITC failed to address the connection between these models and the general desire by companies pursing them either to compete more effectively against minimills or to avoid them altogether. AK Steel, the most profitable U.S. integrated steel producer, is a case on point. As one AK Steel executive told the ITC during its hearings on injury, AK Steel's motivations were simple -- "we have been watching minimills pop up like dandelions in the U.S. [and] we saw an opportunity to avoid the train wreck."[113]

66 Other restructuring strategies are being considered by the integrated industry, such as a transition to EAF production. This is not the solution for all mills. EAF technology is still constrained by quality issues, and most minimills remain unable to compete at the highest end of the value chain where some integrated producers are at least partly positioned. Still other integrated mills may be foreclosed from pursuing this option after waiting too long to finance such an endeavor with debts steadily mounting over the period.

67 Ultimately, for a number of integrated mills, the only real long-term solution is consolidation leading to a rationalization of capacity. Industry executives repeatedly cited the need for such consolidation during the remedy phase of the ITC's investigation. Yet this approach also presents problems for the industry. High legacy costs, particularly post-employment health care and insurance benefits, discourage potential merger and acquisition

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111 *Id.*

112 *See e.g., ITC Report* at 365 (views of the Commission on remedy) and 456 (separate views of Commissioner Okun)**(Exh. CC-6).** For a detailed discussion of integrated mill restructuring over the past decade and the reasons behind it, *see generally* Joint Prehearing Brief of Respondents: Product Group G01, Slab, Sept. 11, 2001 at 60-65 and Exhibits 3, 5, and 6 (**Exh. CC-51**)**.**

113 *ITC Injury Hearing Transcript* at 593 (19 Sept. 2001) (**Exh. CC-58**).

moves. The ITC itself noted the huge liabilities and uncertainty involved.[114] No rational company would want to merge with or acquire an integrated mill with such liabilities, if doing so meant assuming these liabilities. Bethlehem Steel President Robert Miller explained the situation to the ITC in stark terms: "In the past couple of years, we have had one single overarching problem, which is our legacy costs. Everyone that has looked at marrying up with Bethlehem has gone away scared to death that the legacy costs will kill us."[115] Legacy costs present a high exit barrier for inefficient steel capacity in the United States, forcing this capacity to linger in the market to the detriment of more competitive producers.

4. Continuing minimill capacity expansion forces a final shakeout in the U.S. industry

68 Entering the ITC's period of investigation in 1996, the U.S. steel industry was facing an inevitable collision between new minimill capacity and older, less efficient integrated capacity. Confronted with competition from expanding low-cost minimills, the integrated mills continued a long standing practice of sacrificing profitability for size and tonnage.[116] The result was a substantial net addition to overall capacity well in excess of the market's ability to absorb the surplus.

Extent of Excess Capacity[117]

Product	Change in 1996-2000 Domestic Capacity	Change in 1996-2000 Apparent Consumption	Additional Capacity in Excess of Growth in Demand
Flat-Slabs	8,141,799	3,075,527	5,066,272
Flat-Plate	3,160,108	-699,713	3,859,821
Flat-Hot-rolled	9,759,734	6,591,707	3,168,027
Flat-Cold-rolled	5,626,340	3,584,555	2,041,785
Flat-Corrosion-resistant	5,549,240	3,229,450	2,319,790

69 Even the ITC acknowledged a "significant incentive to maximize the use of steel making assets, which can affect producer's pricing behavior."[118] The data cited above

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[114] *ITC Report* at Overview 34-35 (**Exh. CC-6**).

[115] *ITC Remedy Hearing Transcript* at 223 (6 Nov. 2001) (**Exh. CC-63**).

[116] Japanese Respondents' Prehearing Remedy Brief; General Issues (Flat-Rolled Products), October 29, 2001 at 16-19 (citing various industry experts on the capacity phenomenon) (**Exh. CC-56**).

[117] *ITC Report* at FLAT-C-3-7; Table FLAT 12-15, 17-18 and FLAT-C-2-5, C-7-8 (**Exh. CC-6**).

[118] *Id.* at 63.

certainly reflects that "significant incentive." Yet the problems inherent in the capacity and demand trends within the industry over the period of investigation did not immediately arise, despite rising import levels. Surging U.S. consumption, stronger prices and high capacity utilization from 1996 through the first half of 1998 provided a short term buffer. As demand flattened in late 1998 and 1999, however, domestic capacity continued to increase and the disparities between new minimill and old integrated capacity became increasingly apparent and market disruptive. The outcome was predictable. Marginal integrated firms attempting to maintain inefficient capacity fought more aggressively and desperately for sales, cutting prices to maintain volume and generate cash flow.

70 At the end of the period of investigation, the general pattern seen for flat-rolled products included the maintenance of inefficient capacity and production, a collapse in prices, and deteriorating operations -- all as imports were actually leaving the market in the face of softening demand. U.S. antidumping and countervailing duty actions contributed to the retreat, with a number of significant actions initiated as well as orders instituted during the period.

U.S. Antidumping Actions

PRODUCT	ORDER DATE
Carbon Steel Plate From Russia, South Africa, China, and Ukraine	October 1997 (including some undertakings)
Hot-rolled Steel Flat Products from Japan, Brazil, and Russia	July 1999 (including some undertakings)
Certain Cold-rolled Steel Products From Argentina, Brazil, China, Indonesia, Japan, Russia, Slovakia, South Africa, Taiwan, Thailand, Turkey, and Venezuela	Negative Injury, March 2000 and May 2000.
Carbon Steel Plate From France, India, Indonesia, Italy, Japan, and Korea	February 2000
Hot-rolled Carbon Steel Flat Products From Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine.	September 2001 and November 2001

71 It was not until after imports' retreat from the market that the industry's troubles began. With weakening demand beginning in the second half of 2000, several companies entered bankruptcy. Some 11 million tons of additional flat-rolled steel capacity entered Chapter 11 with the bankruptcies of Wheeling Pittsburgh Steel and LTV Steel.[119] Freed from their debt burdens, these mills plunged deeper into the pricing battle with minimills in the pursuit of cash flow, as reflected in the aggregate pricing data for the first two quarters of

[119] *Id.* at OVERVIEW-40.

2001.[120] Again, with no decline in domestic capacity in sight, domestic prices undersold imports even as imports receded.

72 A final respite for the domestic industry would not occur until the major impediment retarding the industry's recovery was removed -- inefficient domestic raw steel capacity. In December 2001 LTV steel finally ceased all operations after producing for a full year under Chapter 11. With the closure of LTV's 8 million tons of capacity, the market immediately responded. Prices for cold-rolled steel, for example, improved from $310 per ton in January to $320 in February and $370 in March.[121] Industry executives admitted the beneficial effect of the capacity reduction. For example, U.S. Steel Chairman Tom Usher confirmed that the loss of LTV's capacity was a significant reason for the improvement in domestic prices beginning in January 2002.[122]

73 The U.S. industry is an industry in transition. One part of the industry, the low cost minimills, is rapidly increasing capacity and capturing market share. In the face of this competition, some integrated mills have successfully adopted models which allow them to remain competitive, including concentrating resources in higher value-added products which minimills cannot produce. Other integrated mills, however, have maintained capacity and attempted to compete with the minimills, often because of the high legacy costs associated with shutting down facilities. This lingering capacity has fueled intra-industry competition and put downward pressure on prices. Despite a decline in flat-rolled import volume of 11.5 million tons between 1998 and 2001, prices remained depressed.

74 Thus, the condition of the U.S. industry depends very much on these internal dynamics. Regardless of imports, the domestic steel industry faces these important internal conditions of competition. As we discuss in detail below, in this case the ITC failed to acknowledge the significance of these internal factors, and improperly blamed imports.

III. CLAIMS

A. Introduction

75 In this section, Japan details the various claims it has chosen to pursue against the U.S. steel safeguard measures. In the course of considering these claims, we recall first the proper method of analysis that the Panel should follow. The Agreement on Safeguards is silent as to the appropriate standard of review. However, the standard set forth in Article 11 of the Dispute Settlement Understanding (DSU) always applies. Article 11 provides that "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."

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[120] *Id.* at FLAT-64-68.

[121] Purchasing Magazine, "Transaction Pricing Service," First Quarter 2002 (Cold-Rolled Steel) (**Exh. CC-65**).

[122] *See* Jennifer Scott Cimperman, "Rivals See Steel Sector Better Off Minus LTV," The Plain Dealer (15 Feb. 2002) (**Exh. CC-64**).

76 In a safeguard case, although panels are not expected to carry out a *de novo* review of the evidence or to substitute their own conclusions for those of the competent authorities, the Appellate Body has emphasized that panels may not simply *accept* the conclusions of that authority:

> [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. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[123]

77 Japan is confident that this Panel will conduct all the appropriate enquiries and evaluations to discharge its duty of making an "objective assessment of the facts" within the meaning of Article 11 of the DSU. Upon doing so, the Panel will discover myriad violations of obligations covered by the Agreement on Safeguards and GATT 1994.

B. The ITC's "Like Product" Analysis For Flat Products Was Inconsistent With Articles 2.1 and 4.1(c) of the Agreement on Safeguards and With Articles XIX:1 and X:3 of GATT 1994

78 The ITC in this case, with no viable explanation, aborted its long-standing practice for defining flat-rolled steel "like products." It did not identify plate, hot-rolled, cold-rolled, and corrosion-resistant finished steels as separate like products, as it has consistently done in other recent trade remedy cases covering those products.[124] Rather, despite the

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[123] Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia ("U.S. – Lamb Meat"),* WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 106. This was most recently confirmed in the Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan ("United States – Cotton Yarn"),* WT/DS192/AB/R, adopted 7 Nov. 2001, paras. 72 to 74.

[124] *See, e.g.*, *Hot-Rolled Steel Products from Argentina and South Africa*, Inv. Nos. 701-TA-404 and 731-TA-898 and 905 (Final) ITC Pub. 3446, (Aug. 2001)(*hereinafter "ITC-Hot-Rolled (Final)* ITC Pub. 3446 (Aug. 2001)") (**Exh. CC-30**)*; Hot-Rolled Steel Products from China, India, Indonesia, Kazakhstan, The Netherlands, Romania, South Africa, Taiwan, Thailand and Ukraine*, Inv. Nos. 701-TA-405-408 and 731-TA-899-904 and 906-908) (Final) ITC Pub. 3468, (Nov. 2001) (*hereinafter "ITC-Hot-Rolled (Final)* ITC Pub. 3468 (Nov. 2001)") (**Exh. CC-31**); *Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan and the United Kingdom* , Inv. Nos. 701-TA-319-354 (Preliminary), and Inv. Nos. 731-TA-573-620 (Preliminary), ITC Pub. 2549 (Aug. 1992) (*hereinafter "ITC Flat-Rolled (Preliminary)* ITC Pub. 2549 (Aug. 1992)") (**Exh. CC-32**); *Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan and the United Kingdom* Inv. Nos. 701-TA-319-332, 334, 336-342, 344, 347-353 and 731-TA-573-579, 581-592, 594-597, 599-609 and 612-619 (Final) ITC Pub. 2664 (Aug. 1993) (*hereinafter "ITC Flat-rolled (Final)* ITC Pub. 2664 (Aug. 1993)") (**Exh. CC-33**); *Certain Cold-Rolled Steel Products from Argentina, Brazil, Japan, Russia, South Africa and Thailand,*

acknowledged differences in products' physical properties, end-uses, customs treatment, and even production processes, the ITC chose to define a single "flat-rolled" steel industry by conjoining the products into a single like product category. To make matters worse, it went further by adding to the category semi-finished slab products from which the finished products are made.[125] These decisions, in turn, had the obvious effect of skewing the increased imports, serious injury, and causation analyses for flat-rolled products.

79 The "like or directly competitive" relationship that must exist between the imported product and the product produced by the domestic industry, as required by the Agreement on Safeguards and Article XIX:1 of the GATT 1994, should be based on the existence of competition between the imported and domestic products to justify imposition of a safeguard measure. This requirement exists regardless of whether domestic products are deemed "like" or "directly competitive" with the imported product. In the case before us, the USG did not ground its determinations on the imports' competitive relationship with "directly competitive" products, but rather on the imported products' "likeness" with domestic products -- a more restrictive concept. Either way, however, competition needs to exist.

80 In this case, the ITC completely ignored this most basic principle. The choice of an overbroad flat-rolled product category -- in respect of both imports and the domestic industry -- made the ITC's analysis meaningless because it masked the true competitive dynamics in the market. Assume, for instance, that imports of semi-finished slab sharply increase, and sales of domestically produced corrosion-resistant steel simultaneously decline. This import increase cannot "cause … injury to domestic producers … of" corrosion-resistant steel because there would be no competitive relationship between these products in light of their wide differences in product properties and end-uses.

81 More generally, no causal relationship can be found between an increase in imports and a sales decline in domestic products if these products do not compete for similar end-uses. Assume further that sales of domestically produced semi-finished slab decline during the same period, and that sales of all (other) flat-rolled steel products, domestic or foreign, remain unchanged. With all flat-rolled steel products plus semi-finished slab chosen to define subject imports and their "like products" for the domestic industry, some causal link may be found between the import increase in a certain part of the subject imports (*i.e.*, semi-finished slab), and a decrease in sales in that part of the domestically produced "like products" (again, *i.e.*, semi-finished slab). However, this finding cannot justify the imposition of safeguard measures on imports of semi-finished slab plus all flat-rolled steel products. While safeguard measures might be justified with respect to imports of semi-finished slab products, domestic producers of all flat-rolled steel products would enjoy protection from import competition without justification.

82 But the problem with this case is not only that the ITC's flat-rolled like product definition causes non-sensical results; it is also clearly inconsistent with U.S. obligations under the WTO Agreement. Once the terms of the Agreement are analyzed in context and in

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(continued)

Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-834, 836, and 838 (Final) ITC Pub. 3283, (Mar. 2000*)* (*hereinafter "ITC-Cold-Rolled (Final)* ITC Pub. 3283 (Mar. 2000)") (**Exh. CC-34**).

[125] *ITC Report* at 36 (Dec. 2001) (**Exh. CC-6**).

light of their object and purpose, and in the light of Appellate Body jurisprudence, it becomes clear that the United States has acted inconsistently with Article XIX:1 of GATT 1994 and Articles 2.1 and 4.1(c) of the Agreement on Safeguards. The ITC's decision does not account for the need to define products strictly enough to make the required analysis meaningful. It focuses on the existence of vertically integrated producers, rather than on the distinct physical properties, end-uses, and tariff classifications of subject imports and domestic products. The ITC's flat-rolled steel like product definition -- and its concomitantly defined flat-rolled steel domestic industry -- is therefore inconsistent with Article XIX:1 of GATT 1994 and Articles 2.1 and 4.2 of the Agreement on Safeguards. Furthermore, the United States actions both in previous trade remedy cases -- where the various flat-rolled products have been deemed separate, individual like products -- and with respect to other product groupings in this same case also lead to a violation of Article X:3(a) of GATT 1994.

1. Articles 2.1 and 4.1(c) of the Agreement on Safeguards and GATT Article XIX:1 require analysis based on a precisely defined "domestic industry that produces like or directly competitive products" in relation to subject imports

a. Guidelines for interpretation of treaty text

83 Before addressing what the text of the WTO Agreement specifically says, it is important to recall the manner in which any treaty text must be interpreted. Article 31 of the Vienna Convention states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Citing the Vienna Convention, the Appellate Body has held that the meaning of the term "like product" in any WTO agreement should be interpreted "in light of the context, and of the object and purpose of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears."[126]

84 The words "like or directly competitive" are not explicitly defined in either GATT 1994 or the Agreement on Safeguards. However, careful review of the text and context of the language, and the object and purpose of the Agreements, combined with a review of the Appellate Body's jurisprudence on the subject, guides us to interpret the term in a strict manner.

b. The text of the Agreement on Safeguards, as interpreted by the Appellate Body, contemplates analyses based on specific products

85 Article XIX:1(a) of GATT 1994 provides, in relevant part, that a safeguard measure is permissible:

> "If … any product is being imported … in such increased quantities and under such conditions as to cause … serious

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[126] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, ("EC – Asbestos")* WT/DS135/AB/R, adopted 13 Dec. 2002 at para 88, *citing* U.N.T.S. 331, 8 International Legal Materials 679.

> injury to domestic producers … of like or directly competitive products."

The Agreement on Safeguards was agreed to "establish rules for the application of safeguard measures … provided for in Article XIX:1 of the GATT 1994."

86 The text of Articles 2.1 and 4.1(c) of the Agreement on Safeguards carries out the intent of Article XIX:1, requiring authorities to focus on strictly constructed "like or directly competitive" products for defining the domestic industry in relation to imports subject to the investigation. Article 2.1 specifically provides that a Member may apply a safeguard measure only if the Member has determined that imports of "a product" have increased so as to "cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."

> 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 product.* (emphasis added)

Article 4.1(c) in turn defines the domestic industry to be analyzed under the Agreement on Safeguards as "the producers as a whole of the *like or directly competitive* products operating within the territory of a Member…."

> In determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of *the like or directly competitive product* operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products. (emphasis added)

87 Although "like or directly competitive" is not itself defined in the Agreement, the Appellate Body has adopted a strict approach to the treaty text with regard to the proper scope of the domestic industry, focusing on the scope of "like or directly competitive products" in relation to imports under investigation. In *U.S. – Lamb Meat*, the Appellate Body emphasized that "a safeguard measure is imposed on a specific '*product*', namely the imported product."[127] On the basis of the terms "a product" and "such product" in Article 2.1 of the *Agreement on Safeguards*, the Appellate Body clarified that the concept of a "specific product" is important to ensure that a safeguard measure is only imposed:

> if that specific product ("such *product*") is having the stated effects upon, the "domestic industry that produces like or directly competitive products." (emphasis added) The

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[127] *U.S. – Lamb Meat*, para. 86.

> conditions in Article 2.1, therefore, relate in several important respects to *specific products*. In particular, according to Article 2.1, the legal basis for imposing a safeguard measure exists *only* when imports of a specific product have prejudicial effects on domestic producers of products that are "like or directly competitive" with that products. In our view, it would be a clear departure from the text of Article 2.1 if a safeguard measure could be imposed because of the prejudicial effects that an imported product has on domestic producers of products that are *not* "like or directly competitive products" in relation to the imported product.[128]

88 It is critical, therefore, not to define the products concerned too broadly. To do so risks potential affirmative findings of "prejudicial effects," that is, injurious effects, which such a definition would permit with regard to the domestic industry producing products that are not like or directly competitive with the imported products. As the Appellate Body emphasized, "the first step in determining the scope of the domestic industry is the identification of the products which are 'like or directly competitive' with the imported product," and thus, the scope of "like or directly competitive products."[129] In doing so, the Appellate Body also made clear that "the focus must, therefore, 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.[130] Consistent with the analysis and findings of the Appellate Body that imported products are "a product," *i.e.*, a "specific product," and domestic products are "like or directly competitive" with them, both imports and domestic products must be within appropriate limits of products which are in competition with each other.

c. The Appellate Body's interpretation of the term "like product" alone, in other contexts, confirms a restrictive approach

89 Further, the Appellate Body has also made clear (albeit in other contexts) that if an industry is defined by the "like" products it produces, it must by definition be more strictly drawn than if that industry were defined by the broader "directly competitive" products. In *Lamb Meat*, the Appellate Body restricted its analysis to "like" products because the ITC in that case had not utilized the "directly competitive" language: "The United States has not argued, before the Panel or before us, that *live lambs* are directly competitive with lamb *meat*, and that issue as we stated earlier, does not form a part of this appeal."[131] This distinction is important because the Appellate Body defines "like" more narrowly than "directly competitive." In *United States – Cotton Yarn*, where the Appellate Body considered similar language in the Agreement on Textiles and Clothing, it stated -- citing its analysis in *Korea – Alcoholic Beverages* -- that:

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[128] *Id.* para. 86 (emphasis in original).

[129] *Id.* para. 87.

[130] *Id.* para. 94 (emphasis in original).

[131] *Id.* para. 88 n.50.

> "Like" products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all "directly competitive or substitutable" products are "like."[132]

The Appellate Body has also specified, in the context of Article III:2 of GATT 1994, that where "like" products are specifically distinguished from "directly competitive" products, then the notion of "like" products "must be construed narrowly."[133] Article III:2 provides:

> The products of the territory of any Member imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no Member shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

Further, the interpretative note to the second sentence of Article III:2 provides:

> "A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed."

Thus, the first sentence of Article III:2 addresses discriminatory treatment between imports and domestic "like products," while the second sentence addresses discriminatory treatment between imports and domestic "directly competitive or substitutable products." The Appellate Body therefore found "like product" to be a more restrictive term, consistent with the finding in *Cotton Yarns*.

90 The term "a directly competitive or substitutable product" is quite similar to the term "directly competitive products" used in GATT Article XIX:1:1(a) and Articles 2.1 and 4.1(c) of the Agreement on Safeguards. Similar to the latter provisions, GATT Article III:2 juxtaposes "like products" against "directly competitive or substitutable [products]." This

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[132] *U.S. – Cotton Yarn*, para. 91.

[133] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, ("*Japan – Alcoholic Beverages*") WT/DS8/AB/R, 4 Oct. 1996, at 19. The Appellate Body made clear in this dispute that one agreement may provide a relevant context for interpreting the term "like product" in a different agreement. It compared the "like product" concept to an accordion that "stretches and squeezes in different places as different provisions of the WTO Agreement are applied," depending on "the particular provision in which the term 'like' is encountered" and "the context and circumstances" of the case in which it applies. *Id.* at 22. It also found that "the meaning attributed to the term 'like products' in other provisions of the GATT 1994, or in other covered agreements, may be relevant context" for interpreting the term "like product" in a particular provision. *Id.* at 22. Examination of these critical terms under other agreements is therefore useful for determining how they should be interpreted under the Agreement on Safeguards.

structural similarity forcefully suggests that the jurisprudence on the interpretation of the term "like products" under Article III:2, first sentence, is highly relevant context for the interpretation of the same term "like products" under GATT Article XIX:1 and Articles 2.1 and 4.1(c) of the Agreement on Safeguards.

91 Hence, in other WTO agreements, like the Agreement on Safeguards, where "like" is juxtaposed against "directly competitive," the notion of a "like" product is by definition more restrictive than "directly competitive" and, also, is in general to be narrowly defined.

92 As the Panel in *Lamb Meat* found, there is no reason to construe the words "like product" in the Agreement on Safeguards any differently from their definition in the Agreements on Anti-Dumping or Subsidies and Countervailing Measures: "the three Agreements' definition of the industry producing the like product are essentially identical."[134] This approach makes sense given that these Agreements condition the imposition of trade remedies on a finding of injury by reason of imports,[135] and both define "domestic industry" as "domestic producers as a whole of the like product"[136] (absent the "directly competitive" language, which becomes superfluous if it is not invoked).

93 As such, the definition in Article 2.6 of the Anti-Dumping Agreement is instructive:

> the term 'like product'…shall be interpreted to mean a product which is identical, *i.e.* alike in all respects to the product under consideration, or in the absence of such a product, another product, which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

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[134] *See, e.g., U.S. – Line Pipe* at para. 212 (interprets non-attribution standard under Article 4.2(c) of the Agreement on Safeguards with reference to its interpretation of the analogous Article 3.5 of the Antidumping Agreement in *Appellate Body Report, United States Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 24 July 2001); *Panel Report, United States – Safeguard Measures of Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia –Lamb Meat*, WT/DS177/R, WT/DS178/R, 21 Dec. 2000, at para. 7.75 ("Another element of relevant context for interpreting the 'domestic industry' definition of SG Article 4.1(c) are the parallel provisions of the WTO agreements on Subsidies and Countervailing Measures and Antidumping.").

[135] Article VI of GATT 1994 provides "No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to materially retard the establishment of a domestic industry."; Article 2 of the Agreement on Safeguards provides "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 caused or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."

[136] Article 4.1 of the Antidumping Agreement provides that "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products… ."; Article 4.1(c) of the Agreement on Safeguards provides that "a 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products… ."

The dictionary definition of "identical" is "two or more separate things, agreeing in every detail," and the definition of "resemble" is to "be like, have a likeness or similarity to, have a feature or property in common with."[137] In light of the definition of "like product" in Article 2.6 of the AD Agreement, and consistent with the plain meaning of the word "like," a "like product" under Articles 2.1 and 4.1(c) of the Agreement on Safeguards should be "identical" and "alike in all respects," or at least possess "characteristics closely resembling," the imported article.

94 The Appellate Body's restrictive interpretation of "like" products, combined with the requirement in *Lamb Meat* that Article 2.1 intends that measures be applied only to "specific products," demonstrates the need of competent authorities to very carefully define the domestic industry "like or directly competitive" product in relation to subject imports, and the domestic industry producing those products.

d. The object and purpose of Articles 2.1 and 4.1(c) of the Agreement on Safeguards, in general, confirm that the domestic industry must be defined to correspond closely to the particular imported product under investigation

95 As noted in the introduction to this submission, it is understood that safeguard measures are "extraordinary remedies to be taken only in emergency situations."[138] Although Members have a right under certain circumstances to impose safeguard measures to facilitate industry adjustment to import competition, "the right to apply a safeguard measure. . . is not unlimited."[139]

96 It is therefore understandable that the Appellate Body has adopted a relatively restrictive definition of "like or directly competitive" products. Such a definition is consistent with the need to ensure the application of safeguard remedies "only to the extent necessary." It focuses the benefits of import restraints on those domestic producers proven to have suffered serious injury from import competition, and in need of adjustment.

97 It is also understandable given the kinds of analyses that must be performed ultimately to discern whether increased imports of the product against which extraordinary relief might be imposed are in fact the cause of an industry's serious injury. Consider the following:

- Increased imports: If the imported product includes products which are not in competition with each other, an import increase in one part of the imported product group (*e.g.*, slab) might mask sharp import declines in other parts of the imported product group (*e.g.*, plate steel). The requirement to find an increase is only meaningful if the analysis is performed for the part of the imported products which are like or directly competitive with their domestic counterpart.

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[137] *New Shorter Oxford English Dictionary* 1304 and 2558 (1993).

[138] *U.S. – Line Pipe*, at para. 80.

[139] *Id.*

- Serious injury: To analyze the condition of the domestic industry, it makes no sense to define that industry to include producers of products which are not in competition with each other and their imported counterparts. If the various products do not compete with each other, if they are used for different end-uses, and if they are produced on different lines, then combining them together simply masks the true performance of each the producers making each of the distinct products.

- Causal link: An increase in imports cannot, by definition, "cause" a decline in sales of the domestic products which are not in competition with the imports, and consequently, injury to their domestic producers. Unless the "domestic industry" is defined properly in light of the relationship between their products and the imports under investigation, an import increase and a decline in domestic sales in a narrow market segment might be used improperly to justify the imposition of safeguard measures beyond that segment. The point is to ensure a close nexus between subject imports and domestic products.

- Relief no broader than necessary: One segment might have growing imports, but this would not justify imposing safeguard measures on another segment showing no increase or perhaps even decreasing imports. Only if imports in the former segment and domestic products in the latter segment are in competition with one another, and accordingly, combined sales of domestic products in both segments declined, may these segments be appropriately combined together.

For the analysis under these various substantive requirements to be meaningful, each of the domestic "like or directly competitive" product(s) must be compared with the specific subject imports with which they compete.

e. The Appellate Body has proposed methods by which to discern the proper scope of the like or directly competitive products

98 The next question is how a competent authority should go about defining the scope of the domestic industry producing products that are like or directly competitive with the imported products under investigation. Neither the Appellate Body nor any panel has presented a decisive interpretation of the term "like product" under the Agreement on Safeguards. However, the Appellate Body has proposed a method of analysis to determine the "likeness" of various products. Indeed, there seems in the jurisprudence to be a consistent application – in the broader GATT context at least – of the considerations that were first identified by the Working Party on *Border Tax Adjustments* in 1970.

99 For example, in *Japan – Alcoholic Beverages*, in examining the question as to "likeness" between certain distilled alcoholic beverages, the Appellate Body held that in the context of GATT Article III:2, first sentence, whether certain domestic products are "like products" of certain imports must be determined on the basis of similarities in terms of products' physical properties, end-use, consumers' preferences, and tariff classifications. The Appellate Body stated:

We agree with the practice under the GATT 1947 of determining whether imported and domestic products are 'like' on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments*, adopted by the CONTRACTING PARTIES in 1970, set out the basic approach for interpreting 'like or similar products' generally in the various provisions of the GATT 1947:

> ... the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a 'similar' product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is 'similar': the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.[140]
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> * * * *
>
> This approach was followed in almost all adopted panel reports after *Border Tax Adjustments.* This approach should be helpful in identifying on a case-by-case basis the range of 'like products' that fall within the narrow limits of Article III:2, first sentence in the GATT 1994."[141]

100 This approach has been reiterated by the Appellate Body in *Canada – Periodicals*, where it stated:

> … [T]he proper test is that a determination of 'like products' for the purposes of Article III:2, first sentence, must be construed narrowly, on a case-by-case basis, by examining relevant factors including:
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> (i) the product's end-uses in a given market;
>
> (ii) consumers' tastes and habits; and
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> (iii) the product's properties, nature and quality.[142]

101 In addition, GATT Article III:4 uses the same term "like products," in providing for national treatment in relation to internal regulations. Article III:4 reads:

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[140] *Japan – Alcoholic Beverages citing* Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, para. 18.

[141] *Japan – Alcoholic Beverages II*, p. 20. In *Indonesia – Autos*, the Panel followed this finding of the Appellate Body. *See* Panel Report – *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998 at para. 14.109.

[142] Appellate Body Report on *Canada – Certain Measures Concerning Periodicals* ("*Canada – Periodicals*"), WT/DS31/AB/R adopted 30 June 1997 at 21. This finding is also supported by the panel *Argentina-Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, ("*Argentina – Bovine*") WT/DS155/R Panel Report, adopted 16 Feb. 2001, at para. 11.167.

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

Under this provision, in *European Communities – Asbestos*, the Appellate Body affirmed a broad framework for analyzing "likeness" that required comparison between imports and domestic products against four sets of characteristics:

- the physical properties of the products;
- the extent to which products are capable of serving the same or similar end-uses;
- the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and
- the international classification of the products for tariff purposes.[143]

The point of these factors is clear: they help determine whether the products compete with each other. Only if the products compete with each other are they properly grouped together. Otherwise, as discussed above, the analysis to be performed in the injury investigation, as well as in choosing an appropriate remedy, is meaningless.

102 As the Appellate Body has cautioned, this framework is not a strict one; other factors might be relevant in any particular case. It nonetheless appears that to determine the scope of the domestic industry under the Agreement on Safeguards, the investigating authorities must, at a minimum, establish that the domestic articles grouped together for the purpose of one single domestic industry definition meet the above criteria and, as the Appellate Body clarified, each of these discrete criteria must be considered.[144]

f. The Appellate Body has also explained that the vertical integration of production facilities is *not* an appropriate factor for analysis

103 The Appellate Body has also explained what is *not* an appropriate basis for distinguishing products. In *U.S. – Lamb Meat*, the Appellate Body found that the ITC's decision to expand the domestic industry to include live lamb on grounds of a "continuous

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[143] *European Communities – Asbestos*, para. 101.

[144] *Id.* paras. 102 and 109.

line of production" and a "substantial coincidence of economic interests" between producers of live lamb and lamb meat had no legal basis in the Agreement on Safeguards.[145]

> 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, that there is no use for the input product other than as an input for the particular end-product, or that there is a substantial coincidence of economic interests between the producers of these products.[146]

Hence, the existence of vertical integration within an industry is irrelevant to the analysis. Further, although the Appellate Body accepted that production processes might be relevant to discerning "whether two articles are separate products,"[147] it made clear that ultimately "[t]he 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.[148]

104 WTO jurisprudence is therefore clear: like product definitions in a safeguards context must be focused on an analysis of the products and their likeness, not on whether the production processes by which they are sometimes made are vertically integrated.

2. In the case at issue here, the ITC made an overbroad determination of like product with regard to flat-rolled products

a. Background on U.S. law and practice

105 The U.S. safeguards statute requires the ITC to begin its safeguards analysis by defining "the domestic industry producing an article that is like or directly competitive with the imported article."[149] The statute defines "domestic industry," in relevant part, as "the producers as a whole of the like or directly competitive product."[150] The ITC must then consider whether increased imports have caused, or threaten to cause, serious injury to each domestic industry producing a separate like product.

106 The statute essentially prescribes two separate approaches the ITC can take in defining the domestic industry producing the "like or directly competitive" product, given the

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[145] *U.S. – Lamb Meat* at para. 89.

[146] *Id.* at para. 90.

[147] *Id.* n 55.

[148] *Id.* para. 94 (emphasis in original). The Appellate Body reached the same conclusion in the *U.S. – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* case where it stated "the definition of the domestic industry must be product-oriented and not producer-oriented and that the definition must be based on the products produced by the domestic industry." *U.S. – Cotton Yarn* para. 86.

[149] 19 U.S.C. §2252(b)(1)(A) (**Exh. CC-47**).

[150] 19 U.S.C. §2252(c)(6)(A)(i) (**Exh. CC-47**).

conjunction "or": a "like product" analysis, or a "directly competitive" analysis. As the ITC explained in a footnote, after describing its "like product" analysis:

> The Commission also may consider whether there are directly competitive products pursuant to 19 U.S.C. §2482(5) ("section 601(5)")…by analyzing what products may be commercial equivalents for the subject imports and/or if earlier or later processed domestic products are suffering the 'comparable' economic effects of imports.[151]

Ultimately, however, the ITC explained that it chose not to invoke the "directly competitive" language, instead relying on "like product" above to define the domestic industries.[152]

107 As the statute does not define "like product," the ITC has developed its own fact-intensive approach to this issue over the years which is almost identical to its like product analysis in the antidumping and countervailing duty ("AD/CVD") contexts.[153] The ITC traditionally takes into account "such factors as the physical properties of the product, its customs treatment, its manufacturing process (*i.e.,* where and how it is made), its uses, and the marketing channels through which the product is sold."[154] The ITC has also traditionally looked for clear dividing lines between products, disregarding "slight variations."[155]

108 The Commission has in some cases applied a more flexible approach to defining like products in the safeguard context than in the AD/CVD context. In its Section 201 determination, the ITC explained:

> Title VII is narrowly aimed at remedying the specific advantages imports may be receiving from unfair trade practices. The purpose of section 201 either is to prevent or remedy serious injury to domestic productive resources from all imports. In light of the purpose of section 201 and in contrast to title VII, the sharing of productive processes and facilities is a fundamental concern in defining the scope of the domestic industry under section 201.[156]

Because Congress intended Section 201 to "protect the productive resources of domestic producers," rather than ameliorate unfair trade practices, the ITC has considered "both the

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[151] *ITC Report* at 30 n. 26 (**Exh. CC-6**).

[152] *Id.* at 45 n. 139 ("Having identified domestic producers of an article that is like the imported article, we are not required to, and do not in this case, look further for an industry producing articles that are directly competitive but not like the imported article.".

[153] *See Certain Steel Wire Rod*, Inv. No. TA-201-69, ITC Pub. 3207 at I-8 (July 1999)(*citing* Trade Reform Act of 1973) ("The term 'like' means those articles which are substantially identical in inherent or intrinsic characteristics (i.e. materials from which made, appearance, quality, texture, etc.)") (**Exh. CC-35**).

[154] *ITC Report* at 30 (**Exh. CC-6**).

[155] *Id*.

[156] *Id*.

productive facilities and processes and the markets for these products" in making its like products determination in the safeguards context, in addition to the like product factors.[157]

b. The ITC in this case determined that, despite their distinct physical characteristics, end-uses, and production processes, all flat-rolled steel products except for tin mill and grain oriented electrical steels are a like product of all such imported products

109 The ITC determined that semi-finished slab and the major finished flat-rolled steel products -- plate, hot-rolled, cold-rolled, and corrosion-resistant steel sheet -- constitute a single like product.[158] It made its determination in essentially two stages. First, it performed an *ad hoc* analysis of its traditional like product factors, without drawing any definitive conclusions. Second, it looked beyond the traditional like product factors to emphasize two conditions of competition suggesting more of an overlap between the products: overlapping end-use markets and the industry's vertical integration.[159]

110 Although the ITC concluded that four of the finished flat-rolled steel products and semi-finished slab are like products, the ITC acknowledged many stark differences among the products in terms of their physical characteristics, end-uses, production processes,[160] and customs classifications. The findings specifically mentioned in the ITC's determination are summarized as follows:[161]

Summary of Distinctions Between Different Flat-rolled Steel Products Set Forth In Determination

Product	Physical characteristics	End-uses	Production processes
All[162]	All made of raw materials including carbon and iron.	All types used in automobile production, but in different applications; different stages of production limit interchangeability between products.	Same production processes at initial stages, but later production processes vary depending on the stage of processing.

[157] *Id*. at 30-31.

[158] *Id.* at 36.

[159] *Id.* at 43.

[160] Note that although the Appellate Body has never specifically listed production processes as a relevant factor to consider (but for its dictum in footnote 55 of *Lamb Meat*), the ITC consistently considers this factor.

[161] *ITC Report* at 40-42, 43-44 **(Exh. CC-6)**.

[162] *Id.* at 38 (physical characteristics), 43-44 (end-uses), 38-39 (production processes).

Product	Physical characteristics	End-uses	Production processes
Slab[163]	Semi-finished form, usually 4 inches.	All further processed into hot-rolled steel or plate	Molten steel cast into a form for rolling; no rolling takes place.
Plate[164]	Thicker than hot-rolled	None given.	Hot- rolling on Steckel mill or reversing mill, then processed in temper mill
Hot-rolled[165]	Over 2mm in thickness; rougher surface finish	Most feedstock for cold-rolling, with balance for pipe and tube, CTL plate, and structural parts of autos and appliances.	Hot-rolled in hot-strip mill or Steckel mill
Cold-rolled[166]	25 to 90 percent reduction from hot-rolled thickness to under 2mm; special mechanical properties or surface texture.	Feedstock for corrosion-resistant steel, tin mill products, and GOES.	Cold-rolled in cold-rolling mill, then annealed and temper rolled, unless destined for coating.
Corrosion-resistant[167]	Improved aesthetics, improved corrosion-resistance, reduced final production cost, tailored to forming requirements.	None given.	Electro-galvanizing or hot dip galvanizing.

111 The ITC also found that these products are classified under a large number (55) of tariff classification categories.[168] Indeed, the only factor considered by the ITC that suggested any degree of product overlap was channels of distribution; the ITC found that all products but plate were generally internally consumed or sold to end-users.[169] Thus, four of the factors considered by the ITC demonstrated clear dividing lines between the five flat-rolled steel products that ultimately made up the ITC's "flat-rolled" like product.

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[163] *Id.* at 39 (physical characteristics), 40 (end-uses), 40 (production processes).

[164] *Id.* at 41 (physical characteristics), 40-41 (production processes).

[165] *Id.* at 38 (end-uses), 40 (production processes), 44 (physical characteristics).

[166] *Id.* at 41 (physical characteristics, end-uses and production processes), 44 (physical characteristics).

[167] *Id.* at 42.

[168] *Id.* at 37.

[169] *Id.* at 44 (most slab, hot-rolled, and cold-rolled is internally transferred, while 60 to 99.6 percent of all finished products except plate are sold directly to end-users; 54.8 percent of plate shipments went to distributors.).

112 The ITC's Staff also detailed the numerous differences among the products, as follows:

> Slabs are generally used to produce flat products and, subsequently, welded pipes. Specific products produced directly and indirectly from slabs include the following:
>
> - Cut-to-length or discrete plate -- flat-rolled product that typically ranges between 3/16 of an inch to more than a foot in thickness. In the most common production process, a slab is reduced on a reversing rolling mill to the desired thickness.
>
> - Hot-rolled coils -- flat-rolled product produced on a hot-strip (continuous) or Steckel-type (reversing) mill and wound into coils at the end of the process. The differences between coiled sheet, strip, and plate consist of differences in thickness and width. Only the lighter thicknesses of plate can be produced in a coiled form. Sheet and strip are thinner than 3/16 of an inch; sheet is rolled to a width of about 24 inches or more while strip is narrower.
>
> - Cold-rolled flat products – hot-rolled flat products that are cold-rolled, improving the steel's surface quality and strength.
>
> - Grain-oriented silicon electrical steel – a cold-rolled sheet product produced from steel that has been refined to have very low levels of carbon. Silicon added to the molten steel to create an alloy with about 3 percent silicon. The addition of silicon creates a steel with excellent magnetic properties.
>
> - Corrosion-resistant and other coated flat products – for hot-dipped or aluminum coatings, sheet and strip are cleaned so the coating will stick better to the steel, then the steel is put into a bath of hot zinc and/or aluminum. As the strip emerges from the bath, it is cooled and the coating solidifies. Electrogalvanized products are produced by passing the steel through a solution containing dissolved zinc, which is deposited on the steel by an electrolytic reaction. For painted products, the steel is cleaned and the surface prepared for painting. The steel then moves to a paint coater where is primer is applied. After the steel moves to a baking oven to cure the primer, it is then cooled and conveyed to a second paint coater where the finishing coat is applied with rollers. The product then enters another oven for curing and cooling.
>
> - Tin mill products – frequently the steel for making tin mill products goes from cold-rolling through an annealing process,

> after which it is temper rolled or cold-rolled again. The steel is cleaned in a dilute acid solution, then it is electroplated with tin in a process similar to electrogalvanizing.[170]

113 Respondents' briefs provided even greater detail of the differences by citing the ITC's own findings in the 1992/93 antidumping and countervailing duty cases on plate, hot-rolled, cold-rolled, and corrosion-resistant steel:

> Petitioners' four proposed like products can be readily distinguished from each other. ***First, the products differ in physical characteristics and uses.*** Hot-rolled sheet is generally thicker and of lower quality than cold-rolled and corrosion-resistant sheet. The cold reduction process, which is used for making cold-rolled and corrosion-resistant sheet, yields smoother surfaces and higher strength-to-weight ratios, while producing thinner gauge steel. Generally, hot-rolled sheet is thinner and weaker than cut-to-length plate, which is stronger and thicker than all other carbon steel flat products. Corrosion-resistant sheet is unique because, unlike the other products, it is coated, clad or plated with metals and alloys.
>
> ***The different physical properties of each like product dictate particular end-uses.*** Hot-rolled sheet, the least refined steel sheet product, is used to meet less exacting specifications. Because it is heavier and less smooth than cold-rolled sheet, hot-rolled sheet is used in applications where surface finish and light weight are not crucial, such as in construction and machinery.
>
> Because of its thin gauge, smooth surface and high strength-to-weight ratio, cold-rolled sheet is used to make products where surface finish and light weight are an important consideration. Such applications include appliances, electrical equipment and unexposed body parts and roofs in automobiles.
>
> Corrosion-resistant sheet is used mostly in applications requiring protection against the weather and other corroding agents. These applications include roofing and siding, culverts, eave troughs, air ducts, heating furnaces, quarter panels, trunk lids and mufflers. The desire of automobile makers to offer rust-through protection has heightened demand for corrosion-resistant sheet. Corrosion-resistant products are also used increasingly in the construction industry, where purchasers are prepared to pay more in initial costs for corrosion-resistant flat steel to avoid replacement costs later.
>
> Because cut-to-length plate is thicker and stronger than the other products, it is designed for heavy industry uses, including storage tanks,

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[170] *Id.* at Overview-10-11.

railroad freight cars, shipbuilding and marine equipment, and industrial and construction machinery and equipment.

Petitioners' proposed like products have limited interchangeability. Because of the need for smooth finishes and light weight, hot-rolled sheet is a poor substitute for cold-rolled sheet in applications such as household appliances. Neither hot-rolled nor cold-rolled sheet can substitute for corrosion-resistant sheet in many applications, because they cannot protect against corrosion -- a necessary quality in applications of corrosion-resistant flat-rolled steel. Cut-to-length plate serves demanding uses requiring thick gauges and superior strength that the other products cannot meet.

All of petitioners' proposed like products share similar channels of distribution. Because hot-rolled and cold-rolled sheet are largely consumed captively by integrated producers, the channels of distribution for them are often similar. Of merchant market shipments, each proposed like product is distributed directly by the domestic producers, or through steel service centers, in roughly equal proportions.

Customers and producers perceive the proposed like products differently. The American Iron & Steel Institute (AISI) reports shipment data on the products separately. Moreover, differing physical properties of the products affect directly customer and producer perceptions of product utility for different applications.

All flat-rolled products share certain production processes and are, therefore, often made in a single plant. ***However, the proposed like products are transformed at different lines by different workers within those plants.*** Hot-rolled sheet is made on a strip mill. Cold-rolled sheet is finished on a cold-reduction mill. Corrosion-resistant flat product is coated on a coating line. However, cold-rolled and most corrosion-resistant sheet is first hot-rolled at a strip mill. But, while these products are all manufactured in part on the same equipment, they each undergo an additional step unique to their production (or, in the case of hot-rolled sheet, no further processing is necessary for the product to be considered hot-rolled in its final form).

Cut-to-length plate also is manufactured through an essentially different process from the other products. Though all cut-to-length plate is hot-rolled, only strip mill plate is hot-rolled at a strip mill; the majority of cut-to-length plate is hot-rolled at a sheared-plate mill. Also, unlike the other products, most cut-to-length plate (i.e. plate mill plate) is never coiled.

Prices vary for the different products. Because each step in the production process adds value, flat product becomes more expensive the more it is refined. Accordingly, hot-rolled sheet tends to be priced lower than cold-rolled, which tends to be priced lower than corrosion-

> resistant. Pricing data for the period of investigation reflect these tendencies.
>
> Accordingly, we determine for these preliminary investigations that there are four like products: hot-rolled carbon steel flat product; cold-rolled carbon steel flat product; corrosion-resistant carbon steel flat product; and cut-to-length carbon steel plate.[171]

114 Finally, Respondents also submitted information on the distinctions between finished flat-rolled and slab products (which were not covered by the 1992/93 AD/CVD cases), which stated:

> Slabs have a coarse grain structure, whereas finished flat-products have a finer grain structure. Slab also have low fracture toughness and high porosity, in contrast to flat-rolled steel products which have high fracture toughness and low porosity**.** Second, slab is classified under different tariff categories (HTS headings 7207 and 72240 from those applicable to finished flat products. Third, the manufacturing process for slab is entirely different from that for finished flat products. Slabs are formed though continuous casting in a casting facility from molten steel, which is produced either by extracting iron from raw ore through a blast furnace and then mixing it with other elements in a basic oxygen furnace or by melting steel scrap in an electric arc furnace. By contrast, finished flat products are rolled from solid steel in rolling and finishing mill facilities. Fourth, slab and finished flat products do not share common use, as slabs are used only by steel mills to produce finished flat products and have no independent use. Thus, slab is not an interchangeable or substitutable product for finished flat-rolled products. Finally, slabs are not marketed beyond steel mills, whereas finished flat-rolled products are marketed to non-steel mill customers for use in other products containing steel. In short, every aspect of slab -- from their physical properties to the process by which they are made, marketed, and used -- indicates that they are not "like" finished flat products.[172]

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[171] Respondents' Joint Prehearing Cold-Rolled Steel Brief at 6-9, Inv. TA-201-73, (11 Sept. 2001) (*filed* by the Law Firm of Willkie Farr & Gallagher) (**CC-53**) (*quoting* from *Certain Flat-Rolled Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, Inv. Nos. 701-TA-319-354 and 731-TA-573-620 (Prelim.) ITC Pub. 2549 at 12-17 (Aug. 1992) (**Exh. CC-32**) (footnotes omitted, emphasis added)). No further discussion of this issue appeared in the final determination of the 1992-93 flat-rolled steel case.

[172] Respondents' Joint Prehearing Brief on Slab at 5-6, Inv. TA-201-73, (11 Sept. 2001) (*filed* by the Law Firm of Willkie Farr & Gallagher) (**Exh. CC-51**). Respondents also submitted detailed analysis of like product factors in their posthearing injury brief on flat products. See **Exh. CC-55 (Exhibit 2).**

115 Despite these differences between flat-rolled steel products, the ITC based its conclusion that four of the finished flat-rolled steel products and semi-finished slab are "like products" of each other, because:

- "{C}ertain carbon flat-rolled steel at different stages of processing share basic physical properties and are interrelated to a certain degree."[173]

- "The primary end-use applications for commercial shipments of certain carbon flat-rolled steel are the automotive and construction industries."[174]

- Flat-rolled steel "is produced using essentially the same production processes at least in the initial stages."[175]

116 In other words, the ITC ignored differences in physical properties, mistook similar end-use*r*s for distinct end-uses, and considered vertically integrated facilities more important than the different production processes that take place in those facilities. Indeed, the ITC focused its attention on what it characterized as the "convergence of a high level of overlap in markets and very high overlap in domestic production among the ranges of steel types that comprise this article."[176] The ITC stated that the five flat-rolled steel products represent the same carbon steel at different stages of processing, with the "vast majority" of flat-rolled steel produced by "firms that are involved in a number of the stages of processing."[177] Accordingly, a large proportion of flat-rolled steel production -- over 80 percent according to Chairman Koplan at the hearings -- is carried out by producers of four of the five types of flat-rolled steel.[178] The ITC noted that the integrated nature of flat-rolled steel production enabled flat-rolled steel producers to vary their product mix in response to demand conditions and capacity and both domestic producers and respondents acknowledged "at least some" cross-price effects across flat-rolled steel products.[179] It was the "high level of overlap in markets" and the "very high overlap in domestic production" among the five major flat-rolled steel products that prompted the ITC to combine them into a single like product.[180] Importantly, however, and as discussed above, the ITC did not invoke the "directly competitive" language, as permitted by the statute and the Agreement on Safeguards.[181]

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[173] *ITC Report* at 37 (**Exh. CC-6**).

[174] *Id.* at 43

[175] *Id.* at 38.

[176] *Id.* at 45.

[177] *Id.* at 37-39.

[178] *Id.* at 39 (The ITC found that U.S. producers of hot-rolled steel were responsible for 94.7 percent of U.S. shipments of cold-rolled steel and 84.8 percent of corrosion-resistant steel in 2000, while U.S. producers of cold-rolled and corrosion-resistant steel were responsible for 89.1 percent of U.S. shipments of hot-rolled steel).

[179] *Id.* at 43 (In other words, if the price of hot-rolled steel declines, producers may decide to produce and ship more cold-rolled steel, expanding the supply of cold-rolled steel and reducing its price.).

[180] *Id.* at 45.

[181] Specifically, the Commission stated: "Domestic producers argued that types of certain carbon flat-rolled steel are "directly competitive," within the meaning of the statute, 19 U.S.C. §2581((5). Having identified domestic producers of an article that is like the imported article, we are not required to, and do not in this case,

3. The ITC's determination to conjoin the five products into a single "flat-rolled" like product is inconsistent with Articles 2.1 and 4.1(c) of the Agreement on Safeguards and Article XIX:1 of GATT 1994

117 The evidence reviewed above -- both that which was specifically mentioned in the ITC determination and other more detailed information on the record -- demonstrates that the ITC decision on the scope of the domestic industry is inconsistent with GATT Article XIX:1(a), and Articles 2.1 and 4.1(c) of the Agreement on Safeguards. There are wide differences between subject imports and domestic products in terms of the factors identified by the Appellate Body for a determination on "like products": the products' physical properties, end-uses, consumer perceptions, and tariff classifications. To summarize again what the ITC itself found:

- The products each have different physical properties. The ITC found, for instance, that cold-rolled steel differs from hot-rolled steel in terms of thickness, mechanical properties, and surface texture, while corrosion-resistant steel differs from cold-rolled steel in terms of its coating of zinc or other materials.

- The products differ in terms of end-uses. For example, the ITC found that while hot-rolled steel and corrosion-resistant steel are both used generally in automotive applications, they are not used for the same specific automotive applications. (For instance, hot-rolled steel may not be substituted for corrosion-resistant steel in a car fender.[182])

- The products differ in their customs treatment. Each flat-rolled steel product is classified under a separate HTS number, though the ITC expressly discounted this factor.[183]

As shown above, the ITC's determination is, even if judged on the basis of only the facts it noted in its Report, inconsistent with GATT Article XIX:1(a) and Articles 2.1 and 4.1(c) of the Agreement on Safeguards. It is evident from the ITC's own findings that semi-finished slab produced by domestic producers is not a like product of any of the imported corrosion-resistant steel, cold-rolled, hot-rolled, or plate products, because of the stark differences in terms of product properties and end-uses. Domestic corrosion-resistant steel products are not "like products" of any of imported semi-finished slab, plate, hot-rolled, or cold-rolled products. Domestic cold-rolled products are not like products of any of flat-rolled steel products except for cold-rolled products. The same is true for plate and hot-rolled. In a

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(continued)

look further for an industry producing articles that are directly competitive but not like the imported article." *ITC Report* at 45, n.139 (**Exh. CC-6**).

[182] *Id.* at 43.

[183] The ITC also found that the products undergo different production processes. The ITC found, for example, that the production processes for hot-rolled steel and cold-rolled steel differ in that cold-rolled steel is further reduced 25 to 90 percent, and is often annealed and temper rolled. Corrosion-resistant steel differs from cold-rolled steel in that it has been processed on an electro-galvanizing or hot-dip galvanizing line.

nutshell, imports and domestic products falling within the same category -- semi-finished slab, plate, hot-rolled, cold-rolled, or corrosion-resistant steel products -- might be "like products" of each other, but imports and domestic products that fall within different categories are definitely not "like" one another.

118 If the ITC had bothered to consider the other factor considered important by the Appellate Body in *EC – Asbestos* -- consumer tastes and habits[184] -- it would have found additional distinguishing characteristics, such as:

- Consumers regard hot-rolled steel as ideal for applications where strength is more important than appearance.

- Consumers view cold-rolled steel as ideal for applications where appearance and thinness take precedence over strength, and exposure to corrosive elements is not an issue.

- Consumers view corrosion-resistant steel as ideal in exposed applications, where corrosion-resistance is important.[185]

119 As summarized above, the ITC justified its finding of a single flat-rolled steel like product with reference to the "high level of overlap in markets" and the "very high overlap in domestic production" among the products. To reiterate, it found that "the primary end-use applications for commercial shipments of certain carbon flat-rolled steel are the automotive and construction industries" As also discussed above, it further found that the "vast majority" of flat-rolled steel was produced by "firms that are involved in a number of the stages of processing."

120 However, the overlap in markets the ITC found is too sparse to be a basis for "likeness"; it discussed the similarity of end-use at a very abstract level, for example, for the "automotive and construction industries." Indeed, the overlap at issue is not of a type that may amount to the "likeness" of products under the Agreement on Safeguards. For example, as noted above, the ITC found that hot-rolled and corrosion-resistant steel products are subject to similar demand trends in the automotive industry, but that they are <u>not</u> used for the same end-use. This finding indicates that the products are not substitutable with each other, but at most complementary. They therefore might not even be directly competitive, much less "like" one another.

121 Also, "very high overlap in domestic production" or the vertical integration found in the domestic steel industry is not relevant to the question before the panel as to whether subject domestic products are "like products" of imports subject investigation. Indeed, the jurisprudence tells us that this factor is irrelevant in the "like product" analysis under the GATT Article XIX:1 and Agreement on Safeguards. Indeed, the ITC's like products determination for flat-rolled steel products is almost identical to its rationale for combining

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[184] In *EC – Asbestos*, the Appellate Body recognized the additional factor of "consumer tastes and habits," as one of four general criteria in analyzing the "likeness" of two products, the others being physical characteristics, end-uses, and tariff classification. *EC – Asbestos*, para. 101.

[185] *ITC Report* at FLAT-3, (**Exh. CC-6**).

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.

122 Consequently, the ITC's like product analysis of flat-rolled steel products is no more consistent with the Agreement on Safeguards than its faulty analysis in *U.S. – Lamb Meat*. As the Appellate Body held in that dispute: "[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." The cascading nature of the production processes for various flat-rolled steel products is irrelevant to the question of "like" products under the Agreement, as interpreted by the Appellate Body. The nature of the factors to be considered in determining the scope of the "like" products -- *i.e.*, physical properties, end-use, consumer tastes and habits, and customs treatment -- also indicate that the vertical integration of production facilities is irrelevant. 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.

123 Notwithstanding its own findings, additional detailed facts on the record, and WTO guidance on the topic, the Commission found that five of the seven distinct flat-rolled products, including semi-finished slab, constituted a single like product. Its decision flies in the face of the conclusions drawn from applying the relevant factors. Indeed, even the ITC's past analysis of the same factors led to the opposite conclusion, as detailed below in the context of Japan's GATT 1994 Article X:3(a) claim. Factually, this decision simply makes no sense, and is inconsistent with the requirement, as set forth by the Appellate Body, to construe the domestic industry definition strictly, particularly when relying on the "like" rather than "directly competitive" language in the Agreement.

124 Because the ITC did not find each of the five flat-rolled steel products to be "like" the imports under investigation, and did not even try to establish whether they were "directly competitive" in relation to 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 products is inconsistent with Article XIX:1 of GATT 1994 and Articles 2.1 and 4.1(c) of the Agreement on Safeguards.

4. Because the ITC adopted a like product analysis contrary to its prior like product determinations in prior AD/CVD cases and contrary to like product distinctions for other products in this very case, its actions are inconsistent with Article X:3(a) of GATT 1994

125 The ITC's like product analysis of flat-rolled steel products increased the probability of an affirmative injury determination in two ways. First, it ignored its innumerable findings in past AD/CVD investigations[186] -- based on many of the same like product factors -- that the five flat-rolled steel products constitute separate like products. Second, it made slab part of a single domestic like product encompassing finished flat-rolled steel products, while making semi-finished long and stainless products separate like products; and it made corrosion-resistant products part of the flat-rolled like product, while making tin mill products a separate like product. In all such instances, the ITC did not administer the safeguards law in a "uniform, impartial, and reasonable manner," as required by GATT 1994 Article X:3(a).

a. The obligations imposed by Article X:3(a) of GATT 1994

126 Unlike most provisions of GATT 1994, which are concerned with the content of a government's laws, regulations, decisions and rulings, Article X of GATT 1994 focuses on the administration of those laws, regulations, decisions, and rulings.[187] Article X articulates the basic principles of what is widely known as due process or fundamental fairness.[188] According to Article X:3(a):

> Each contracting party shall administer *in a uniform, impartial and reasonable manner* all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article. (Emphasis added.)

127 The words "uniform," "impartial," and "reasonable" form the essence of the Article X:3(a) obligations.[189] They are to be interpreted "in good faith in accordance with the

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[186] *See* cases cited *supra* note 6.

[187] The Appellate Body referenced this distinction in *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 Sept. 1997 at para. 200 ("Article X applies to the *administration* of laws, regulations, decisions and rulings." (emphasis in original)).

[188] The term "due process" has been used extensively in WTO dispute settlement proceedings. *See, e.g.*, Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 Dec. 1997, at para. 94; and Panel Report, *U.S.—Tax Treatment For "Foreign Sales Corporations*," WT/DS108/R, 8 Oct. 1999 at para. 6.3.

[189] The *New Shorter Oxford Dictionary* defines these important terms as:

"impartial" — Not partial; not favouring one party or side more than another; unprejudiced, unbiased; fair, at 1318;

"reasonable" — 1. Endowed with the faculty of reason, rational. 2. In accordance with reason; not irrational or absurd. 3. Proportionate. 4. Having sound judgment; ready to listen to reason, sensible. Also, not asking for too much. 5. Within the limits of reason; not greatly less or more than might be thought likely or appropriate; moderate, at 2496;

ordinary meaning to be given to the terms of the treaty in the context of its object and purpose."[190] With respect to the administration of laws which Article X:3(a) governs, "impartial" ensures that authorities do not favor particular parties over others;[191] "reasonable" is directed at the nature of the administration itself and ensures that authorities do not administer a law in an inappropriate manner, such as applying a penalty in a disproportionate manner;[192] and "uniform" ensures that authorities do not administer laws in different ways under similar circumstances.[193] Collectively, these obligations ensure due process.

128 The Appellate Body interpreted the due process standards set forth in Article X:3 in *U.S. – Shrimp*, where it emphasized the standards of good faith as regards the obligations placed upon Members in other GATT 1994 articles:

> Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of treaty rights of other Members.[194]

Thus, the Appellate Body considers the standards contained in Article X:3 to represent in one sense the notion of good faith and in another sense the "fundamental requirements of due process."

(continued)

"uniform" — "1. Of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times, . . . 4. Of the same form, character, or kind as another or others; conforming to one standard, rule, or pattern; alike, similar" at 3488.

[190] Vienna Convention, art. 31.1. Article 26 also establishes the concept of *pacta sunt servanda* stating "Every treaty in force is binding upon the parties to it and must be performed by them in good faith," and it appears in Part III of the Vienna Convention titled, "Observance, Application and Interpretation of Treaties." *Id.* The Vienna Convention governs the interpretation of the provisions of the WTO Agreements, including GATT 1994. *See* DSU Article 3.2; *see also* Anti-Dumping Agreement, Art 17.6 (i) (requiring Members' authorities to evaluate facts in "an unbiased and objective manner"); Art. 17.6(ii) (directing Panels interpreting the Agreement to use "customary rules of interpretation of public international law," *i.e.*, the Vienna Convention). Most recently, the Panel in *Korea—Measures Affecting Government Procurement* recognized the implicit development of Vienna Convention Article 26 *pacta sunt servanda* in respect of the GATT 1947 and the WTO Agreements. Circulated on 1 May 2000, WT/DS163/R, at para. 7.93.

[191] *See Argentina – Bovine*, para. 11.95, 11.100 (noting that "impartiality" prohibits an authority from giving unfair advantage to one party).

[192] *See Argentina – Bovine*, para. 11.86 (holding that the meaning of "reasonableness" relates to how a law or regulation is actually administered). *U.S. – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, Panel Report, adopted 1 Feb. 2001, para. 6.51 ("the requirement of uniform application of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situation").

[193] *Id.*

[194] Appellate Body Report, *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*, (emphasis in original) ("*U.S. – Shrimp"*) WT/DS8/AB/R, 12 October 1998, at para. 182.

129 The Article X:3(a) due process rights may be viewed as a specific incorporation of the fundamental international legal principle of *abus de droit. Abus de droit*, or abuse of law, prohibits a state from engaging in an abusive exercise of its rights.[195] This principle was recognized by the Appellate Body in the *U.S. – Shrimp* case. "It noted that good faith" is a "general principle of law and a general principle of international law {that} controls the exercise of rights by states"[196] and that *abus de droit* is one application of this general principle.[197]

130 In this way, the Appellate Body adopted the concept of good faith as a tool for interpreting WTO provisions so as to guarantee the due process rights of WTO Members. Specifically, good faith precludes unreasonable, abusive, or discriminatory interpretation of WTO rights and obligations. These principles prove even more crucial when a particular law endows a national authority with discretion.[198] An exercise of discretion in good faith must include a consideration of the parties' interests. In this way, the concept of good faith imposes a duty upon Members to implement the provisions in a reasonable and equitable manner.

b. The ITC made inconsistent factual conclusions in this case *vis-a-vis* previous cases

131 The Agreement on Safeguards requires the competent authority to determine whether or not increased imports cause serious injury to the domestic industry before taking a safeguard measure. Under U.S. law, the ITC is responsible for the injury determination. Thus, the ITC determination falls under the scope of Article X:3, since the administration of the laws, regulations, decisions and rulings related to the U.S. safeguard system mainly consists of the ITC determination based on its investigation as well as the subsequent decision on the application of the measure by the President.

132 As mentioned above, the ITC determination to make five flat-rolled steel products a single like product in relation to imports was inconsistent with 15 years of precedent in the AD/CVD context, which the ITC unreasonably ignored. Plate, hot-rolled, cold-rolled, and corrosion-resistant steel have traditionally been treated as separate like products by the ITC in

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[195] *See, e.g.*, Sir Robert Jennings, 1 *Oppenheim's International Law* 407 (9th ed. 1992) (an abuse of right occurs when a state avails itself of a right in an arbitrary manner).

[196] *U.S. – Shrimp*, at para. 158; *see also U.S. – Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R, 24 Feb. 2000, at para. 166; *U.S. – Standard for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 Apr. 1996, at 18. This principle is set out at Article 26 ("pacta sunt servanda") of the Vienna Convention, which requires states bound by treaties to perform them in good faith.

[197] As the Appellate Body concluded, "{a}n abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the Treaty obligation of the Member so acting." *U.S. – Shrimp*, at para. 158.

[198] The same leading treatise used by the Appellate Body in *U.S. – Shrimp* explains, "wherever the law leaves a matter to the judgment of the person exercising the right, this discretion must be exercised in good faith, and the law will intervene in all cases where this discretion is abused. . . . Whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which means that it must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interests of others." *B. Cheng, General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, p. 133, (**Exh. CC-48**).

other recent trade remedy cases.[199] The factual findings in these cases confirm the factual findings in this case about physical properties, production processes, and end-uses.

133 It is important to note in this regard that the like product factor analysis performed by the ITC in the antidumping and safeguards contexts share many common elements.

AD/CVD Like Product Factors[200]	**Section 201 Like Product Factors**[201]
1) physical characteristics and uses	1) the physical properties of the article (including physical attributes and interchangeability)
2) interchangeability	2) uses
3) channels of distribution	3) marketing channels
4) common manufacturing facilitates	4) where and how it is made (e.g. in a separate facility)
5) customer and producer perceptions of the products	5) customs treatment
6) sometimes prices	

Under both bodies of law, the ITC considers physical properties, manufacturing processes, end-uses, and channels of distribution.

134 The precedent in which these same factors were applied but produced opposite results was the 1992 AD/CVD investigation encompassing hot-rolled steel, cold-rolled steel, corrosion-resistant steel, and cut-to-length plate. In that case, the ITC found that "Petitioners' four proposed like products can be readily distinguished from each other," as they "differ in physical characteristics and uses," "have limited interchangeability," and "are transformed at different [production] lines by different workers."[202] In no subsequent AD/CVD case has the ITC determined that two or more flat-rolled steel products should be treated as a single domestic like product.[203] On the contrary, the ITC has consistently found

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[199] *See, e.g.*, *ITC Hot-Rolled (Final)* ITC Pub. 3446 (Aug. 2001) (**Exh. CC-30**), *ITC Hot-Rolled (Final)* ITC Pub. 3468 (Nov. 2001) (**Exh. CC-31**), *ITC Flat-Rolled (Preliminary)* ITC Pub. 2549(Aug. 1992) (**Exh. CC-32**), *ITC-Cold-Rolled (Final)* ITC Pub. 3283 (Mar. 2000) (**Exh. CC-34**).

[200] *See Certain Hot-Rolled Steel Products from Japan*, Inv. No. 731-TA-807 (Final), ITC Pub. 3202 at 3 n.7 (June 1999) (**Exh. CC-36**).

[201] *See Certain Steel Wire Rod*, ITC Pub. 3207 (July 1999), at I-9, (**Exh. CC-35**).

[202] *ITC Flat-Rolled (Preliminary)* ITC Pub. 2549 (Aug. 1992), at 12-15 (**Exh. CC-32**) (the ITC affirmed this like product determination in the final investigation, with the addition of clad plate as a fifth like product).

[203] *See, e.g.*, *Certain Cold-Rolled Steel Products from Argentina, Australia, Belgium, Brazil, China, France, Germany, India, Japan, Korea, The Netherlands, New Zealand, Russia, South Africa, Spain, Sweden, Taiwan, Thailand, Turkey, and Venezuela*, Inv. Nos. 701-TA-422-425 and 731-TA-964-983 (Preliminary), ITC Pub. 3471 (Nov. 2001) (**Exh. CC-37**); *Tin and Chromium Coated Steel Sheet from Japan*, Inv. No. 731-TA-860 (Final), ITC Pub. 3337 (Aug. 2000) (**Exh. CC-38**); *ITC-Cold-Rolled (Final)* ITC Pub. 3283 (March 2000) (**Exh. CC-34**); *Certain Cut-To-Length Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, Inv. Nos. 701-TA-387-391 and 731-TA-816-821 (Final), ITC Pub. 3273 (Jan. 2000) (**Exh. CC-39**); *Certain Hot-Rolled*

that no individual flat-rolled steel product is commercially interchangeable with any other flat-rolled steel product. Indeed, the ITC considered and rejected making even cut-to-length plate and plate-in-coil (a hot-rolled steel product) a single like product, citing "differences in physical characteristics and end-uses," "some limitations on…interchangeability," and "differences in production facilities."[204]

135 The ITC was well aware of this treasure trove of factual findings on like product factors for flat-rolled steel products when it performed its like products analysis in the Section 201 investigation. Respondents surveyed these precedents extensively in their Joint Prehearing Framework Brief, summarizing the ITC's like product factual findings in past AD/CVD investigations, and noting that these findings should be directly relevant to its analysis of the same products and factors in the Section 201 context.[205]

136 The ITC, however, chose to completely ignore this precedent. Nowhere in its Section 201 determination does the ITC attempt to square its finding of a single flat-rolled steel like product with its innumerable factual findings from previous AD/CVD cases demonstrating the contrary. Nowhere does the ITC rebut, or even address, Respondents' argument that the ITC's like product factual findings from past AD/CVD cases are relevant for its consideration of the same products and factors in the Section 201 context.

137 Inconsistent with its previous decisions, the ITC failed to perform its like products analysis of flat-rolled steel products in a "uniform," "impartial," or "reasonable" manner, consistent with Article X:3(a) of GATT 1994. The analysis was not "uniform" because it did not treat imports the same under similar circumstances. Nor was it "reasonable" to break with its past factual findings on the same flat-rolled steel products and like product factors without explanation.

138 The analysis was not "impartial" because the ITC's omission of these factual findings was not accidental oversight, but a willful gambit to facilitate an affirmative injury determination on flat-rolled steel products to benefit the U.S. domestic industries over their foreign competitors. Under the safeguards statute, the ITC cannot render an affirmative determination unless it finds: (1) an increase in imports, either actual or as a percentage of domestic production; (2) the domestic industry producing the like product is suffering serious injury; and (3) imports were a substantial cause of the serious injury.[206] In analyzing the question of increased imports, the ITC traditionally compares import volume and the ratio of imports to domestic production in the first and last full years of its period of investigation;[207] in this case, it compared 1996 and 2000.[208]

(continued)

Steel Products from Japan, Inv. No. 731-TA-807 (Final), ITC Pub. 3202 (Jun. 1999) (**Exh. CC-36**); *Clad Steel Plate from Japan*, Inv. No. 731-TA-739 (Final), ITC Pub. 2972 (Jun. 1996) (**Exh. CC-40**).

[204] *Certain Carbon Steel Plate from China, Russia, South Africa, and Ukraine*, Inv. Nos. 731-TA-753-756 (Final), ITC Pub. 3076 (Dec. 1997), at 5-7 (**Exh. CC-41**).

[205] Joint Respondents' Prehearing Framework Brief, (11 Sept. 2001) at 14-21 (**Exh. CC-50**).

[206] 19 U.S.C. §§2252(c)(1)(A-C) (**Exh. CC-47**).

[207] *ITC Report* at 32-33 (**Exh. CC-6**).

[208] *Id.* at 49.

139 Had the ITC made each flat-rolled steel product a separate domestic like product, consistent with past practice, then it could not have found the requisite increase in import volume for plate -- plate import volume declined 50.9 percent between 1996 and 2000[209] -- and would have had to somehow explain away the decline in the ratio of imports to domestic production for cold-rolled steel and corrosion-resistant steel.[210] With a single flat-rolled like product, the ITC was able simply to note that imports increased from one end-point to another, both absolutely and as a ratio to domestic production[211] (though, as discussed below, this increased imports analysis fails to meet the standard established by the Agreement on Safeguards, as interpreted by the Appellate Body).

140 Also, had the ITC made each flat-rolled steel product a separate like product, it could not have established causation for many of the products. For example, slab import volume increased the most of any flat-rolled steel product between 1996 and 2000, but almost all of these imports were purchased by domestic producers themselves, because they could not produce sufficient volumes of slab to meet booming steel demand;[212] in this way, slab imports actually *benefited* domestic producers.[213]

141 The ITC also could not have found cold-rolled steel imports a "substantial cause" of serious injury to the domestic cold-rolled steel industry, when it had just determined that cold-rolled steel imports had not caused material injury to the domestic industry in its March 2000 antidumping determination for cold-rolled steel,[214] under a lower causation standard.[215] By combining the major flat-rolled steel products into a single domestic like product, the ITC was able to ignore conditions of competition unique to individual flat-rolled steel products, thereby facilitating its affirmative determination.

142 Based on past precedent, and its own factual findings, the ITC could only have determined that each flat-rolled steel product constitutes a separate like product. Its failure to do so constitutes an inconsistency with the U.S. obligation under Article X:3(a) to apply its laws in a uniform, impartial, and reasonable manner.

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209 *Id.* at FLAT-9.

210 *Id.* at FLAT-11 (cold-rolled import volume as a share of domestic production declined from 7.5 percent to 7.3 percent), and FLAT-13 (corrosion-resistant import volume as a share of domestic production declined from 13.3 percent to 11.8 percent.).

211 *Id.* at 49-50.

212 *Id.* at 56 ("steelmakers themselves are the only purchasers of slabs").

213 *Id.* at 62 ("The domestic industry includes a number of producers who rely on imported certain carbon flat-rolled steel--especially slab--for use as raw materials in the production of further processed certain carbon flat-rolled steel. Some of these producers may have benefited from the decline in import prices during the POI.").

214 *ITC Cold-Rolled (Final)* ITC Pub. 3283 (Mar. 2000), at 24 (**Exh. CC-34**).

215 In antidumping investigations, the ITC need only find that a domestic industry is suffering material injury "by reason of" subject imports. *See* 19 U.S.C. § 1677(7)(A) (defining "material injury" as "harm which is not inconsequential, immaterial or unimportant."). In Section 201 investigations, the ITC must find that imports are a "substantial cause" of "serious injury" meaning "a cause which is important and not less than any other cause." 19 U.S.C §2252(b)(1)(B) (**Exh. CC-47**).

c. The ITC's decision on the flat-rolled like product was also internally inconsistent with its findings in the same case with regard to semi-finished long and stainless steel products, and with regard to tin mill products

143 Not only did the ITC conduct its like products analysis of flat-rolled steel products inconsistently with its past AD/CVD like products analyses of the same products, it also conducted its like product analyses of semi-finished flat, long, and stainless steel products inconsistently within the Section 201 investigation itself. The ITC made similar factual findings for each of the three products under its like product factors, but failed to render similar like product determinations.

144 As mentioned above, the ITC combined semi-finished slab with the major finished flat-rolled steel products made from slab -- hot-rolled steel, plate, cold-rolled steel, and corrosion-resistant steel -- into a single flat-rolled steel like product by ignoring the findings of its own analysis of like product factors.[216] These findings demonstrated that slab is not "like" any of the finished flat-rolled steel products in terms of physical characteristics, end-uses, production processes, channels of distribution, and tariff classifications. In terms of physical characteristics, slab is much thicker than any finished flat-rolled steel product, all of which are reduced in thickness via rolling.[217] In terms of production processes, slab is continuously cast, whereas all finished flat-rolled steel products are rolled,[218] and some are coated.[219] In terms of channels of distribution and end-uses, nearly all slab is internally consumed by domestic producers themselves for the production of downstream products.[220] By contrast, most corrosion-resistant steel and plate is sold to end-users and distributors, as is a substantial proportion of hot-rolled and cold-rolled steel, destined for a variety of end-use applications.[221] The ITC folded all flat-rolled steel products into a single like product in part because most finished flat-rolled steel products are sold into the automotive and construction markets, but this logic does not apply to slab. Finally, as with all flat-rolled steel products, slab is classified under its own tariff classification numbers.

145 But while the ITC lumped semi-finished carbon steel into the same like product as finished flat carbon steel, it decided to treat semi-finished long products (billets) and semi-finished stainless products as separate like products, apart from finished products. The only reason for doing so was the extent of vertical integration, which -- as discussed above -- is not relevant, much less controlling, given the Appellate Body's findings in previous cases.

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216 *ITC Report* at 36 (**Exh. CC-6**).

217 *Id.* at OVERVIEW - 8.

218 *Id.* at OVERVIEW - 10.

219 *Id.*

220 *Id.* at FLAT - 1.

221 *Id.* at OVERVIEW - 13, Table OVERVIEW - 2.

Comparison of ITC Like Product Findings for Semi-Finished Products

Like Product Factor	Finished Products -- All Categories[222]	Flat Semi-finished ("slab")[223]	Long Semi-finished	Stainless Semi-finished
Physical characteristics	Specific properties imparted by finishing	Semi-finished	Semi-finished	Semi-finished
Ends uses	Substantial proportion for end use applications	Processed into downstream products	Processed into downstream products[224]	Processed into downstream products[225]
Channels of Distribution	Substantial proportion to end users and distributors	Captively consumed	Captively consumed[226]	Captively consumed[227]
Production process	Rolled, drawn, extruded, or otherwise finished	Cast	Cast[228]	Cast[229]
Tariff classification	Separate	Separate	Separate[230]	Separate[231]

The ITC's similar like product findings for all three semi-finished products should have resulted in determinations that all three were not "like" the corresponding finished steel products. Yet, the ITC did not render like product determinations consistent with these

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[222] *See, generally, id.* at 36-45 (flat products), 79-91(long products), 190-205 (stainless products).

[223] *See id*. at 40.

[224] *Id*. at 83 ("these products are used as inputs to produce a wide array of finished products.").

[225] *Id.* at 195 ("all four semi-finished products…must be further worked…in order to produce finished stainless products… .").

[226] *Id.* ("over 92 percent…captively consumed... .").

[227] *Id.* at 195 ("{T}he large bulk of these shipments are internally consumed by the producers of the semifinished products.").

[228] *Id.* at 83 (*citing* OVERVIEW-7-8); *see also id.* at OVERVIEW-8 ("the steel is typically continuously cast into three semi-finished forms… .")..

[229] *Id*. at 194 ("all four forms of semifinished stainless steel…are produced during…the casting stage of the process.").

[230] *See id.* at LONG-1-4 (listing the separate HTSUS numbers for all long products).

[231] *See id.* at STAINLESS-2-4 (separate HTSUS numbers for all stainless products).

findings: semi-finished long and stainless products were made separate like products, but carbon slab was not.[232]

146 Likewise, within the flat-rolled category, both tin mill products and corrosion-resistant products use a cold-rolled substrate.[233] Tin mill products are coated with tin or chromium; corrosion-resistant products are coated with zinc or zinc-aluminum alloys. Yet, they were treated as separate like products, with all commissioners treating corrosion-resistant products as part of the larger flat product category, and four commissioners treating tin mill products as its own separate like product.[234] If anything, it would make more sense to consider tin mill and corrosion-resistant products as a single like product given their physical characteristics, their location in the production chain, and their sometimes common treatment in the HTS. But, the ITC made the odd leap to consider, effectively, slab and plate to be more comparable to corrosion-resistant steel than tin mill products.

147 The ITC's differential like product treatment of these products was not "uniform," "impartial," or "reasonable," and, therefore, violated Article X:3(a) of GATT 1994. It was not "uniform" or "reasonable" because the ITC had no principled reason for relying on its analysis of like product factors for semi-finished long, semifinished stainless products, and tin mill products while ignoring the same analysis for slab and corrosion-resistant products, based on the allegedly greater degree of vertical integration for those products, as discussed above. It was not "impartial" because, for the reasons discussed above, the ITC's decision to combine all flat-rolled steel products, including slab, into a single like product was calculated to facilitate an affirmative injury determination -- under WTO-inconsistent application of U.S. law -- based on a wrongful like product definition and resulting in the application of safeguard measure to a wider range of imports than should have been lawfully allowed under the Agreement on Safeguards.

148 The ITC's disparate like product determinations on semi-finished products were therefore not merely non-uniform, but also partial and unreasonable, and thus violated Article X:3 of GATT 1994.

C. The President's Measures On Tin Mill and Stainless Wire Products Are Inconsistent With Articles 2.1, 3.1, 4.2(b), and 4.2(c) of the Agreement on Safeguards and Article X:3(a) of GATT 1994

149 Two of the products against which the President decided to impose separate safeguard measures based on his treatment of these products as subject to ITC's tie-vote injury determinations were tin mill products and stainless steel wire products. The Commission's decisions on these products, however, should not have been treated as equally divided, and do not support the measures.

- For tin mill products: Two commissioners considered these products as part of the larger "flat-rolled" category and made an affirmative

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[232] *Id.* at 36 (flat), 83 (long), 193 (stainless).

[233] *Compare id.* at 42 (discussing cold-rolled products) to 48 (discussion of tin mill products).

[234] *See id.* at 48 (with Commissioner Devaney not joining in the views of the Commission in tin mills).

determination with regard to those products. The other four commissioners considered these products separate like products; one of these commissioners made an affirmative injury determination; the other three voted negative. Overall, therefore, the vote was tied at three-to-three; but for tin mill as a separate like product, the vote was three-to-one negative.

- For stainless wire products: Two commissioners considered these products as part of a combined stainless wire and wire rope like product and issued an affirmative determination on these products. The other four commissioners considered them separate like products. All four voted in the negative for stainless wire rope, resulting in a majority negative determination for this product. One of the four, however, made an affirmative determination for stainless wire; the other three voted in the negative for stainless wire. Overall, therefore, the vote was tied at three-to-three for stainless wire; but for stainless wire as a separate like product, the vote was three-to-one negative.

150 Under U.S. law, the ITC's determination is reached through voting by the six Commissioners. When the Commission is divided on an injury determination, it is up to the President to "break the tie." The WTO Agreements, particularly GATT Article X:3(a), require the President to administer the safeguard law in a uniform, impartial, and reasonable manner. The rights of other WTO Members to fundamental fairness and due process envisioned under Article X:3(a) were breached when the President treated the ITC votes on tin mill and stainless wire products as "*evenly* divided" based on inappropriate integration of affirmative votes premised on different like product definitions.

151 The treatment of ITC votes by the President is one of the key areas to which Article X:3(a) applies. There is no doubt that the U.S. domestic rules on the President's treatment of ITC tie votes falls within the scope of paragraph 1 of Article X:3(a) -- "administrative laws, regulations, decisions and rulings" pertaining to "restrictions or prohibition on imports." Thus, as required by paragraph 3 of that Article, the President has an obligation to treat divided ITC votes in a consistent and transparent way, given that the result of the investigation, including whether the U.S. eventually imposes a safeguard measure or not, depends on such vote treatment. He did not do so and, thereby, violated Article X:3(a).[235]

152 In this case, the President agreed with the three affirmative votes on tin mill and stainless wire products. But he also agreed with the four commissioners who found these products to be separate like products. Hence, he effectively imposed a measure on products for which only one out of four commissioners with whom he agreed in terms of the like product definition (treating the tin mill and stainless wire products as separate products) had made an affirmative determination, and did so without any explanation. He also provided no explanation for why he treated these purported "tie votes" as affirmative determinations while treating tie votes on two other products -- tool steel and stainless flanges/fittings -- as negative determinations. In this way, the USG violated Articles 2, 3, and 4 of the Agreement on Safeguards and Article X:3(a) of GATT 1994.

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[235] *See* discussion of GATT 1994 Article X:3 obligations in Section III.A.4. above.

1. The President's measures are inconsistent with Articles 2.1 and 4.2(b) of the Agreement on Safeguards and Article X:3(a) of GATT 1994 because there was no correlation between the injury determination, the like product definition, and the measure imposed

a. Articles 2.1 and 4.2(b) of the Agreement on Safeguards require an exact correspondence between the injury determination, the like product definition, and the measure imposed

153 Under Article 2.1, a Member may apply a safeguard measure only if the Member has determined that increased imports of the product in question have caused or threaten to cause serious injury to the industry producing the "like or directly competitive" product. Article 4.2(b) states further that an affirmative injury determination cannot be made unless an investigation shows "the existence of a causal link between increased imports *of the product concerned* and serious injury or threat thereof" (emphasis added).

154 Under the plain meaning of these articles, a safeguard measure cannot be applied to imports of a product without an affirmative injury or threat 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.

b. In this case, the commissioners did not agree on either the like product definition or the injury findings for tin mill products and stainless steel wire products

155 Two commissioners -- Bragg and Devaney -- treated: (a) tin mill products as part of the flat-rolled steel product category; and (b) stainless wire products as a part of a combined stainless wire/wire rope category.[236] They, in turn, made an affirmative injury determination concerning these broader categories.

156 The other four commissioners considered tin mill products as a separate like product from the flat-rolled steel product category and stainless wire as separate from stainless wire rope. Three of these four commissioners made negative injury determinations on the tin mill and stainless wire products.

- Commissioners Hillman, Okun, and Koplan found that imports of tin mill products were not injuring the domestic tin mill industry; only Commissioner Miller found otherwise.[237]

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[236] *ITC Report* at 273 (Bragg on tin mill), 277 (Bragg on stainless wire), 36 n. 65 (Devaney on tin mill), and 335 (Devaney on stainless wire) (**Exh. CC-6**).

[237] *Id.* at 25 (Hillman, Okun, and Koplan) and 307 (Miller's separate views).

- Commissioners Hillman, Okun, and Miller found that imports of stainless wire were not injuring the domestic stainless wire industry; only Commissioner Koplan found otherwise. [238]

In other words, *only one commissioner* found that imports of tin mill products and stainless wire products, unbundled from other products, injured the domestic industry making those same products.

157 So, the overall injury votes on these two products was three-to-three. But, the decision on the proper like product definitions for the products was 4-2 in favor of treating them as their own like product categories: tin mill was separate from other flat products; stainless steel wire was separate from stainless wire rope. And the injury votes on these preferred like product definitions were 3-1 negative determinations.[239]

c. The ITC's injury determinations on these products improperly were treated by the President as 3-3 ties

158 Under Section 330(d)(1) of the Tariff Act of 1930, as amended, when the ITC is required to determine under section 202(b) of the Trade Act "whether increased imports of an article are a substantial cause of serious injury … and the commissioners voting are equally divided with respect to such determination, then the determination agreed upon by either group of commissioners *may be considered by the President as the determination of the Commission*."[240]

159 In this case, the President applied what he believed was his discretion under Section 330(d)(1) to treat the votes on tin mill and stainless products either as affirmative or as negative decisions. In this instance, he chose the former.[241] The President, however, announced a remedy for tin mill products separate from his remedy for flat-rolled products, thereby indicating his agreement with the four commissioners who treated tin mill products as a separate like product.[242] For stainless wire, the President had to treat it as a separate like product since the Commission had voted 4-2 that stainless wire rope imports were not injuring the domestic stainless wire rope industry.[243]

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[238] *Id.* at 27 (Hillman, Okun, and Miller) and 256 (Koplan's separate views).

[239] *Id.* at 49.

[240] 19 U.S.C. 1330(d)(1) (emphasis added) (**Exh. CC-47**).

[241] *Proclamation 7529*, 67 Fed. Reg. 10553, 10562 (7 Mar. 2002) (effective 20 March 2002, temporary duties were imposed: tin mill products -- a tariff of 30 percent *ad valorem* on imports of tin mill products in the first year, 24 percent in the second year, and 18 percent in the third year; stainless steel wire products -- a tariff of 8 percent *ad valorem* on imports in the first year, 7 percent in the second year and 6 percent in the third year) (**Exh. CC-13**).

[242] *Id*.

[243] *ITC Report* at 27 (Koplan, Bragg, and Devaney affirmative determination on stainless wire and Okun, Miller, and Hillman negative determination with respect to stainless wire); *also* at 27 n.13 (Bragg and Devaney indicate that stainless wire and wire rope are one like product) and 277 (Bragg's separate views for stainless steel wire products) along with 335 (Devaney's separate views with respect to stainless steel wire and wire rope).

d. The President's action represents a violation of Articles 2.1 and 4.2(b) of the Agreement on Safeguards

160 As discussed above, Articles 2.1 and 4.2(b) of the Agreement on Safeguards necessarily require a one-to-one correlation between the injury finding and the definition of the like or directly competitive product. The President's choice to impose a separate measure on tin mill products shows he agreed with a majority of commissioners that tin mill products are a separate like product. The same applies to stainless wire. Yet, only one commissioner found that imports of these products injured the relevant domestic industry.[244]

161 The President's reliance on tie votes that did not correspond to the separate like product definitions with which he implicitly agreed violates Articles 2.1 and 4.1(b). The measure is not supported by an affirmative injury determination on the tin mill and stainless steel wire product categories themselves.

e. The President's decision also violates GATT 1994 Article X:3

162 As we argued above, GATT Article X:3(a) requires that each Member apply its laws, regulations, decisions and rulings in a uniform, impartial, and reasonable manner.[245] Like the ITC determination, the President's treatment of the ITC votes and the resulting decision concerning the application of safeguard measures, too, is subject to the obligation under Article X:3(a).[246] The aforesaid illogical treatment of the ITC vote by the President in this particular case is first and foremost unreasonable.

163 Section 330(d)(1) of the Tariff Act of 1930 specifies, in pertinent part, that when the ITC determines "whether increased imports *of an article* are a substantial cause of serious injury … and the commissioners voting are equally divided with respect to such determination," then the President can choose either of the two decisions.

164 "An article," according to a majority of commissioners, was clearly defined as: (i) tin mill products, separate from all other flat-rolled products; and (ii) stainless wire, separate from stainless wire rope. Only one of four commissioners found imports of these separate articles to injure the relevant domestic industries. However, the President treated the Commission's decision as a tie vote and accordingly an affirmative injury determination and he imposed a safeguard measure on imports of tin mill and stainless wire. Such treatment is an unreasonable administration of the safeguard law, because the President regarded the vote in this particular case as a tie when two of the affirmative votes were based on a like product

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(continued)

See also id. at 26 (Koplan, Okun, Miller and Hillman determine that stainless rope does not cause serious injury to the domestic industry) (**Exh. CC-6**).

[244] Treated as a separate like product, imports of products tin mill were found by Commissioner Miller to be seriously injuring the domestic tin mill industry. *Id.* at 307. Likewise, stainless wire was regarded by Chairman Koplan as a separate like product and found the domestic stainless wire industry to be seriously injured. *Id*. at 256.

[245] *See* Section III.A.4.a. above.

[246] *See* Section III.A.4.b. above.

definition with which he disagreed; such a decision simply strains logic. His treatment also constitutes non-uniform administration of the safeguard law because the President's treatment of the divided votes as "equally divided" within the meaning of Article 330(d)(1) is a clear departure from the ordinary and longstanding practice in the administration of U.S. safeguard law. For the President to treat the Commission's determination in this instance as a tie vote and an affirmative injury determination and to impose a safeguard measure on imports of tin mill and stainless wire products is considered to be at least unreasonable and non-uniform and therefore is inconsistent with Article X:3(a).

165 For the President to rely on the inappropriate mixture of votes based on different like product definitions in this case does not represent, to say the least, a uniform or reasonable application of U.S. law, as required by Article X:3(a) of GATT 1994. Left unchecked, such action impermissibly would erode the predictability and stability of the administration of the safeguard law.

2. Even assuming that the President's reliance on three affirmative votes based on differing like product definitions was legitimate, the decision was inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards and Article X:3(a) of GATT 1994 on other grounds

166 Whatever the Panel decides with regard to correlating injury and like product determinations, the tie votes in this case present still another violation. Even assuming the President's treatment of the ITC's tin mill and stainless wire products decisions as "equally divided" was legitimate, he -- without explanation -- treated these "tie" votes as positive determinations, while treating others as negative determinations. This approach violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards and Article X:3(a) of GATT 1994.

a. Articles 3.1 and 4.2(c) of the Agreement on Safeguards require the President to explain any departure from the ITC's findings

167 Article 3.1 requires authorities to publish a report "setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Article 4.2(c) requires the authorities to publish promptly, in accordance with Article 3, "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined."

168 A question arises in this case as to who is the "competent authority" in the United States in safeguard investigations. After all, although the ITC conducts the injury investigation, the President makes the ultimate decision on whether and how to impose the measure. This distinction will sometimes not matter if the President agrees with the ITC and imposes the remedy they recommend he impose. However, anytime the President makes a decision that departs from or lacks an ITC majority -- which applies with respect to the tin mill and stainless wire products, and his choice of remedy for all products -- then he must provide an explanation for the decision. The U.S. law construct that the President rather than the competent authority, *i.e.*, the ITC, makes the final decision in safeguards cases does not absolve the USG of the obligation to abide by Articles 3.1 and 4.2(c). If the President chooses a course unsupported by an ITC majority, he must issue his own report or, at least, provide a reasoned analysis or identify whose reports and analysis he is adopting. Otherwise, as here, the measure is unsupported and violates Articles 3.1 and 4.2(c).

b. The President in this case violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards

169 The Commission in this case was equally divided in its injury determination with respect to four products: tin mill, stainless steel wire, tool steel, and stainless flanges/fittings.

- On the first two -- tin mill and stainless wire -- the President sided with the affirmative votes.

- On the third and fourth -- tool steel and stainless flanges/fittings -- the President agreed with the negative votes.

170 No explanation was provided at all by the President, in his proclamation or elsewhere, as to why he agreed with one or the other side of these tie votes.

171 Perhaps it can be inferred in some cases why the President agreed with one side or the other because there might be just two reports -- one signed by three Commissioners, the other signed by the other three. In such instances, one could say that he 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.[247] And, as discussed above, the reports address different combinations of like product categories.[248]

172 It is impossible, therefore, to know with which Commissioner's or Commissioners' analysis the President agreed. The President failed to state which of the multiple reports issued by the Commission he adopted. Thus, it is impossible to know the basis for his decision. In the parlance of 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 has 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."

c. The President's decision also violates Article X:3(a) of GATT 1994

173 With no explanation of his decision to treat some tie votes as affirmative and some as negative, the President's decisions in this regard are inconsistent with one another. They therefore violate the requirement under Article X:3(a) of the GATT that each Member must administer its laws in a uniform, impartial, and reasonable manner. A careful look at each of

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[247] *See ITC Report* at 269 (Bragg's separate views), 307 (Miller's separate views), 311 (Devaney's separate views, 256 (Koplan's separate views) (**Exh. CC-6**). Together, four separate reports comprised the reasoning of the marginal 3-3 affirmative determinations in the tin mill and stainless wire products.

[248] *See id.* at 36 (identifying tin mill as a separate product from the flat products category), and 190 (identifying ten domestic industries producing stainless steel articles of which stainless wire was distinguished as a separate industry).

these concepts of fundamental fairness -- as interpreted by the panel in *Argentina – Bovine* -- reveal the violation.[249]

174 The decisions here are not uniform for the obvious reason that they are inconsistent: two tie votes are treated as affirmative; two are treated as negative. This is not a uniform administration of U.S. law. Absent the required explanation for the President's decision, one can only surmise that the decisions are also not impartial. Finally, the decisions are by nature unreasonable because, as discussed above, they were not supported by the requisite reports and analyses. It is not a reasonable administration of U.S. law to make a decision without explaining the basis for that decision. The decisions are therefore inconsistent with the requirements of Article X:3(a).

D. The U.S. Government Failed to Meet the "Increased Imports" Requirement Prescribed by Articles 2.1 and 4.2(a) of the Agreement on Safeguards, Article XIX:1(a) of the GATT 1994, and Relevant WTO Jurisprudence

175 The WTO agreements permit a Member to impose a safeguard measure only to address the effects of import surges, affording domestic industries the time to adjust to the heightened import competition resulting from trade liberalization. Accordingly, the requirement for the imposition of safeguard measures is an increase in imports sufficient to cause or threaten serious injury on a domestic industry, as provided in Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

176 Perhaps the most glaring deficiency of the U.S. safeguard measures is that they were imposed even though steel import volumes were declining. Imports of all subject flat-rolled steel products (whether aggregated or separated, and including tin mill products) have declined since 1998 or 1999, depending on the product, both absolutely and as a percentage of domestic production. These declines are even more pronounced for steel imports from countries actually subject to the safeguard measures. Because the U.S. Government did not demonstrate a "recent," "sudden," "sharp," and "significant" increase in import volume for these products, its steel safeguard measures on flat-rolled products -- grouped or separated -- are inconsistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1:1(a) of the GATT 1994. The same is true for other products subject to the relief, as demonstrated by the other complainants.

1. Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 Establish a Requirement of Increased Imports

177 The increased imports requirement is set forth in Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. The plain meaning of the language of these provisions, as interpreted by the Appellate Body, requires authorities to analyze import trends over the entire period of investigation. To impose a safeguard measure, there must be an increase in imports that is "recent enough, sudden enough, sharp enough,

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[249] *Argentina – Bovine*, para. 11.78 - 11.101.

and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'" to the domestic industry producing the like product.[250]

a. The plain meaning of the increased imports requirement

178 Article 2.1 of the Agreement on Safeguards sets forth the "pre-conditions" for a Member to impose a safeguard measure on imports, the keystone of which is the increased imports requirement:

> 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.

The very first of the three general requirements for the imposition of safeguard relief is increased imports, either absolute or relative to domestic production.

179 The relevant language of Article XIX:1(a) of the GATT 1994 is practically identical to that of Article 2.1 of the Agreement on Safeguards:

> If…any product is being imported into the territory of that contracting party 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 contracting party shall be free…to suspend the obligation in whole or in part or to withdraw or modify the concession.

The Appellate Body has recognized the symmetry between this increased imports requirement and that provided in Article 2.1 of the Agreement on Safeguards.[251]

180 The plain meaning of this language is straightforward and unambiguous. The increased imports requirement is stated in the present tense -- "such product *is being imported*" (emphasis added) -- indicating that the increase in import volume must be in the present, as of the time of the safeguards investigation, and not in the past.

181 Moreover, not just any increase suffices. Article 2.1 requires that the product concerned be imported "in *such* increased quantities and under such conditions *as to* cause or threaten to cause serious injury" (emphases added). The increase in import volume must be "such" as -- that is, sufficient -- to cause or threaten serious injury to the domestic industry producing the like or directly competitive product. It would therefore be insufficient to make an affirmative determination based on only a minor increase in imports even if there were a

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[250] *Argentina – Footwear* at para. 131.

[251] *Argentina – Footwear*, para. 130 ("we emphasize that this requirement {increased imports} is found in *both* Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994…." (emphasis in original)).

causal link between imports and the industry's injury (*e.g.*, a price-related impact with no concomitant volume-related impact). Rather, the increase itself must be big enough to cause the damage.

182 The language "pursuant to the provisions set out below" modifies the conditions in Article 2.1 with reference to the related requirements provided elsewhere in the Agreement. Article 4.2(a) explicitly elaborates upon the increased imports requirement:

> 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 all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, *in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms*, …. (Emphasis added).

Although Article 4.2(a) is largely concerned with serious injury and causation, it also informs the increased imports analysis. The use of the word "shall" in the provision requires authorities to evaluate "the rate and amount of the increase in imports in absolute and relative terms." To be meaningful, this provision by necessity requires that imports have a positive rate of increase -- that is, an acceleration.[252] If the rate at which imports have increased has declined, either absolutely or relatively, there cannot possibly be serious injury as envisioned by Article 4.2(a).

b. The Appellate Body has confirmed this interpretation of the increased imports requirement

183 The Appellate Body interpreted the plain meaning of these provisions in *Argentina – Safeguard Measures on Imports of Footwear*. In that dispute, the Argentine authority had satisfied the increased imports requirement by finding that import volume had increased 70 percent between 1991 and 1995 -- the end points of its period of investigation -- while ignoring the fact that footwear imports had declined steadily since peaking in 1993.[253]

184 The Appellate Body affirmed on slightly different grounds the Panel's holding that the Argentine authority's increased imports finding was inconsistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[254] It agreed with the Panel that, under Article 4.2(a), "the competent authorities are required to consider the trends in imports over the period of investigation (rather than just comparing the end points)."[255] Yet it added that "the use of the present tense" in Article 2.1 of the Agreement

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[252] *New Shorter Oxford English Dictionary* at 2481 (1993) (defines "rate" as "speed of movement, change, etc.; rapidity with which something takes place").

[253] *Argentina – Footwear* WT/DS121/R, Panel Report 25 June 1999 (hereinafter *"Argentina – Footwear Panel Report")* at paras. 5.146-147.

[254] *Argentina – Footwear* at para. 129.

[255] *Id.* at para. 129. The notion that current conditions should be considered in light of general market trends as well as the full period was also discussed in *U.S. – Lamb Meat*, para. 139.

on Safeguards and Article XIX:1(a) of the GATT 1994 "implies that the increase in imports must have been sudden and recent," and not over a period of years.[256]

185 The Appellate Body agreed with the Panel that "the specific provisions of Article 4.2(a) require that 'the rate and amount of the increase in imports . . . in absolute and relative terms' (emphasis added) must be evaluated."[257] It then further clarified the increased imports obligation:

> {I}t is not enough for an investigation to show simply that imports of the product are more this year 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 fulfill 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."[258]

Accordingly, for the increased imports requirement to be met, an authority must analyze import trends over the entire period of investigation and find that there is an increase in import volume that is "recent enough, sudden enough, sharp enough, and significant enough" to cause or threaten to cause serious injury.[259] This ruling by the Appellate Body coincides with the interpretation discussed above that the "rate" of increase is a crucial part of the analysis.

186 In *United States – Line Pipe*, the Panel considered that a slight and brief decrease of absolute imports at the very end of the investigation period would not preclude a finding of increased imports, if they remain at high levels and there is still a relative increase of imports.[260] However, as had already been clarified in *Argentina – Footwear*, where the imports declined "continuously and significantly" over a longer period, a product is no longer "being imported in such increased quantities" and the purpose of the safeguard remedy to address urgent situations is not met.[261]

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[256] *Id*. at para. 130.

[257] *Id.* at para. 129.

[258] *Id.* at para. 131.

[259] *Argentina – Footwear* at para. 131.

[260] Panel Report, *United States – Line Pipe*, paras. 7.210 and 7.213.

[261] Panel Report, *Argentina – Footwear*, para 8.162.

2. Summary of U.S. Law and Practice as Applied in this Case

187 Under the U.S. safeguards statute, the first of the three major requirements for an affirmative injury determination is a finding of "an increase in imports (either actual or relative to domestic production)."[262] The ITC has traditionally analyzed import trends over a five-year period of investigation, and found any increase in import volume between the first and fifth year, no matter how slight, sufficient to support a finding of increased imports.[263] As it has noted repeatedly: "There is no minimum amount by which imports must have increased. A simple increase is sufficient."[264] In its provisional relief safeguard determination for *Fresh Winter Tomatoes*, for example, the ITC found the increased imports condition met where import volume had increased from 360.1 million kg in 1990 to 396.0 million kg in 1994 -- a mere 10 percent -- even though imports as a percentage of domestic production remained unchanged at 24 percent.[265]

188 Not surprisingly, in this case the ITC determined that "the statutory criterion of increased imports is met" by finding a simple increase in import volume between 1996 and 2000 and by dismissing the decline in import volume since 1998. Also, as discussed above, the ITC grouped the products to support its increased imports findings.

a. "Flat-rolled" products

189 Analyzing its combined flat-rolled steel like product, the ITC found that "total imports increased from 18.4 million short tons in 1996 to 20.9 million short tons in 2000, an increase of 13.7 percent."[266] It further found that "{t}he ratio of imports to domestic production also increased during the period of investigation, from 10.0 percent in 1996 to

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[262] 19 U.S.C. §2252(c)(1)(C) (**Exh. CC-47**); *see also* 19 U.S.C. §2251(a) ("If the United States International Trade Commission…determines…that an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article, the President…shall take all appropriate and feasible action within his power… ."(emphasis added)).

[263] The ITC has occasionally considered import volume trends over the interim period (the most recent partial year data), *See Circular Welded Carbon Quality Line Pipe*, Inv. No. TA-201-70, ITC Pub. 3261 (Dec. 1999) at I-14 ("*Line Pipe 201*")(import volume declined during interim period) (**Exh. CC-42**), intervening import volume trends between the first and fifth years. S*ee Extruded Rubber Thread*, Inv. No. TA-201-72, ITC Pub. 3375 (Dec. 2000) at I-9 ("*Rubber Thread 201*")(import volume peaked in year four and declined in year five to a level still above year one) (**Exh. CC-43**). However, in every case, the ITC has treated a simple increase in import volume between the first and fifth years of the period of investigation as meeting the increased imports requirement. *Line Pipe 201* at I-11 (**Exh. CC- 42**); *Rubber Thread 201* at I-9 (**Exh. CC- 43**).

[264] *See, e.g., Line Pipe 201* at I-14 (**Exh. CC-42**); *Lamb Meat*, Inv. No. TA-201-68, ITC Pub. 3176 (Apr. 1999), at I-15 (**Exh. CC-44**); *Wheat Gluten*, Inv., No. TA-201-67, ITC Pub. 3088 (Mar. 1998), at I-10 (**Exh. CC-45**). The steel determination is the first determination in recent years to omit this boilerplate language. See *ITC Report* at 32-33, 49-50 (**Exh. CC-6**).

[265] Inv. No. TA-201-64 (provisional relief phase), ITC Pub. 2881 (April 1995), at I-15 (**Exh. CC-46**).

[266] *ITC Report* at 49 (**Exh. CC-6**).

10.5 percent in 2000."[267] Finally, it noted that "total imports were equivalent to 32.6 percent of domestic commercial shipments in 2000, up from 31.5 percent in 1996."[268]

190 The ITC acknowledged, but ignored, the fact that import volume declined 40 percent in the interim period -- between the first half of 2000 and the first half of 2001.[269] The ITC also acknowledged that import volume had peaked in 1998 -- reaching 25.3 million short tons for a 37.5 percent increase over 1996 -- and "declined in 1999 and 2000 from this peak,"[270] but discounted the importance of this trend by focusing on the end points of its period of investigation: "the absolute volume and ratio of imports to U.S. production were still significantly higher in 1999 and 2000 than at the beginning of the period."[271]

191 In its discussion of causation, the ITC elaborated on its rationale for discounting the decline in import volume after 1998.[272] It noted that the 30 percent import "surge" in that year "occurred in most types of certain flat-rolled steel," and exceeded the 3.2 percent increase in apparent domestic consumption and the 0.5 percent increase in net domestic sales.[273] The ITC claimed that the surge "altered the competitive strategy of domestic producers" by compelling them to cut prices in order to regain market share from low-priced imports at the expense of their financial performance;[274] "the corrosive effects of low-priced imports continued to injure the domestic industry even as the absolute volume of imports slackened somewhat.[275] In other words, the ITC decided that the decline in import volume in 1999 and 2000 was symptomatic of the serious injury that began in 1998.

b. Tin mill products

192 As discussed above, only one commissioner found that tin mill products -- as a separate like product -- met the statutory standards for making an affirmative injury determination. Two others lumped these products with other flat products. The remaining three found that tin mill product imports, considered separately, did not injure the domestic tin mill industry, though they did find that the increased imports standard was met.

193 Commissioner Miller, who cast the only affirmative vote on tin mill products, made only one statement regarding increased tin mill imports: "Imports increased overall during

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267 *Id.* at 50.

268 *Id*.

269 *Id.* at 49-50 ("Total imports declined from 11.5 million short tons in interim 2000 to 6.9 million short tons in interim 2001…. In interim 2001 total imports were equivalent to 22.7 percent of domestic commercial shipments.").

270 *Id.* at 50.

271 *Id.*

272 In its analysis of increased imports, the ITC noted that the "significance" of the declining import trend since 1998 "is discussed below under Substantial Cause of Serious Injury." *Id.*

273 *ITC Report* at 60 (**Exh. CC-6**).

274 *Id.* at 61 ("Repeated price cuts by the industry, while stemming somewhat the tide of imports and increasing domestic shipments, did nothing to improve the industry's condition.").

275 *Id.* at 62.

the period, but surged in 1999, increasing by 45.0 percent from 1998 to 1999, as compared to 30.5 percent from 1996 to 2000."[276] The other three commissioners who considered this product separately -- Commissioners Koplan, Okun, and Hillman -- stated:

> We find that total import of tin mill products have increased both in actual terms and relative to domestic production during the POI [period of investigation]. In actual terms, imports increased from 444,684 short tons in 1996 to a peak level of 698,543 short tons in 1999, and while they declined to 580,196 short tons in 2000, the overall increase from 1996 to 2000 was 30.5 percent. Imports of tin mill products were 263,091 short tons in interim 2001, 11.1 percent lower than in interim 2000. The ratio of imports to domestic production increased during the POI [period of investigation], from 12.0 percent to 17.4 percent in 2000. The ratio of imports to production was 20.1 percent during the import volume peak in 1999.[277]

3. The ITC's findings of increased imports do not meet the standard required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards

194 Under a plain reading of Articles 2.1 and 4.2(a) of the Agreement on Safeguards, as interpreted by the Appellate Body in *Argentina-Footwear*, the ITC's decision violates U.S. obligations under the WTO. The ITC could not have reasonably found a "recent," "sharp," "sudden," and "significant" increase in imports. This is evident even if one considers flat-rolled steel as a single like product. Moreover, when one properly breaks down the five like products within the ITC's flat-rolled product category, the defects in the ITC finding are even more apparent. Finally, when one examines the data focusing on those countries against whose imports the measures were ultimately imposed, the facts even more starkly demonstrate the ITC's utter failure to meet the increased imports standard.

a. Imports of "flat-rolled products," as defined by a majority of the ITC, did not meet the increased imports standard

195 To find an increase in imports, the ITC limited its analysis to the end points of its period of investigation, in violation of Articles 2.1 and 4.2(a) as interpreted in *Argentina-Footwear*. But, even if this "end-point" approach generally were acceptable, a modest increase in import volume stretched over a five year period does not qualify as "recent" or "sudden." In fact, import levels in 1999 and 2000 were down from 1998; imports in 2001 were well below 2000 levels; the trend since 1998 was stable or declining, not increasing.

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[276] *Id.* at 308.

[277] *Id*. at 71-72.

Absolute and Relative Import Trends: Flat-rolled (as defined by the ITC)[278]

	1996	1997	1998	1999	2000	1H00	1H01
Imports (mil. tons)	18.4	19.3	25.3	20.8	20.9	11.5	6.9
Production (mil. tons)	184.4	188.8	191.2	195.8	199.9	106.2	93.9
Import Share of Prod.	10.0%	10.2%	13.2%	10.6%	10.5%	10.8%	7.4%

Nor does the magnitude of the increase over the five full-year period -- a modest change from 18.4 to 21.1 million tons, or an increase of 14.7 percent -- qualify as "sharp." Much of this increase reflected the overall growth in the market, as confirmed by the "relative" data. The increase could not have been "significant" when it represented a mere 0.5 percentage point increase in imports as a share of production -- especially when 38 percent of the increase consisted of slab imported by the domestic industry itself.[279]

196 The ITC itself admitted that increased import volume in 1998, not a recent increase, is the primary cause of the serious injury.[280] Yet, the Appellate Body specifically rejected this approach in *Argentina-Footwear*. Indeed, the facts of *Footwear* are uncannily similar to the facts of our case, though in *Argentina – Footwear* the increase from the beginning to the middle *and* to the end of the period of investigation was far greater as illustrated below:

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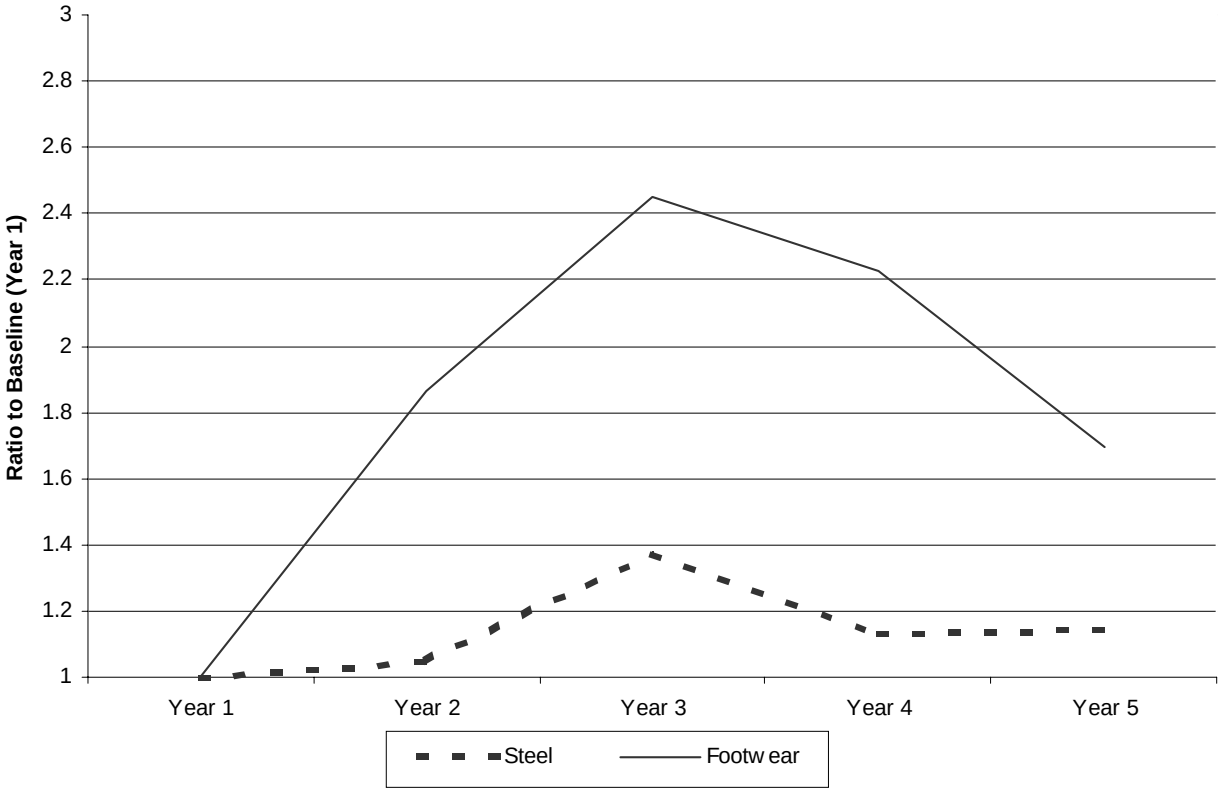
[278] *ITC Report* at FLAT-8 to 11, 13 and FLAT-16 to 19 and 21. Note that production numbers are simply added together for each product category, which was the methodology used by the Commission. *ITC Report* at 50 (**Exh. CC-6**).

[279] It was well established during the investigation that the domestic industry seeking safeguard relief imported the lion's share of the slab imports that some producers claimed were damaging the industry's performance. *ITC Report* at FLAT-51,(*stating* "[d]uring 2000, all 11 domestic steel producers which bought slabs purchased imported slabs.") (**Exh. CC-6**). The 38 percent figure is derived by taking the 962,409 ton increase in slab imports divided by the 2.5 million increase in total flat-rolled imports. *ITC Report* at FLAT-8 to 11 and 13 (**Exh. CC-6**).

[280] *ITC Report* at 59 (**Exh. CC-6)**

Comparison of Increases in Steel vs. Footwear[281]



197 Note also that the ITC's practice of comparing end points in this investigation is inconsistent with Articles 2.1 and 4.2(a) because it results in a failure to evaluate the "rate" of increase, as required by the Appellate Body.[282] If the ITC had examined the "rate" of increase, it would have found, for 1998 to 1999, *negative* 17.7 percent (decrease); for 1999 to 2000, positive 0.4 percent; and for first half 2000 to first half 2001, *negative* 39.7 percent (decrease).[283]

198 Indeed, as one would expect given these data, there has been an accelerating decline in import market share. Under the ITC's combined flat-rolled steel product, import market share decreased from 24.9% in 1999, to 24.6% in 2000, and even more sharply, to 18.5% in first half 2001.[284]

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[281] This Index uses data from both cases. The actual data in *Argentina – Footwear* were as follows:

	1991	**1992**	**1993**	**1994**	**1995**
Footwear Imports (millions)	8.86	16.63	21.78	19.84	15.07

[282] *Argentina – Footwear*, Panel Report, at para. 8.273. *Argentina – Footwear* at para. 129.

[283] *ITC Report* at FLAT-7-14 (**Exh. CC-6**).

[284] *Id.* at FLAT-7-14; FLAT-16-22. *See also* Data Compilation in **Annex A.**

199 Thus, as we have seen above, the imports have been decreasing "continuously and significantly" since 1998. The USG, therefore, failed to meet the increased import requirement for the ITC's chosen "flat-rolled" product category. It therefore also failed to provide the necessary "reasoned and adequate" explanation of how the facts in the record supported its affirmative determination on these products.

b. Imports of each of the individual flat-rolled products, considered separately, also did not meet the increased imports standard

200 When properly considered separately, the record shows even more dramatically that imports of various individual flat-rolled steel imports have decreased, both in absolute terms and as a share of domestic production. Here, too, the focus must be on a complete review of the trends over the period, with a focus on the most-recent period, not some simplistic, mechanical comparison of the beginning and end points.

201 The trends as illustrated below show that imports in every product peaked in 1998 or 1999, and have been decreasing "continuously and significantly" since then. Even worse, if we look closer at more recent trends, both absolute and relative imports were either flat or declining for every product in 2001 compared to 2000. Furthermore, for every product except hot-rolled, the volume and market share were either flat or declining in 2000 compared to 1999. In no event were any of the increases "significant," "sudden," or "sharp."

Import Volume, Absolute and As a Share of U.S. Production[285]

	1996	1997	1998	1999	2000	1H00	1H01
				Volume in Million Tons			
Slab	6.3	5.4	5.4	7.4	7.3	4.1	2.4
HR	5.3	6.5	11.5	6.5	7.5	4.4	1.8
CR	2.6	3.6	4.0	3.4	2.8	1.3	1.4
Corr.	2.3	2.4	2.3	2.7	2.5	1.3	1.0
Plate	1.9	1.4	2.1	0.9	1.0	0.4	0.4
				As a Percent of U.S. Production			
Slab	9.9	8.2	8.1	11.4	10.9	11.6	7.7
HR	8.3	10.0	18.1	9.7	10.9	12.1	5.3
CR	7.5	10.6	11.4	9.0	7.3	6.4	8.4
Corr.	13.3	13.5	12.0	12.8	11.8	11.7	10.4
Plate	32.5	22.5	29.0	15.2	14.9	11.5	11.9

As the data show, even if one uses the ITC's flawed comparison of end points, imports as a percentage of production for cold-rolled, corrosion-resistant, and plate were all down in 2000 compared to 1996, and the share of slab increased by only 1 percentage point and the share of hot-rolled by only 2.6 percentage points. This breakdown shows that, at most, there might have been a modest increase in hot-rolled imports, but this trend completely reversed in 2001

[285] *Id.*

as the multiple antidumping orders shut down trade.[286] These trends simply do not meet the requirements of Articles 2.1 and 4.2(a), as interpreted by the Appellate Body.

202 In addition, no product showed an accelerating rate of increase. In fact, for the most recent three periods of comparison, there was no product that managed to sustain even a small increase for more than one period. The other two periods show declines. In fact, for many flat-rolled steel products, the rate of "change" was negative – imports were declining. The only increase in the most recent period was a small increase in cold-rolled imports, which were simply beginning to recover after being shut out of the market by an unsuccessful antidumping case.[287]

Import Rate of Increase, 1998-1999, 1999-2000, 1H00-1H01 (In Percent)[288]

	1998-1999	1999-2000	1H00-1H01
All flat	-17.8	+0.4	-39.7
Slab	+37.7	-1.5	-42.0
HR	-43.3	+14.4	-60.3
CR	-16.5	-18.1	+11.2
Corr.	+15.8	-7.5	-23.0
Plate	-57.7	+6.2	-2.8

c. The trends in the most recent period are even more pronounced when one examines flat-rolled imports from those countries against which the measures were actually imposed

203 The declining trend in the most recent period is even more pronounced for flat-rolled steel imports actually subject to the safeguard measure -- *i.e.*, without the free trade area and developing countries which were ultimately excluded from the measure. Whether considered as a single flat-rolled category or separately for individual flat-rolled steel products, import volume generally declined after 1998 or 1999, and between first half 2000 and first half 2001.

204 Consider, for instance, non-NAFTA imports. First, it should be noted that overall levels of imports are much lower when excluding Canada and Mexico. NAFTA imports were, after all, from 16 to 21 percent of total flat-rolled steel imports throughout the period of investigation. Furthermore, their removal does not change overall import trends. As with total imports, there is no sudden, sharp, recent, or significant increase once the NAFTA

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[286] *See e.g., ITC Hot-Rolled (Final)* ITC Pub. 3446, (Aug. 2001) (**Exh. CC-30**)*; ITC Hot-Rolled (Final)* ITC Pub. 3468 (Nov. 2001) (**Exh. CC-31**). *See* Joint Respondent's Prehearing Brief: Product Group 4, Cold-Rolled Steel (11 Sept. 2001) at 14-15 (**Exh. CC-53**).

[287] *See* Joint Respondents' Prehearing Brief: Product Group 4, Cold-Rolled Steel (11 Sept. 2001) at 14-15 (**Exh. CC-53**).

[288] *Id*. *See also* Data Compilation at **Annex A** (all flat consists of slab, plate, hot-rolled, cold-rolled, and corrosion-resistant steels).

imports are removed. Even using the faulty beginning-to-end analysis, non-NAFTA imports were either relatively stable or down in 2000 compared with 1996. And from interim 2000 to interim 2001, these imports were all down except for cold-rolled, which was simply adjusting to the removal of provisional measures after a negative AD/CVD injury determination in March 2000.

Non-NAFTA Import Volume, Absolute and As a Share of U.S. Production[289]

	1996	1997	1998	1999	2000	1H00	1H01
				Volume in Million Tons			
All "flat"	14.5	15.2	21.2	16.4	16.8	9.2	5.1
Slab	4.9	3.8	3.6	5.4	5.4	3.0	1.7
HR	4.3	5.7	10.7	5.6	6.7	4.0	1.4
CR	2.2	3.2	3.7	3.0	2.3	1.1	1.2
Corr.	1.3	1.3	1.3	1.7	1.6	0.8	0.6
Plate	1.8	1.2	1.9	0.7	0.8	0.3	0.3
				As a Percentage of U.S. Production			
All "flat"	7.9	8.0	11.1	8.4	8.4	8.6	5.5
Slab	7.7	5.7	5.5	8.4	8.1	8.5	5.4
HR	6.8	8.7	16.8	8.4	9.8	10.9	4.1
CR	6.5	9.4	10.4	8.0	6.2	5.3	7.2
Corr.	7.7	7.6	6.8	8.0	7.6	7.3	6.5
Plate	29.3	19.6	26.0	11.3	12.2	9.3	8.6

205 When one removes excluded developing countries from the import trend analysis, it becomes even more clear how unjustifiable the ITC's increased imports decision really was. Flat-rolled steel imports remained constant, approximately 13.5 million tons in every year but 1998, before declining sharply in 2001. Even under the ITC's flawed comparison of 1996 to 2000, flat-rolled steel imports actually subject to the safeguard measure increased an insignificant 253,884 tons, or 1.9 percent, for combined flat-rolled products, and declined as a share of U.S. production. The same pattern holds true for hot-rolled, cold-rolled, and plate. Slab and corrosion-resistant steel imports reached their peak in 1999, before declining slightly in 2000 (corrosion-resistant steel imports declined from 1.43 million tons to 1.37 million tons), and then declining sharply in 2001.

[289] *ITC Report* at FLAT-7-14 (**Exh. CC-6**). *See also* Data Compilation at **Annex A.**

Non-Excluded Country Import Volume, Absolute and As a Share of U.S. Production[290]

	1996	1997	1998	1999	2000	1H00	1H01
				Volume in Million Tons			
All "flat"	13.4	13.5	19.1	13.5	13.7	7.3	3.4
Slab	4.6	3.6	3.5	5.3	5.2	2.9	1.5
HR	4.1	5.3	10.0	3.9	4.4	2.5	1.0
CR	1.9	2.5	2.9	2.4	2.1	1.0	1.0
Corr.	1.2	1.2	1.2	1.4	1.4	0.7	0.5
Plate	1.6	0.9	1.4	0.5	0.7	0.3	0.2
				As a Percent of U.S. Production			
All "flat"	7.3	7.2	10.0	6.9	6.8	6.9	3.7
Slab	7.3	5.5	5.3	8.2	7.8	8.1	4.7
HR	6.4	8.2	15.8	5.7	6.4	6.9	3.1
CR	5.6	7.4	8.2	6.5	5.5	4.9	6.0
Corr.	7.1	6.7	6.3	6.9	6.6	6.2	5.6
Plate	26.1	14.3	19.8	9.1	10.2	8.1	7.3

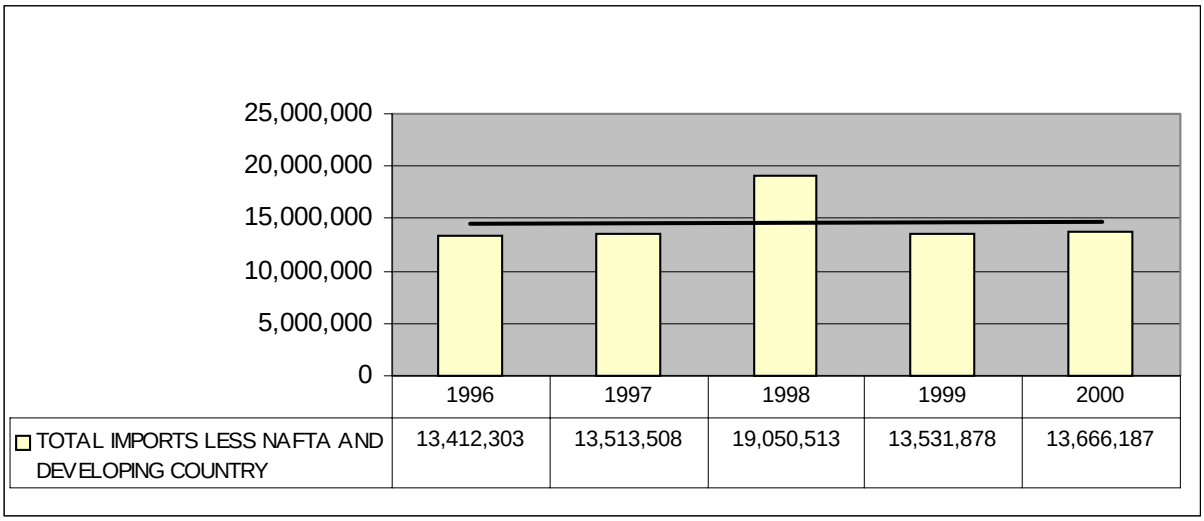
206 These data prove, yet again (as was true with the ITC's like product determinations), the results-oriented nature of the ITC decision with respect to flat-rolled products. Obvious beginning-to-end decreases were masked (such as with plate) by selection of the overly broad "flat" like product determination. Moreover, the decreases are all the more apparent once excluded countries are removed from the analysis. Absent imports from Canada and Mexico -- both countries which shipped significantly high volumes of flat products in every year between 1996 and 2000, but were excluded from the remedy (in violation of the principle of parallelism, as shown below) -- and imports from developing countries -- whose shipments rose from nearly zero to significant numbers later in the period of investigation -- most perceivable increases no longer exist. Indeed, while imports actually subject to the safeguard measure show no trend of import increase to satisfy the requirement set forth under the Agreement on Safeguards and Article XIX:1 of GATT 1994, *the absolute volume increase in flat-rolled imports from excluded developing countries over the 1996 to 2000 period was eight times the increase from countries subject to the relief,* yet they are not subject to the relief, because the United States excluded them under Article 9.1 of the Agreement on Safeguards.[291]

[290] Previous table adjusted for excluded developing country import volume from ITC Dataweb.

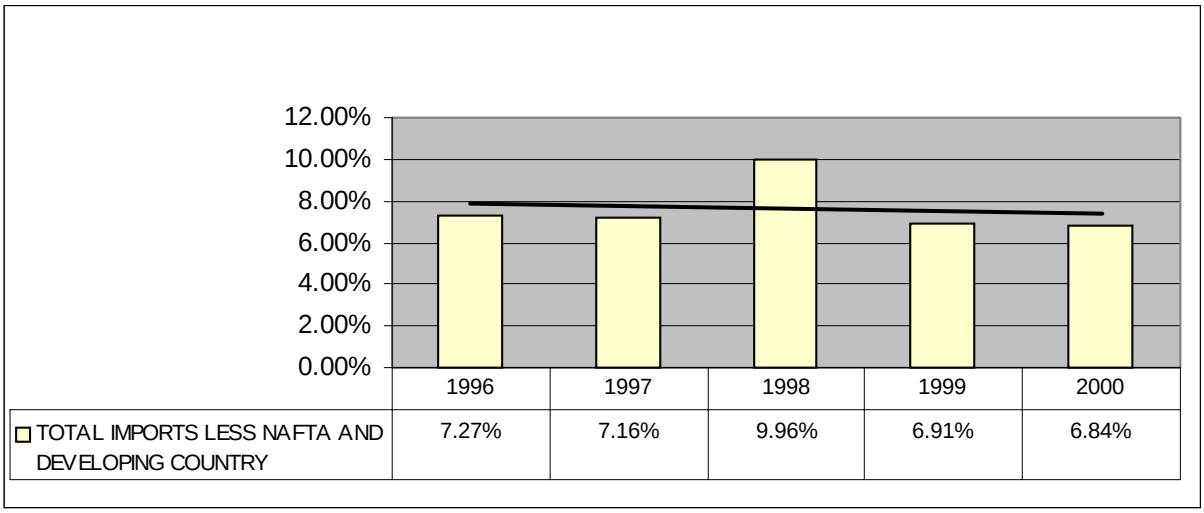
[291] *See* Data Compilation provided in **Annex A**.

207 As shown by the charts below, the trend lines alone are a dramatic illustration.

Total Imports Less NAFTA & Dev. Countries[292]



Total Imports Less NAFTA & Dev. Countries as % of U.S. Production[293]



208 While complainants in this case believe that the ITC acted inconsistently with the increased imports requirement regardless of how one presents the data, we raise this issue to ensure that the Panel is aware of the distorted analysis and decisions made by the United States to justify application of inappropriate safeguard measures against its non-FTA and non-developing country trading partners.

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[292] *See* Data Compilation at **Annex A.**

[293] *Id.*

d. The ITC's analysis of tin mill products is equally flawed

209 The import data relevant to the four Commissioners who considered tin mill products separately are:

Tin Mill Absolute Import Trends[294]

	1996	1997	1998	1999	2000	2000 ½	2001 ½
All imports	444,684	438,121	481,611	698,543	580,197	295,970	263,092
Non-NAFTA	399,295	359,558	396,717	601,105	488,588	250,068	206,010
Non-NAFTA, non-LDC	398,443	359,139	396,580	599,101	487,204	249,953	205,090

These data show that, although imports increased from 1996 to 2000 (using the flawed end-point comparison), they decreased from 1999 to 2000 and from interim 2000 to interim 2001. The same is true of imports as a percentage of U.S. production:

Tin Mill Imports As A Percentage Of U.S. Production[295]

	1996	1997	1998	1999	2000	2000 ½	2001 ½
All imports	12.0	11.6	13.9	20.1	17.4	17.1	17.7
Non-NAFTA	10.8	9.5	11.4	17.3	14.7	14.4	13.8
Non-NAFTA, non-LDC	10.7	9.5	11.4	17.2	14.6	14.4	13.8

Again, although imports as a percentage of production increased from 1996 to 2000, they declined from 1999 to 2000. Between interim periods, the imports that mattered -- *i.e.*, those covered by the measure (particularly non-NAFTA countries, for which parallelism between injury and remedy is required) -- also declined as a percentage of production.

210 These trends show that U.S. imports in tin-mill products have been decreasing "continuously and significantly," both in absolute and relative terms. Hence, the requisite sharp, recent, sudden, and significant increase was not present, and the affirmative injury finding for tin mill products was unjustified.

e. The ITC's import trend analyses of other products was also wrong

211 As set forth in the submissions of other complainants, Japan agrees that the increased imports requirement was not met for other products as well. In closely analyzing the ITC's methodology for examining import trend data, it becomes abundantly clear that the ITC was not merely inconsistent, but also selective and result-oriented in its approach to determining whether imports increased. For some products, the ITC ignored the most recent period (as in the case of hot-rolled bar where the ITC only compared end points of the investigation) to

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294 *See* Data Compilation at **Annex A**.

295 *Id*.

demonstrate that imports have increased during the period of investigation.[296] Yet for other products, (carbon and alloy fittings), the ITC exclusively focused on the most recent period where the facts supported the pre-determined result.[297]

212 In violation of Article 2.1, to say the least, the United States employed a flawed methodology to achieve its findings of increased imports.

E. The ITC's Causation Analysis Was Inconsistent With Article 4.2(b) of the Agreement on Safeguards

1. The Agreement on Safeguards sets strict standards for establishing the causal connection necessary to justify imposition of safeguard measures

a. Article 4.2(b), first sentence, requires a "causal link" between the increased imports and the serious injury to the domestic industry

213 Article 2.1 of the Agreement on Safeguards sets forth the basic conditions that must be found to exist before safeguard measures can be imposed. Under Article 2.1, a Member must determine that a "product is being imported…in such increased quantities…as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products." The text thus explicitly requires that increased imports "cause" serious injury.

214 Article 4.2(b) then clarifies the nature of this obligation. Under Article 4.2(b), the authority must first demonstrate "the existence of the causal link between increased imports…and serious injury or threat thereof." Moreover, this demonstration must be "on the basis of objective evidence."

215 Under the plain meaning of these provisions, Members must therefore demonstrate an explicit "causal link" between the increase in imports and any serious injury suffered by the domestic industry. The text could not be more direct in imposing a specific obligation on the authority to have a solid evidentiary basis for blaming increased imports for any problems being suffered by the domestic industry.

b. Article 4.2(b), second sentence, goes further and explicitly requires authorities to establish "non-attribution"

216 Although the first sentence of Article 4.2(b) imposes an explicit obligation to demonstrate the "causal link," the second sentence of Article 4.2(b) goes even further. The second sentence of Article 4.2(b) requires, as part of the causation analysis, that "{w}hen factors other than increased imports are causing injury to the domestic industry at the same

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[296] *ITC Report* at 92, (**Exh. CC-6**).

[297] *Id*. at 171.

time, such injury shall not be attributed to increased imports." This is commonly known as the non-attribution requirement.

217 Under the plain meaning of this language, authorities may not demonstrate a causal nexus between imports and serious injury simply by correlating increased imports with serious injury. Mere correlation is a necessary, but insufficient condition. Because other factors may be causing the decline in domestic industry performance, the authorities also must specifically investigate other possible causes, and the injury from those alternative causes "shall not be attributed" to imports.

c. The Appellate Body has clarified these obligations

218 The Appellate Body consistently has interpreted these two obligations in four prior cases. Taken together, this body of Appellate Body jurisprudence provides guidance to authorities that is explicit and unmistakable.

219 The Appellate Body has clarified the meaning of "causal link." In *Argentina–Footwear*, the Appellate Body explicitly held that authorities are required to find a correlation between the increased imports and the deterioration in the performance of the domestic industry:

> In practical terms, we believe therefore that this provision means that if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. While such a coincidence by itself cannot *prove* causation…its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation is still present.[298]

220 The Appellate Body further clarified the nature of this "causal link" in *U.S. – Line Pipe*:

> … the causal link required by Article 4.2(b), first sentence, of the *Agreement on Safeguards* is "a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury." More specifically, we said there that "[t]he word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element." We also explained that the word "link" indicates "that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection' or 'nexus' between these two elements."[299]

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[298] *Argentina – Footwear* at paras. 144-45 (emphasis in original) (*quoting Argentina – Footwear* Panel Report decision at para 8.238)

[299] *U.S. – Line Pipe*, at para. 209 (citations omitted) (*quoting U.S. – Wheat Gluten*).

The Appellate Body thus agrees with the common sense notion that, at a minimum, to establish a causal link, the facts must demonstrate a correlation in time between *the increased* imports and the decline in industry performance. Absent this correlation, the increase in imports cannot be said to have "brought about" the serious injury.

221 Based on the text of Article 4.2(b), the Appellate Body has also established that to comply with the non-attribution requirement, an authority must "separate" and "distinguish" the injurious effects of factors other than increased imports to ensure they are not attributed to imports. In *U.S. – Wheat Gluten*, the Appellate Body explained:

> The need to ensure a proper attribution of "injury" under Article 4.2(b) indicates that competent authorities must take account, in their determination, of the effects of increased imports *as distinguished from* the effects of other factors.[300]

222 In *U.S. – Lamb Meat*, the Appellate Body reiterated and elaborated on this requirement of distinguishing alternative causes:

> The primary objective of the process we described in *U.S. – Wheat Gluten Safeguard* is, of course, to determine whether there is "a genuine and substantial relationship of cause and effect" between increased imports and serious injury or threat thereof. As part of that determination, 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.[301]

223 Authorities must thus identify the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the injurious effects of those other factors as distinguished from the injurious effects of the increased imports.

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[300] *U.S. – Wheat Gluten*, at para. 70 (emphasis in original).

[301] *U.S. – Lamb Meat*, at para. 179 (emphasis in original).

224 Most recently, in summarizing the obligation of Article 4.2(b), the Appellate Body explained:

> Thus, 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. 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.[302]

225 The fundamental obligation not to blame imports for other causes is one that is found in other WTO trade remedy agreements as well. Article 3.5 of the AD Agreement imposes an identical obligation before imposing anti-dumping duties. In clarifying this obligation, the Appellate Body in *U.S. – Hot-Rolled Steel* explained:

> In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.[303]

226 The Appellate Body went on to state that although it acknowledged that the task is a difficult one, this is nonetheless what members of the WTO agreed was required to justify application of the trade remedy measures.[304]

227 These obligations explicitly to separate and distinguish are now reflected in a long line of decisions, including *Wheat Gluten*, *Lamb Meat*, and *Line Pipe* in the safeguards context, and *Hot-Rolled Steel* in the antidumping context. The plain language of the text, as consistently interpreted by the Appellate Body, provides an unmistakable framework within which to analyze actions by authorities. For the United States to continue to flout this

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[302] *U.S. – Line Pipe*, at para. 217.

[303] *U.S. – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R adopted 24 July 2001, at para. 223.

[304] *Id.* at para 228.

explicit guidance, and to repeat the same inadequate and flawed analysis in case after case, does not show either good faith or respect for U.S. WTO obligations.

d. Authorities have an obligation to undertake a comprehensive and detailed review of the facts

228 In summarizing its decisions under the Agreement on Safeguards, the Appellate Body in *U.S. – Cotton Yarn* has clarified that authorities must undertake a careful and rigorous review of safeguard determinations by the authorities. In particular, the authority must: (i) "evaluate all relevant factors"; (ii) provide "an adequate explanation"; (iii) "address fully the nature and complexities of the data"; and (iv) "respond to other plausible interpretations of the data."[305]

229 Of course, it ultimately falls to panels to hold national authorities to these strict standards and to examine any factual findings critically in light of other evidence before the authority and alternative explanations of relevant facts.

230 As discussed further below, the ITC Report fails to meet the standard of "an adequate explanation" which "addresses fully the nature and complexities of the data." The evidence before the ITC in this case was particularly robust and demonstrated the lack of causation. It included sophisticated econometric studies that specifically analyzed the relative impact of different factors on the domestic industry performance. Yet, even when presented with this wealth of information, the ITC did not "separate" and "distinguish" the injurious effects in this case. In fact, the ITC ignored detailed and exhaustive evidence that did separate and distinguish these alternative causes.

2. In this case, the ITC failed to establish a "causal link" between increased imports and serious injury to the flat-rolled industry, and thus failed to meet the test of Article 4.2(b) first sentence

231 The ITC finding of a "causal link" in this case is wrong. The ITC alleges that the increase in imports and the decline in the domestic flat-rolled industry performance occurred at the same time. But the facts actually demonstrate a complete absence of any correlation in time, which is the minimum requirement for establishing a causal link as the Appellate Body jurisprudence suggests. Any injury by the domestic industry occurred only after imports already began to decline. There is thus logically no causal link between the increased imports in 1998 and the declining performance of the industry.

a. The ITC improperly blurs the timing of key trends, and exaggerates their magnitude

232 The ITC's finding of a causal link between increased imports and serious injury centered on what happened in 1998. The ITC asserts that "the impact of the 1998 surge in imports is undeniable"[306] and that "the import surge in 1998 altered the competitive strategy

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[305] *U.S. – Cotton Yarn*, at para. 74.

[306] *ITC Report* at 60 (**Exh. CC-6**).

of the domestic producers." [307] The ITC concludes that "the dramatic increase in the volume of imports in 1998 -- at the midpoint of the period examined -- coincided with sharp declines in the domestic industry's performance and condition which occurred despite growing U.S. demand."[308] Yet this crucial assertion -- that in 1998 a surge in imports caused injury to the domestic industry -- is demonstrably false. The evidence flatly contradicts this assertion. The evidence shows that, when imports were increasing early in the period, the U.S. industry was not injured and that when, later in the period, the U.S. industry arguably was injured, imports were decreasing.

233 First, there is no evidence of a "dramatic increase." The record, as explained above, proves just the opposite. When discussing the causation issue, the ITC itself notes that imports increased from 10.0 percent of production in 1996 to only 13.2 percent of production in 1998 -- hardly "dramatic," particularly since imports then proceeded to drop back to 10.5 percent of production in 2000. The same trend appears when imports are measured either as a percentage of the open market or as a percentage of apparent domestic consumption.[309]

234 Second, the record also provides no objective evidence of a "sharp decline" in the domestic industry's performance in 1998 when imports peaked. Whether considered as a single aggregate like product as the ITC did, or as individual like products as the ITC should have done, the domestic industry performance in 1998 was stable and did not reflect any serious injury.

235 For the flat-rolled steel products overall, the 4.0 percent operating income in 1998 was essentially the same as the 4.3 percent operating income in 1996.[310] The ITC itself characterized the 1996 levels of operating income as "reasonable operating profits."[311] The ITC conveniently ignored the 1996 performance of the industry by shifting focus to the boom year 1997, when the domestic industry did somewhat better than either 1996 or 1998. It is disingenuous, however, to argue that a return to mere "reasonable operating profits" in 1998 somehow constitutes serious injury just because that performance is somewhat weaker performance than 1997, the peak year.

236 The other indicia of domestic industry health show either improving or stable trends through 1998. Although the ITC decision provides several tables comparing 1996 to 2000, the real issue is what happened to the domestic industry in between these two end points. The ITC's logic for a "causal link" places the performance of the domestic industry in 1998 at the center of the analysis. Yet by most measures, the industry was doing fine in 1998:

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307 *Id.* at 61.

308 *Id.* at 59.

309 *Id.* at 59.

310 *ITC Report* at 53, (**Exh. CC-6**).

311 *Id.* at 51.

Measures of Domestic Industry Performance[312]

Factor	1996	1997	1998	1999	2000
capacity (m tons)	202.3	210.7	224.3	229.7	234.6
production (m tons)	184.4	188.8	191.2	195.8	199.9
shipments (m tons)	58.3	59.9	59.8	62.9	64.1
hours worked (m hours)	234.2	233.9	234.7	228.1	226.0

This table underscores that beyond its stable financial performance through 1998, the domestic industry had stable or improving production through 1998 and, indeed, throughout the period.

237 The flawed logic of ignoring the timing of key events also appears in the ITC discussion of bankruptcies. The ITC opened its discussion of serious injury by referring to steel company bankruptcies, but then failed to analyze what the bankruptcy data really reveals about the causation analysis. It may be true that ten flat-rolled steel producers declared bankruptcy during the entire period of investigation.[313] But the key question for understanding any causal link is the timing of <u>when</u> these companies declared bankruptcy. The ITC analysis implies the bankruptcies began in 1998. Yet the record demonstrates that the financial distress began much later in the period. Of the ten flat-rolled steel producers cited by the ITC, eight of the ten declared bankruptcy <u>after 1998</u>. Most of the companies declared bankruptcy in 2000 and 2001, two years after 1998, and these companies were the larger of those producers that declared bankruptcy. Of these ten companies representing 29.7 million tons of raw steel-making capacity operated by firms that declared bankruptcy during the period of investigation, firms accounting for 24.5 million tons of this capacity declared bankruptcy in 2000 or 2001.[314] Rather than support the ITC logic for a correlation in time and thereby a causal link, this data shows that the problems facing the domestic steel industry occurred much later in the period when imports were already declining, not in 1998.

238 For individual flat-rolled products, the record before the ITC demonstrates the same logical disconnect. The 1998 results were often <u>better</u> than 1996. Operating income for slabs, plate, and hot-rolled steel were all better in 1998 than in 1996. The operating income for

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[312] These summary figures are based on the data compilation in **Annex B**, which totals the data for individual flat-rolled steel products including slab, plate, hot-rolled, cold-rolled and corrosion-resistant. We note that in its staff report, ITC discussion of "flat-rolled" included tin mill steel and GOES, two products ultimately found to constitute separate like products.

[313] *ITC Report* at 51 (**Exh. CC-6**). (Listing the following companies filing for bankruptcy during the period: Gulf States, LTV, Geneva, Wheeling-Pitt, Trico, Acme Metals, Heartland Steel, Great Lakes Metals, World Processing. Bethlehem also sought bankruptcy protection after the period. **Annex B.**

[314] These data can be found in *id.* at Table OVERVIEW-11. The figures in the text reflect only flat-rolled producers. If we included all producers, including those making both flat-rolled steel and those making other products as does this Table, the analysis and conclusions are basically the same.

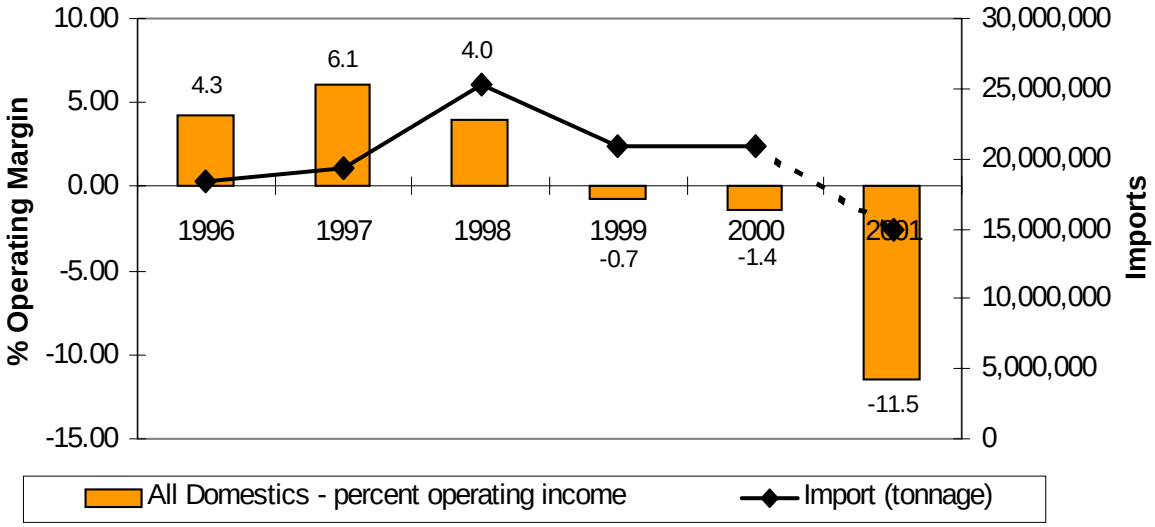
corrosion-resistant steel was about the same. The operating margin for cold-rolled had dropped somewhat, but the ITC had already specifically found that any decline in the performance of the cold-rolled industry had nothing to do with imports.[315] Thus, regardless of whether the flat-rolled steel products are considered as a single like product or individually, the evidence shows a basic disconnect between increased imports and the performance of the domestic industry. There is no causal link.

b. The increase in flat-rolled steel imports that occurred in 1998 thus does not correlate with the condition of the corresponding domestic industry

239 Industry performance only began to decline after imports also began to decline. The ITC seeks to mask this fundamental problem in its analysis alleging a causal link between increased imports and injury. By 1999 and 2000, however, imports were being increasingly shut out of the U.S. market by antidumping and countervailing duty cases.

240 For the ITC's broad category of all flat-rolled steel, although imports increased somewhat in 1998, imports fell in both 1999 and 2000. At the time of the alleged serious injury, imports were decreasing, not increasing, as the following figure shows:

There Is No Correlation Between Increased Import Levels and Declines in Domestic Operating Performance[316]



[315] *Id.* at 53. With respect to cold-rolled, *see ITC Cold-Rolled (Final)* ITC Pub. 3283 (Mar. 2000) at 24 (**Exh. CC-34**).

[316] *ITC Report* at Table FLAT-4, 5, 6, 7, and 9, with 2001 annualized (imports); *ITC Report* at 53 (operating income percentage) (**Exh. CC-6**). This figure reproduces a figure using an earlier version of the underlying data presented in Joint Respondents' Posthearing Brief: Flat-Rolled Steel (1 Oct. 2001) at 84 (**Exh. CC-55**). Whether the Panel considers the version presented to the ITC, or the updated version presented here, the trends and conclusions are the same.

241 The decline in financial performance occurred only after imports had already begun to decline. In absolute terms, imports of flat-rolled steel peaked at 25.8 million tons in 1998, but then were down in 1999 and 2000 to only 21.5 million tons.[317] The same trend occurred for total flat-rolled imports as share of the market.

242 For individual flat-rolled steel products, the same trends in import levels and import share of production quantity appear. As the ITC itself admitted, AD and CVD orders "to some extent staunched the flow of imports after 1998."[318] In fact, these orders led to sharp drops in imports. Plate imports were cut in half in 1999 and 2000 due to antidumping actions.[319] Hot-rolled imports were cut by almost half in 1999 and 2000, also due to antidumping actions.[320] Cold-rolled imports fell in 1999 and then fell even further in 2000 due to antidumping actions.[321] Corrosion-resistant steel imports were up slightly in 1999 and 2000, but were essentially stable; corrosion-resistant steel imports had been restrained by AD and CVD orders since 1993.[322] Thus, for all four finished flat-rolled products, imports decreased in 1999 and 2000.[323]

243 The same declining trend can also be seen in the share of imports for each specific flat-rolled product relative to the overall market. Market share levels were either stable or declining in 1999 and 2000 relative to 1998.

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[317] *ITC Report* at Table FLAT-3. The same trend is seen in non-NAFTA imports, which peaked at 21.7 million tons, and then fell to 17.0 million tons in 1999 and 17.3 million tons in 2000 (**Exh. CC-6**).

[318] *Id.* at 62.

[319] *Id.* at Table FLAT-5. *See also, Certain Cut-To-Length Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, Inv. Nos. 701-TA-387-391 and 731-TA-816-821 (Final), ITC Pub. 3273 (Jan. 2000) (**Exh. CC-39**).

[320] *ITC Report* at Table FLAT-6 (**Exh. CC-6**). *See also, ITC Hot-rolled (Final)* ITC Pub. 3446 (Aug. 2001) (**Exh. CC-30**).

[321] *ITC Report* at Table FLAT-7 (**Exh. CC-6**). *ITC Cold-Rolled (Final)* ITC Pub. 3283 (Mar. 2000) (**Exh. CC-34**). In this case the ITC made a negative injury determination, so no AD or CVD orders went into effect. The uncertainty and disruption of the pending case, however, had the same effect on import levels as the ultimately successful cases on plate and hot-rolled steel.

[322] *ITC Report* at Table FLAT-9 (**Exh. CC-6**). *See also ITC Flat-rolled (Final)* ITC Pub. 2664 (Aug. 1993) (**Exh. CC-33**).

[323] The only exception was slab, which increased somewhat in 1999 and 2000 to meet growing U.S. industry demand (by U.S. re-rollers).

Import Market Share Trends for Individual Flat-rolled Steel Production[324] (in percentage)

Product	1996	1997	1998	1999	2000
slab	6.8	5.2	5.1	7.3	7.3
plate	22.4	16.6	20.8	10.0	11.0
hot-rolled	6.3	8.0	14.3	7.6	8.9
cold-rolled	6.2	8.6	9.5	7.4	5.8
corrosion-resistant	6.9	6.8	6.3	7.3	7.1

244 The ITC thus blamed imports, not increasing imports, for the condition of the domestic industry. When the domestic industry began to experience difficulties in 1999 and 2000, there were no increasing imports to blame. The ITC could only point to decreasing imports -- both absolutely and as a share of the market.

c. Article 4.2(b) does not allow such a disconnect between the serious injury and the increase in imports

245 Article 4.2(b) requires a causal link between the increased imports and the serious injury alleged. Article 4.2(b) does not allow authorities to find some imports in the marketplace, and then to attribute to those imports -- regardless of their magnitude and regardless of trends -- any difficulties being faced by the domestic industry. Article 4.2(b) requires more. As the Appellate Body has made clear, the absence of a correlation in time between increased imports and serious injury "would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present."[325]

246 The ITC failed to provide even a credible analysis, let alone a "very compelling" analysis. In this case, the flaw in the ITC logic is glaring, since the decline in industry performance in 1999 and 2000 coincides with declining imports, not increasing imports. As imports increased in 1998, the industry continued to enjoy stable and reasonable levels of operating performance. Only when imports dropped sharply -- in many cases, to levels well below the levels in 1997, when the domestic industry had its peak operating performance -- did the domestic industry begin to suffer. The ITC logic in this case thus fails the most basic

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[324] *See ITC Report* at Tables FLAT 51-56 (**Exh. CC-6**), all imports other than NAFTA imports. The trends are the same if NAFTA imports are included, and those figures can be found in the same pages of the *ITC Report*.

[325] *Argentina – Footwear* at para. 144 (emphasis in original).

test of all -- simple common sense. The United States has not demonstrated any correlation in time, not to mention a "causal link" sufficient to satisfy Article 4.2(b).

3. In this case, the ITC also failed to ensure that it did not attribute the effects of other causes to flat-rolled steel imports, and thus failed to meet the test of Article 4.2(b) second sentence

247 The ITC made no attempt rigorously to "separate" or "distinguish" the serious injury caused by factors other than imports, or to evaluate the extent these factors injured the domestic industry. Rather, the ITC merely speculated that imports were a "substantial cause" of serious injury, a cause no less important than any other cause.

a. Unsubstantiated conclusions that imports caused more injury than each alternative cause of injury cannot substitute for "separating" and "distinguishing" serious injury caused by such factors

248 Even if imports caused more injury than any single alternative cause of injury (which they did not), this finding would not mean that the injury caused by increased imports rises to the level of serious injury, as required under Articles 2.1 and 4.2(b). As a growing body of WTO jurisprudence demonstrates, mere compliance with U.S. law most definitely does not ensure compliance with international obligations of the United States under the WTO Agreement.

249 The ITC's superficial approach to addressing alternative causes of serious injury is inconsistent with the non-attribution requirement of Article 4.2(b), because the ITC approach does not ensure that serious injury caused by other factors is not attributed to imports. The ITC once again applied the "substantial cause" test of the U.S. statute. The statute defines "substantial cause" as "a cause which is important and not less than any other cause."[326] The ITC thus found that increased imports must be both an important cause of the serious injury or threat *and* a cause that is equal to or greater than any other cause.[327] The ITC's limited and narrow causation analysis here is essentially the same as its causation analyses in *U.S. -- Wheat Gluten*, *U.S. – Lamb Meat*, and *U.S. – Line Pipe*, all of which the Appellate Body found insufficient to meet the requirement of non-attribution. In these other cases, as in the *Certain Steel* case before us, the ITC stated its conclusion that imports were a "substantial cause" of serious injury, no less important than any other cause. Yet in all three safeguard cases, the Appellate Body held that such an analysis violated the non-attribution requirement, as the ITC failed both to "separate" and "distinguish" the injurious effects caused by factors other than imports and to provide an explicit, reasoned, and adequate explanation of how injury caused by other factors was not attributed to imports.

250 It is hard to imagine more concrete guidance from the Appellate Body than that already provided to the United States:

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[326] 19 U.S.C. § 2252(b)(1)(B), (**Exh. CC-47**).

[327] *ITC Report* at 34, (**Exh. CC-6**).

> Although an examination of the relative causal importance of the different causal factors may satisfy the requirements of United States law, *such an examination does not, for that reason, satisfy the requirements of the Agreement on Safeguards.* On the record before us in this case, a review of whether the United States complied with the non-attribution language in the second sentence of Article 4.2(b) can only be made in the light of the explanation given by the ITC for its conclusions on the relative causal importance of the increased imports, as distinguished from the injurious effects of the other causal factors.[328]

Yet the United States continues to apply its traditional and superficial approach to determine whether imports are a cause of serious injury, despite the recurring denunciation by the Appellate Body.

b. For flat-rolled steel products, the ITC acknowledged myriad factors other than increased imports, but made no attempt either to "distinguish" and "separate" these factors, or to explain how injury caused by these other sources was not being attributed to imports

251 At the outset, we note that the ITC report provided an inadequate explanation of how it met the non-attribution obligation. The ITC discussion is disappointingly sparse. Although there had been extensive argumentation and data on each of the alternative causes, the ITC devotes only a paragraph or two to summarily dismissing these alternative causes. These explanations do not pass the test set forth most recently by the Appellate Body in *U.S. – Line Pipe* to "establish explicitly, with a reasoned and adequate explanation."[329]

252 This dismissive approach to non-attribution is particularly troubling for two reasons. First, all of the participants in the ITC proceeding realized this safeguard investigation of steel was important to the world trading system. Dozens of countries devoted considerable effort to providing the ITC with more extensive and more detailed information and evidence than would normally be the case. Yet the ITC largely ignored parties' efforts to supply the ITC with the comprehensive and detailed factual information necessary to undertake an explicit, reasoned, and adequate discussion of these issues.

253 Second, the ITC was on notice that its traditional approach was insufficient. The teachings of *U.S. --Wheat Gluten*, *U.S. – Lamb Meat*, and *U.S. – Line Pipe* -- all cases in which the panels and then the Appellate Body rejected the ITC traditional approach -- could not possibly have been mistaken. Moreover, just in case the ITC Commissioners had not been keeping up with their WTO jurisprudence, foreign respondents made these points in their presentations before the ITC.[330] Yet the ITC refused to adjust its approach to reflect the

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328 *Lamb Meat*, at para 184 (emphasis added).

329 *U.S. – Line Pipe*, para 220 (emphasis in original).

330 *See, e.g.*, Joint Respondents' Prehearing Framework Brief at 45 (**Exh. CC-50**).

clear and unambiguous instructions from the Appellate Body. Indeed, the ITC apparently decided to ignore WTO requirements, viewing its mandate as simply to follow its established practices, even those already held by the Appellate Body to be inconsistent with U.S. WTO obligations. Although we are not challenging the U.S. law as such, the ITC refusal to adapt to clear Appellate Body decisions contributed significantly to the flawed analysis in this case.

254 The underlying record developed during the ITC proceeding demonstrates that the issue of alternative causes for any injury suffered by the domestic industry was extensively, indeed exhaustively, discussed. In its report, the ITC identifies six "alternate sources of injury" that were raised by the exporters: (1) declining domestic demand; (2) domestic capacity increases; (3) intra-industry competition; (4) buyer consolidation; (5) excess leverage of domestic producers; and (6) legacy costs. The ITC failed to provide "a reasoned and adequate explanation" for any of these alternate sources of injury.

255 To appreciate these deficiencies, however, the Panel need examine only the first three of these factors -- declining domestic demand, domestic capacity increases, and intra-industry competition -- to conclude that the ITC decision does not satisfy the non-attribution requirement of Article 4.2(b). For each of these three other factors, the evidence is both compelling *and measurable* -- and shows that each alternate source is a more important cause of the domestic industry's injury than imports. Had the ITC separated and distinguished these alternative causes, it could not have concluded that increased imports caused any serious injury.

i. Declining domestic demand

256 At the outset, we note that the ITC failed to separate and distinguish the injury to the domestic industry attributed to declining demand from the entire injury experienced by the domestic industry. Instead, the ITC simply dismissed the decline in demand as a limited, end-of-the-period phenomenon. The ITC ignored the fact that when demand for flat-rolled products declined, imports declined even more sharply, suggesting that at least some purchasers of domestic steel were buying less steel, not switching to imports,[331] thus impacting negatively on the industry's financial performance. Had the ITC properly distinguished this factor, it would have realized this fundamental point.

257 The ITC mischaracterized the relationships among demand shifts, changes in imports, and changes in domestic industry operating performance. If one compares the trends since 1998, and if one uses the first half 2000 data to derive separate figures for the second half of 2000, a striking comparison emerges. Operating margins correlate strongly with demand -- falling when demand falls -- and do not correlate at all with import levels.

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[331] The ITC seems to have acknowledge it when stating that "declining demand … contributed to the industry's continued deterioration at the end of the period [of investigation]," and "the losses experienced by the industry in 1999 and 2000 as a result of imports left the industry in a much weakened position to face the slowdown in demand." *ITC Report,* p. 63 (**Exh. CC- 6**).

Comparison of Changes in Demand and Changes in Import Levels

	1998	1999	1st Half 2000	2nd Half 2000	1st Half 2001
operating margin[332]	4.0	-0.7%	3.6%	-3.0%	-11.5%
import levels[333]	25.3	20.8	11.5	9.4	6.9
total demand[334]	85.1	83.7	46.0	39.0	37.5
domestic market share	70.3%	75.1%	75.0%	75.9%	81.5%

258 These data demonstrate the fallacy of the ITC arguments about the roles of demand versus imports. Between 1998 and 1999, imports fell significantly, both absolutely and as a percent of total demand. Yet domestic operating performance still declined. Even with a significantly larger share of total demand, the domestic industry performed even more poorly. This pattern continued in 2000. Demand in the first half of 2000 was up strongly -- and so was domestic industry operating income at 3.6 percent, a recovery almost to historical performance in the 1996 to 1998 period. Yet demand dropped significantly in the second half of 2000 and continued to drop in 2001. Even as imports fell, and even as the domestic firms captured more and more of the market, the total demand decreased too rapidly. It is hard to imagine how this data supports the conclusion that demand does not matter, and that decreasing levels of imports somehow matter more than demand declines that reduced total apparent consumption.

259 The same basic pattern applies to all the individual finished flat-rolled products. The operating margins for plate, hot-rolled, cold-rolled, and corrosion-resistant steel all fell in 1999,[335] even though the import share of the market for each of these products either fell or was stable.[336] The largest volume product, hot-rolled steel, is a good example. Operating profit fell from 0.2 percent in 1998 to -5.3 percent in 1999, even as total imports fell from 15.4 percent of the market to 8.9 percent of the market.[337]

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[332] Operating income expressed as a percentage of sales. *See id.* at 53; Table FLAT-20 through -25 for the 1st half 2000 and full year 2000 data used to generate the 2nd half 2000 results. The addition of the five flat-rolled products is provided in **Annex B.**

[333] *See ITC Report* Tables FLAT-3, 4, 5, 6, 7, and 9 (**Exh. CC-6**). The addition of the five flat-rolled products is provided in **Annex A**.

[334] Sum of total commercial shipments reported in *ITC Report* Tables FLAT 12, 13, 14, 15, and 17, plus total imports reported in Tables FLAT-3, 4, 5, 6, 7, and 9 (**Exh. CC-6**). The addition of the five flat-rolled products is provided in **Annex B**. Tin mill products and GOES are excluded from this analysis.

[335] *ITC Report* at 53 (**Exh. CC-6**).

[336] *Id.* at Table FLAT-52 -56.

[337] *Compare id.* at Tables FLAT 21 (financial results of operations) to FLAT 53 (U.S. consumption and market shares).

260 The trend extends to 2000. In the first half of 2000, U.S. producers of plate, hot-rolled, cold-rolled, and corrosion-resistant steel all showed significantly improved operating margins. Demand in the first half of 2000 was strong.[338] Yet in the second half of 2000, when demand began to collapse, U.S. producers experienced sharp drops in operating performance, even as imports continued to the flea market.[339]

261 The ITC made no attempt, however to "separate" and "distinguish" the proportion of current serious injury attributable to declining demand. Consider a simple calculation. In the first half of 2001 the domestic industry shipped 3.9 million tons less than it had in the same period of 2000.[340] Apparent consumption in the same period fell 18.5 percent (46 million tons to 37.5 million tons).[341] It is hard to imagine more compelling evidence that in late 2000 and 2001 the problem was declining demand, not declining imports. With "increased" imports at zero (imports actually declined) but decreasing demand eliminating almost 4 million tons of domestic production, it is hard to see how "increased" imports could be the problem.[342]

ii. Domestic capacity increases

262 The ITC also failed to separate and distinguish the role of the growth in domestic capacity during the period of investigation. Domestic capacity increases would usually result in over-capacity if total demand and imports remained constant, thus negatively impacting the domestic industry's financial condition. This effect must be separated and distinguished from the effects of other factors having a bearing on the industry's condition. The ITC simply hid behind the U.S. legal standard that allows the ITC to ignore any cause that it deems less important than imports. Thus, the ITC conceded that increased production capacity "likely play[ed] a role in the price declines that helped cause injury."[343] But, the ITC made no effort to try to determine how much of the injury should be attributed to the capacity increases.

263 The ITC noted that "if increased domestic capacity were in fact the source of injury to the domestic industry, we would have expected to see the domestic industry lead prices downward, and wrest market share from imports."[344] They did. As the table above shows, the domestic share of the total flat-rolled steel market grew from 70 percent in 1998, to 75 percent in 1999 and 2000, and then to 81.5 percent in 2001. This increase in domestic market share is the flip side of the declining imports and falling import market share.

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338 *See* **Annex B**.

339 *Id*.

340 34.4 million tons to 30.5 million tons = 3.9 million tons. *See ITC Report* at Tables FLAT 12, 13, 14, 15 and 17 **(Exh. CC-6)**.

341 Compare *id.* at Tables FLAT 4, 5, 6, 7, and 9 with FLAT 12, 13, 14, 15 and 17.

342 Had imports maintained a constant share of the market, instead of falling 39 percent as they did, the domestic industry would have still lost 2.4 million tons of steel shipments due to declining demand.

343 *Id.* at 64.

344 *Id.* at 64.

264 Moreover, this gain in domestic share resulted from aggressive domestic pricing. In 2000 and 2001, when the domestic operating income declined significantly, the combination of excess domestic capacity and declining demand meant that domestic firms were desperately competing for cash flow. The ITC acknowledged this economic reality, noting that there is a "significant incentive to maximize the use of steel making assets, which can affect producers' pricing behavior."[345] The ITC then cited product-specific pricing data for a proposition that is just not true: that imports led prices down. The product-specific pricing data shows just the opposite. If one reviews the 2000 and 2001 pricing data, for the largest tonnage of plate, hot-rolled, and cold-rolled steel products, the domestic industry typically undersold imports, and by growing margins over this period. For all these products, the domestic price fell sharply in the second half of 2000, and then fell even more sharply in 2001.[346]

265 Ironically, the less imported steel in the market, the more domestic prices fell. The only way to explain this phenomenon is that competition among domestic mills -- fueled by growing excess capacity -- drove down the prices. It is hard to see how declining import volumes, rather than increasing capacity and domestic shipments, can somehow cause declines in prices and operating performance.

266 Even more troubling than these misinterpretations of pricing data, the ITC refused even to discuss the compelling quantitative evidence that foreign respondents provided the ITC about the economic effects of capacity. In particular, respondents demonstrated that the growth in excess domestic capacity dwarfed the modest increases in imports. In its decision, the ITC generally focused on just the end points -- comparing 2000 to 1996. When considering capacity increases over this same period, the data show the following:

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345 *Id.* at 63.

346 *Id.* at Tables FLAT 67-71.

Comparison of Changes in Excess Capacity and Changes in Imports between 1996-2000[347]

Flat-rolled Steel Products	Increase in Excess Capacity over Demand	Increase or Decrease in Imports	Ratio of Excess Capacity to Imports
slab	5,066,262	962,409	5.3
plate	3,859,821	(986,589)	N/A
hot-rolled	3,168,027	2,194,557	1.4
cold-rolled	2,041,785	172,400	11.8
corrosion-resistant	2,319,790	179,022	13.0

267 Having acknowledged the "significant incentive" facing the domestic producers with excess capacity, it is remarkable that the ITC does not even discuss this data. The ITC acknowledged the first column of this table, noting that it "is true, as alleged by respondents, that capacity increases did exceed the increases in domestic consumption."[348] But then the ITC never related that excess capacity to changes in import levels. With respect to all five flat-rolled steel products, the excess capacity exceeded the modest change in imports over the period. For four out of five products, the excess capacity dwarfs the modest change in imports. With so much excess capacity chasing a shrinking total market, it is no wonder that domestic mills were cutting prices and trying to maintain volume. It makes no sense to blame the modest and declining level of imports for this problem.

268 The ITC analysis is also perplexing in light of the Appellate Body decision in *U.S. – Wheat Gluten*. In that case, the ITC pointed to low capacity utilization rates as evidence of injury caused by imports.[349] The Appellate Body specifically and at length discussed the need to carefully consider increases in capacity and decreases in capacity utilization. Had the ITC conducted the analysis set forth in *U.S. – Wheat Gluten* -- considering the capacity utilization rate, if capacity had remained stable over the period rather than increasing[350] -- the results would have been quite revealing. In 1996, before any alleged import surges, the domestic industry had utilization rates in the 80s and low 90s.

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[347] *Id.* at Table FLAT 5-7, and 9 and 12-15, and 17. *See also* the data compilation provided in **Annex B**. This argument was presented by respondents in their briefs before the ITC. Joint Respondents' Prehearing Framework Brief at 53-55 (**Exh. CC-50**).

[348] *ITC Report* at 63 (**Exh. CC-6**).

[349] *Id.* at 52.

[350] *Wheat Gluten*, at paras. 85-91.

Domestic Capacity Utilization
Absent Capacity Increases[351]

Flat-rolled Steel Product	1996 Utilization at 1996 Capacity Levels	2000 Utilization at 1996 Capacity Levels
slab	94.8	99.8
plate	80.7	86.6
hot-rolled	91.7	98.6
cold-rolled	87.5	96.3
corrosion-resistant	86.7	105.2

Yet, by the ITC's own admission, the domestic industry had reasonable operating profits in 1996 at this level of utilization. But for the massive increases in domestic capacity, the industry could have been operating flat-out and more profitably in 2000. This more careful analysis of the data underscores the importance of capacity additions to understanding the role of different causes in explaining the health of the domestic industry. Yet the ITC did none of this analysis.

iii. Intra-industry competition

269 Expanding capacity and shipments by certain segments of the domestic industry have given rise to more fierce competition *among* domestic producers. Yet once again, the ITC did not separate and distinguish this alternative cause.

270 Intra-industry competition in the flat-rolled market came from two main sources. First, the minimills expanded their shipments of flat-rolled steel. Following basic economic principles, new entrants used an alternative technology (electric arc furnaces) to take advantage of ever cheaper raw material (scrap).[352] With an extremely competitive cost structure, minimills could thus charge lower and lower prices, and yet still earn attractive operating profits. Second, weaker integrated mills, using the more traditional blast furnace technology, decided they had to sell flat-rolled steel to generate cash flow regardless of the price. Competing largely with minimills in the commodity segment of the market, the integrated firms had little choice but to compete with minimills that had much lower costs.

271 The ITC acknowledged the competition from minimills, but then dismissed this factor without any serious analysis. The ITC noted that minimills "did typically enjoy cost

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[351] *See ITC Report* at Tables FLAT 12-15, and-17. The ratios came from dividing 2000 production by 1996 capacity **(Exh. CC-6)**.

[352] The record before the ITC demonstrated declining scrap prices over the period. *See* Joint Respondents' Posthearing Brief: Flat-Rolled Steel (1 Oct. 2001) at 102. (**Exh. CC-55)**.

advantages over integrated producers," and that "a greater volume of lower-cost capacity would be expected to have an effect on prices, and we find that it did."[353] As with the capacity increase factor, the ITC then dismissed this important factor with a quick, flawed examination of pricing. It asserted that, for a particular hot-rolled product, import prices apparently were lower than minimill prices.[354] This attempt to dismiss the role of intra-industry competition fails for several reasons.

272 First, although the ITC decision applied to all flat-rolled products, the ITC analysis cites only an isolated example for a single product, hot-rolled steel. Minimills also make and sell plate, cold-rolled, and even some corrosion-resistant steel. The ITC extrapolates to these other products without any factual basis.

273 Second, the ITC ignored substantial evidence to the contrary. The ITC never evaluated the role of minimill competition in different segments of the flat-rolled steel industry, or addressed arguments that minimills pricing was in fact leading domestic mill pricing. For example, the ITC never responded to specific evidence that customers viewed minimills as the price leaders in the cold-rolled market, not imports.[355] The Commission had specifically recognized minimills as an important competitive factor in the flat-rolled steel industry, both in its recent cold-rolled steel decision[356] and in subsequent court filings.[357] Indeed, at the Section 201 hearing executives from AK Steel specifically testified about the economic impact of expanding minimill capacity.[358] Now that minimills are commercially significant players in hot-rolled, cold-rolled, and corrosion-resistant steel, they affect the ITC's grouped flat-rolled segment.

274 Third, the ITC ignored evidence that as minimill pricing fell, they still had stronger financial performance. Minimill costs, based on scrap prices, dropped over the period, falling almost 20 percent or $67 per ton, giving minimills tremendous competitive flexibility.[359] Not surprisingly, the minimills exploited this advantage. Indeed, at the hearing Nucor executives testified about their duty to their shareholders to exploit this advantage.[360] Minimills increased their shipments of all flat-rolled steel and decreased their average unit sales values.

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353 *ITC Report* at 65 (**Exh. CC-6**).

354 *Id.* at 65. It is hard to know exactly what the ITC alleges, since key parts of the report have been deleted as proprietary information. We urge the USG to disclose this information to the Panel.

355 *See* Respondents Prehearing Brief on Cold-Rolled Steel at 49-63 (**Exh. CC-53**); *see also ITC-Cold-Rolled (Final)* ITC Pub. 3283 (March 2000) at 23 (ITC negative determination on cold-rolled) (**Exh. CC-34**).

356 *ITC-Cold-Rolled (Final)* ITC Pub. 3283 (March 2000) at 23 (**Exh. CC-34**).

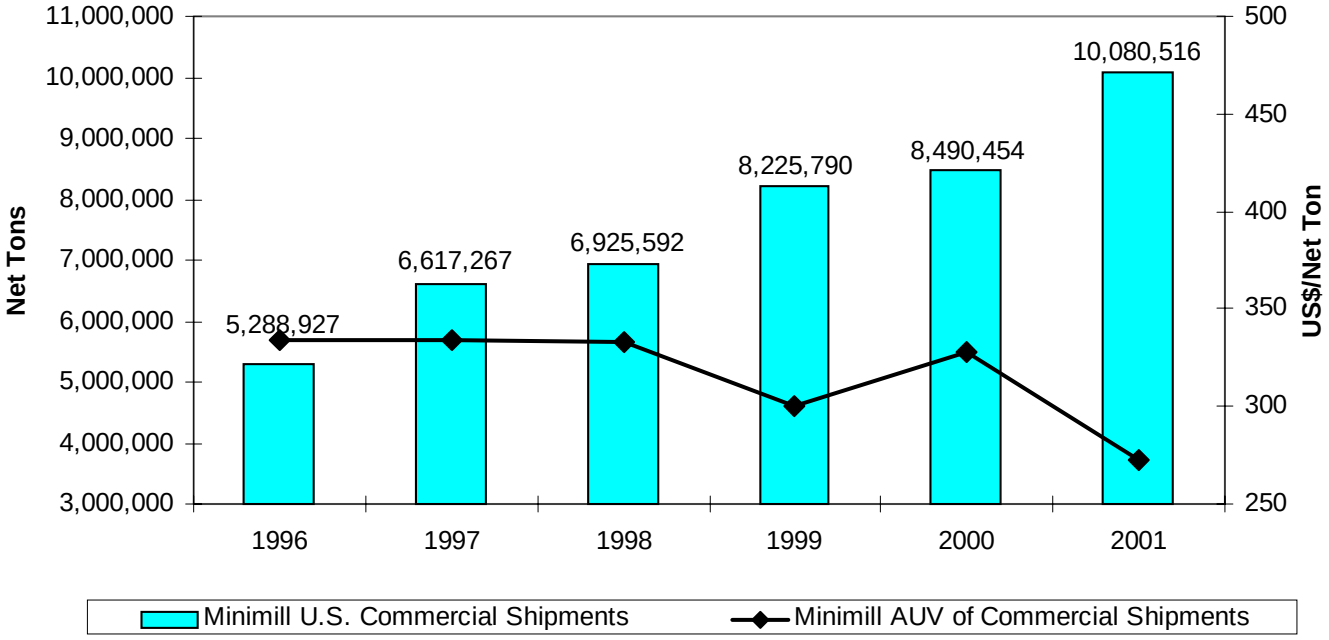
357 Defendant ITC's Opposition to Plaintiffs' Motion for Judgment on the Record at 43, *Bethlehem Steel Corp. v. United States*, No. 00-04-00151 (CIT March 23, 2001) at 38 (**Exh. CC-49**), (*cited in* Joint Respondents' Posthearing Brief*:* Flat-Rolled Steel (1 Oct. 2001) at 106) (**Exh. CC-55)**.

358 *See ITC Hearing Transcript* at 593 (19 Sept. 2001) (**Exh. CC-58**).

359 *See* Joint Prehearing Brief of Respondents : Product Group 4, Cold-Rolled Steel, (11 Sept. 2001) at 50-61. (**Exh. CC-53).**

360 See *ITC Hearing Transcript* at 1014 (20 Sept. 2001), (**Exh. CC-58**).

Increasing Minimill Shipments at Lower Prices Has Created Downward Pressure on Price[361]



Remarkably, as minimill volumes increased and prices fell, their profits still increased. The contrast between minimill and non-minimill operating results is dramatic. Minimills did much better in 1999 and 2000 *precisely when the other mills began to experience financial difficulties* as the following figure demonstrates:[362]

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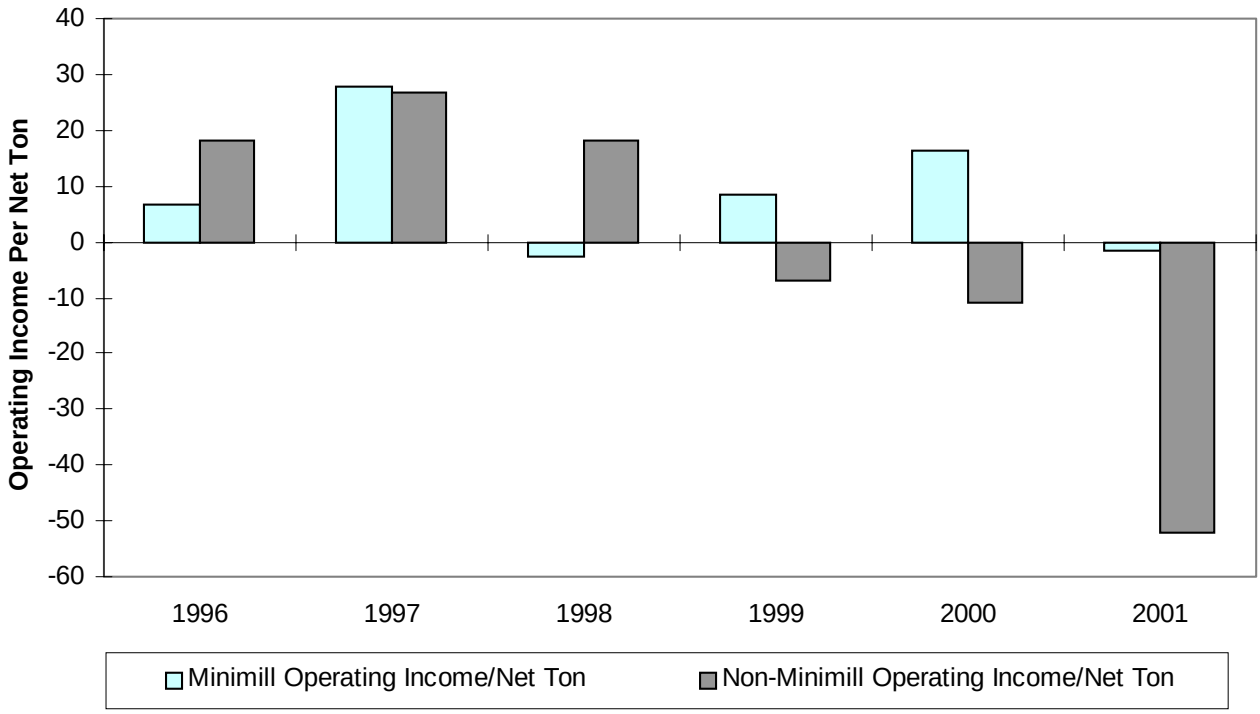
[361] Joint Respondents' Posthearing Brief: Flat-Rolled Steel (1 Oct. 2001) at 104, (**Exh. CC-55**). Annual minimill commercial shipment and AUV figures were derived from the responses of those minimills responding to the ITC U.S. producer questionnaire and aggregated into a public form during the proceedings below. AUVs were derived by dividing reported U.S. commercial shipment values by reported U.S. commercial shipment volumes. For the purposes of this analysis, 2001 was annualized by doubling the reported interim period 2001 figures. Since minimills do not produce either tin mill product or GOES, or sell slab on the open market, this data reflects the other four flat-rolled products: plate, hot-rolled, cold-rolled, and corrosion-resistant steel.

[362] *Id.* at 105.

Flat-Rolled: Minimills Have Lowed Prices While Still Earning Much Better Returns Than Integrated Firms[363]



275 Perhaps the most colorful evidence about intra-industry competition before the ITC came from John Correnti, a noted figure in the steel industry and one of the founders of Nucor, the leading American minimill. At a recent conference, Mr. Correnti offered the following observations:

> The other 60 percent {of the price problem} is self inflicted. Someone told me the other day that the American steel industry -- the minimills and the integrated -- are like a bunch of monkeys running around shooting each other with AK-47s and machines guns. It's happened time and time again.[364]

Our point is simply that the Commission has an international obligation to distinguish the effect of imports from the effects of such fierce intra-industry competition. When a leading expert -- and member of the U.S. industry -- like John Correnti states that the industry itself

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[363] Joint Respondent's Posthearing Brief: Flat-Rolled Steel (1 Oct. 2001) at 105 **(Exh. CC-55)**. Note this table reflects a public aggregation of data, the details of which are not found in the ITC public report. The non-minimill average operating income per ton includes a small amount attributable to tin mill products. But as Table FLAT-26 for tin mill products shows, the operating losses for tin mill products were relatively stable over time, and thus do not materially affect the trend analysis in this figure.

[364] *See* www.newsteel.com/articles/2001/april/ns0104f3rt02.htm. (*cited* in Joint Respondents' Posthearing Brief: Flat-Rolled Steel (1 Oct. 2001) at 107) (**Exh. CC-55**).

is responsible for 60 percent of the problem, the Commission should have paused long and hard before blaming imports. Yet the Commission simply dismissed this fact with cursory analysis. This does not meet the standard of Article 4.2(b).

c. The ITC also dismissed economic analysis that sought to separate and identify the relative role of different causes

276 In light of the explicit and consistent guidance from the Appellate Body to separate and distinguish alternative causes, foreign respondents commissioned formal economic analyses to do just that -- to identify specific alternative causes, and to measure their effect on price relative to the role of the increasing imports. Econometric studies by respondents with respect to the three most important and largest volume flat-rolled products[365] -- hot-rolled steel, cold-rolled steel, and corrosion-resistant steel -- documented the relative role of different causes, and demonstrated qualitatively and quantitatively that several of these causes were dramatically more important than imports. Consider the following summary of results from these studies:

[365] Those three products accounted for 87 percent of total finished flat-rolled steel for which there are merchant market prices to analyze.

Explanatory Variables in the Flat-rolled Steel Industry:
Magnitude of Different Factors in Explaining Domestic Price Declines

Factor	Hot Rolled[366]	Cold Rolled[367]	Corrosion Resistant[368]
changes in the price of subject imports[369]	$8-10 per ton	$2 per ton	$1-2 per ton
changes in scrap prices, a key raw material input	$20 per ton	$15 per ton	NA[370]
additions of domestic capacity	$7 per ton	$10 per ton	$90 per ton
additional effect of adding minimill capacity	$20 per ton	$50 per ton	NA
declines in domestic demand	$40 per ton	$40 per ton	$60 per ton
role of intra-industry competition from low cost minimills	$30 per ton	$20 per ton	NA

277 These studies demonstrate two critical points. First, it is indeed possible to separate and distinguish the various economic factors. The exporters did so, even if the ITC did not. Second, once one has separated and distinguished these other causes, the role of imports is quite small.

278 The ITC ignored these studies,[371] although they were a prominent part of the respondents' written briefs and oral presentations at the hearing. In the final decision, the

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366 Joint Respondents' Prehearing Brief on Hot-Rolled Steel (Product Category A.3), (11 Sept. 2001) (*filed* by the law firm of Kaye Scholer) (see Exhibit 26, Dr. Prusa Econometric Exhibits at 4-6) (**Exh. CC-52**).

367 Joint Respondents' Prehearing Brief: Product Group 4, Cold-Rolled Steel, (11 Sept. 2001) (Econometric Exhibits) (*filed* by the Law Firm of Willkie Farr & Gallagher) (*see* Exhibit 4, Dr. Prusa Econometric Exhibit at 16) (**Exh. CC-53**).

368 *See* Joint Respondents Prehearing Brief: Carbon Alloy Flat Products, Product 6 -- Corrosion-Resistant and Other Coated Sheet and Strip, (10 Sept. 2001) (*filed* by the Law Firm of Sharrets Paley) (Econometric Exhibits) (*see* Exhibit 8, Dr. Prusa Econometric Exhibits at 12-15) (**Exh. CC-54**).

369 The models also included specifications for import volume. For cold-rolled and corrosion-resistant steel, volume never mattered. For hot-rolled, the effect of volume depended on whether one included the substantial surge in 1998 in the period being considered.

370 Minimills are not yet major players in the corrosion-resistant segment, and therefore three variables relating primarily to minimills were excluded from the econometric study of corrosion-resistant steel.

371 *ITC Report* at 59 n. 260, (**Exh. CC-6**).

ITC makes little mention of them relegating a reference to them to a footnote -- and thus provides scant recognition of what could have been the most relevant evidence for meeting the obligation to separate and distinguish the role of alternative causes.

279 The ITC made two mistakes in glossing over these studies. First, the ITC seems to have assumed that once it decided to consider only a single like product that combined all flat-rolled products, it no longer needed to consider the evidence for individual flat-rolled products. But in fact, the ITC should still have considered this more product-specific evidence. After all, it did so for its price analyses, where it had no choice since there is no "price" for flat-rolled carbon steel. The ITC, therefore, apparently understood that to truly understand the dynamics of pricing -- the lynchpin of the ITC argument -- it needed to consider product-specific data. But, when it came to considering product-specific economic studies which led to conclusions it did not like, the ITC "placed little weight" on them.[372]

280 Second, the ITC seems to have misread its own staff memo. Commissioner Bragg requested staff commentary on the competing economic studies by Professor Prusa for foreign respondents and by Professor Hausman for domestic petitioners.[373] That staff memo acknowledges that both the respondents' and the petitioners' econometric studies demonstrated that the imports of cold-rolled steel and corrosion-resistant steel had no discernible impact on domestic price levels. The only point of disagreement was with respect to hot-rolled steel. Domestic producers' econometric study used the increase in hot-rolled imports during 1998 to 1999 to argue for spill-over effects into all flat-rolled steel products, but confirmed that cold-rolled imports, alone, and corrosion-resistant imports, alone, had no discernible impact.[374] Yet, the ITC completely ignored this critical point. It completely ignored consensus evidence by all of the economists that cold-rolled and corrosion-resistant imports had no effect on domestic price levels for those two product categories.

281 Instead of recognizing the importance of considering these separate industry segments, the ITC continued to blur these important distinctions by considering only flat-rolled steel overall. By doing so, the ITC failed to meet its obligations to separate and distinguish the impact of other factors.

d. The ITC entirely ignored the cumulative effect or interrelation of other causes

282 Each of the factors discussed above was important and collectively they severed any credible connection between imports and the condition of the domestic industry. If one combines the impact of the other factors, and compares them to imports, a reasonable authority simply cannot conclude that imports caused the problems.

283 The effects of these various factors are interrelated and mutually reinforcing, particularly at the end of the period of investigation, when the U.S. industry encountered its

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372 *Id.*

373 ITC Staff Memorandum (EC-Y-042) to Commissioner Bragg, Investigation No. TA-201-73 Steel (22 Oct. 2001) (**Exh. CC-10**).

374 Joint Respondents Posthearing Brief: Flat-Rolled Steel (1 Oct. 2001) at 116-119 (**Exh. CC-55**).

only significant decline in operating results. For example, substantial increases in domestic capacity occurred throughout the 1996-2001 period. Intra-industry competition also increased throughout the period, intensifying in 1999-2001 as sharp declines in the price of scrap increased minimills' cost advantage; and then again when the 2000-2001 decline in steel consumption created an environment in which the minimills and certain financially troubled U.S. producers priced aggressively to retain volume. Finally, the concentrated purchasing power of automotive customers, the construction sector, and appliance manufacturers also existed throughout the period, but intensified at the end of the period when big customers demanded price cuts, adding to downward pressure on prices.

284 The effect of these factors intensified dramatically in the latter part of the period when the steel market experienced a sharp contraction in demand, in fact showing much clearer correlation in time with the decline of the condition of the industry than the trend in imports. The price, volume, and profit effects in that period were much greater than they otherwise would have been, because prior domestic capacity additions had far exceeded demand growth, because minimills (with an enhanced cost advantage due to declining scrap prices) aggressively fought to preserve volume, and because of the opposing purchasing power of the increasingly concentrated auto and appliance industries. Although imports may have had some effect on U.S. producers, the effects of these other factors were substantially larger in causing any serious injury that U.S. producers are currently experiencing.

285 Yet, the ITC analysis provides no discussion of these interactions. Instead, the ITC superficially evaluated the importance of each other factor in isolation relative to increased imports, and did not either separate or distinguish the injury attributable to such other factors, thus failing to meet its obligation to address fully the complexities of the data.

e. The ITC improperly reached conclusions about the broad category "flat-rolled steel," even when the effects of other factors could only be realistically assessed for individual products

286 The ITC discussion of alternative causes underscores the difficulties with the overbroad finding of a single like product that combined all flat-rolled carbon steel. The ITC faced an analytic conundrum: the ITC decided to make determinations about the abstract construct "flat-rolled carbon steel," yet the underlying economic factors could only be assessed meaningfully for specific products.

287 Take, for example, demand for different products. Although one can add up the different elements of demand, doing so is actually quite misleading. Increasing demand for plate has little to do with the market realities for cold-rolled steel. Decreasing demand for slab has no relevance for the market realities facing corrosion-resistant steel. Yet the ITC analysis largely blurs these important distinctions.

288 The same distinction should be made for excess capacity. A reasonable decision-maker should distinguish between a product with a 5 percent growth in excess capacity and a product with a 10 percent growth in excess capacity. Similarly if excess capacity is more than 10 times as large as the increase in imports, a reasonable decision-maker might distinguish that situation from one where the excess capacity is the same size as the increase in imports. Yet the ITC analysis ignores these key points.

289 Sometimes the distinction is even more sharp, as with intra-industry competition. For all finished flat-rolled products (plate, hot-rolled, cold-rolled, corrosion-resistant steel), minimills are a serious competitive issue. Yet minimills cannot make slab. So the competitive dynamics of intra-industry competition for slab is dramatically different than the dynamics for finished products.

290 These important distinctions highlight two important points about the ITC analysis. First, these distinctions -- and the degree to which the ITC ignored them -- demonstrate the failure of the ITC to meet the standards set by Article 4.2(b) by distinguishing and evaluating different injurious effects caused by alternative factors.

291 Second, these distinctions also demonstrate the extent to which the overbroad like product tainted the ITC's analysis of the crucial issue of causation. As argued in Section A, above, the use of an overbroad single "like" product was inconsistent with U.S. WTO obligations. This inconsistency then created yet another inconsistency by leading the ITC to perform a cursory and defective analysis of causation.

f. The ITC's conclusion that imports were a "substantial cause" of serious injury is therefore inconsistent with Articles 2.1 and 4.2(b), as the ITC failed to demonstrate that serious injury caused by other factors was not attributed to imports

292 For all of these reasons, the ITC failed to meet the standards set by Article 4.2(b). The ITC did not evaluate all the relevant economic factors, and instead simply choose those factors that supported its conclusions. The ITC did not provide an adequate explanation, and instead provided cursory comments. The ITC did not address fully the nature and complexities of the data, and instead ignored the complexities. Finally, the ITC did not respond to other plausible interpretations of the data, and instead largely ignored the arguments about such interpretations that had been provided. The ITC thus failed to adequately and explicitly address these alternative causes, and failed to separate and distinguish the role of these alternative causes in any serious injury suffered by the domestic steel industry.

4. The ITC failed to establish causation with respect to tin mill products

293 The ITC findings with respect to tin mill products do not establish any causal link. In fact, of the four Commissioners who treated tin mill products as a separate and distinct like product, three specifically found that other causes were more important than imports in explaining the problems in the domestic tin mill industry.[375] Thus the ITC itself acknowledged that the standards of Article 4.2(b) had not been met.

294 Because two other Commissioners treated tin mill products as part of the overall group "flat-rolled carbon steel,"[376] we face a novel situation. The President combined those

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[375] *ITC Report* at 76-77 (**Exh. CC-6**).

[376] Commissioners Bragg and Devaney found tin mill to be part of the flat-rolled group.

two affirmative votes on all flat-rolled carbon steel with the single affirmative vote by Commissioner Miller that tin mill products considered as a single like product did cause injury, creating a three-three tie vote. The President then considered the affirmative decision as that of the ITC, and imposed restrictions on tin mill imports. (This is discussed in more detail in Section III.C.1. above.)

295 Commissioner Miller's affirmative decision with respect to tin mill products, however, fails to satisfy the standards of Article 4.2(b). Commissioner Miller fails to identify a sufficient causal link between increased imports and serious injury. She points to the modest increase in operating losses in 1999 when imports gained about 4.9 percentage points of market share.[377] But she then ignores the fact that these operating losses persisted in 2000 even when import market share decreased by 2.2 percentage points. She also ignores the fact that the operating losses grew in 2001 even as import market share remained stable.[378] Taken as a whole, these trends do not establish any correlation in time, to say the least, between the import increase and the allegedly injured condition of the industry, and thus fails to establish any causal link.

296 Commissioner Miller also failed to separate and distinguish alternative causes. Given that three of her colleagues read the record very differently, one might expect Commissioner Miller to elaborate at some length why she reached a different conclusion. Instead, she provided three short paragraphs. With respect to each alternative cause, she failed to meet the standard required by Article 4.2(b).

297 The other three Commissioners found declining demand to be an important alternative cause.[379] Commissioner Miller asserted that demand recovered in 1999,[380] but ignored the fact that the increase was modest, only five percent, and short lived. In 2000, demand fell lower than 1998, and in 2001 demand was at record lows for the period.[381] Narrow focus on a single year simply cannot satisfy the demands of Article 4.2(b) for a careful review of the entire period.

298 The other three Commissioners found that a large portion of purchasers testified that they imported specific products that the domestic industry simply did not make.[382] This factual finding argues strongly that imports could not be the cause of serious injury. Yet Commissioner Miller did not address this finding at all.

299 Taken as a whole, Commissioner Miller's determination fails to meet the standards of Article 4.2(b), and thus cannot establish the necessary causal connection between tin mill imports and serious injury. The President's decision on tin mill products, relying on the

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377 *ITC Report* at 307 (Miller's separate views) (**Exh. CC-6**).

378 *See id.* at Table FLAT-26 (operating results) and Table FLAT-57 (import market share).

379 *Id.* at 76.

380 *Id.* at 309.

381 *Id.* at Table FLAT-57.

382 *Id.* at 77.

affirmative vote of Commissioner Miller which fails to satisfy the causation requirement under the Agreement on Safeguards, therefore cannot be upheld.

5. In this case, the ITC also failed to establish causation for other products

300 Japan supports the various arguments made by co-complainants that demonstrate the failure to establish a proper causal link with respect to other steel products subject to the U.S. safeguard measures.

F. The Safeguard Measure Is Inconsistent With Articles 2.1 And 2.2 Because the Sources of Imports Covered by the Investigation Do Not Parallel the Sources of Imports Within the Scope of the Measure

1. The Agreement clearly requires the safeguard measure to parallel the injury determination

301 Articles 2.1 and 2.2 establish the basic requirements for imposing safeguards measures. Article 2.1 requires a determination of (1) increased quantities of the "*product . . . being imported*," (2) serious injury or threat thereof to a domestic industry, and (3) a causal link between "such increased imports" and serious injury, or threat thereof, to the domestic industry. (Emphasis added.) Article 2.2 provides that "[s]afeguard measures shall be applied to a *product being imported* irrespective of its source." (Emphasis added.)

302 In *U.S. – Wheat Gluten* and *U.S. – Line Pipe*, the Appellate Body held that Articles 2.1 and 2.2, read in concert, create a "parallelism" requirement for safeguard measures. The Appellate Body explained:

> 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.[383]

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[383] *See e.g.* Appellate Body Report, *U.S. – Definitive Safeguard Measures on Imports of Wheat Gluten from European Communities ("U.S. – Wheat Gluten")* WT/DS177/AB/R adopted 5 Jan. 2001 at para. 96 (emphasis original); *see also U.S. – Line Pipe*, para. 180.

To satisfy the parallelism requirement, "the imports included in the determination made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2."[384] If measures are warranted, the Member must apply the measure to the same quantum of imports as was used to determine injury.

303 In *U.S. – Wheat Gluten* and *U.S. – Line Pipe*, the Appellate Body faced the same issue raised by this case. In each case, as here, the United States conducted its safeguards investigation based on the total quantity of subject imports from all over the world, but the President excluded from the measure those countries that are members of the North American Free Trade Agreement ("NAFTA").[385] The Appellate Body twice has held that the U.S.'s failure to correlate a safeguard measure with the injury determination violates the Agreement's parallelism requirement.[386]

304 To exclude NAFTA countries from a safeguard measure, parallelism requires a "*reasoned and adequate explanation* that *establishes explicitly* that imports from non-NAFTA sources 'satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*.'"[387] Moreover, "[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."[388] As the Appellate Body found in *U.S. – Wheat Gluten* and *U.S. – Line Pipe*, a mere recitation of the facts without a detailed analysis of whether the non-NAFTA imports alone cause serious injury is insufficient to limit the application of the measure to any subset of total imports.

305 More specifically, the ITC's analysis must address all of the relevant factors to establish explicitly that non-NAFTA imports, alone, caused serious injury to the domestic industry. The ITC's analysis must include:

- An evaluation of each of the Article 4.2(a) factors (*i.e.*, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment);[389]

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[384] *U.S. – Wheat Gluten*, para. 96; *see also U.S. – Line Pipe*, para. 181.

[385] *U.S. – Line Pipe*, para. 186; *U.S. – Wheat Gluten*, para. 98.

[386] *U.S. – Line Pipe*, para. 197; *U.S. – Wheat Gluten*, para. 98.

[387] *U.S. – Line Pipe*, para. 188 (*citing U.S. – Wheat Gluten*, para. 98) (emphasis in original). The Appellate Body issued a similar holding in the context of transitional safeguards measures under the Agreement on Textiles and Clothing ("ATC"). *See generally U.S. – Cotton Yarn*, para. 106-127 (upholding the Panel's findings with respect to attribution, but not reaching the issue of application of measures); *U.S. – Cotton Yarn*, Panel Report, paras. 7.122-7.132. Unlike the Agreement on Safeguards, the ATC permits application of safeguards measures on individual countries, but to avoid overburdening one Member with "a disproportionate level of pain for the remedy" the authority must carefully attribute the injury caused to each exporting country. *U.S. – Cotton Yarn*, Panel Report, paras. 7.129 and 7.132. Authorities therefore cannot be allowed to "pick and choose" among Members. *Id.* para. 7.126.

[388] *U.S. – Line Pipe*, para. 194.

[389] *Argentina – Footwear*, para. 136.

- An evaluation of other factors relevant to the situation of the specific industry concerned;[390]

- An explanation of the relationship between the movements in imports (volume and market share) and the movements in injury factors;[391] and

- Finally, a determination of whether a "causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements.[392]

2. U.S. law requires the President to exclude NAFTA imports from safeguard measures under certain circumstances

306 Under Section 311 of the NAFTA Implementing Act, in the event of an affirmative injury determination based on imports overall, the ITC must also render a separate determination on whether imports from Canada and Mexico: (a) individually account for a substantial share of total imports; and (b) contribute significantly to the serious injury, or threat thereof, caused by total imports.[393] The ITC must report its findings on these two factors to the President; in practice, ITC incorporates them into its remedy recommendations. Under Section 312 of this Act, the President must make determinations on the same two factors for NAFTA countries, and exclude a NAFTA country from a safeguard measure if a negative determination is made on either (a) or (b), above, with respect to that country.[394]

307 In this case, the ITC followed the statute and made a decision with regard to Canada and/or Mexico, depending on the product. The ITC's report analyzed the various safeguards factors based on total imports, but the Commissioners nonetheless recommended excluding Canada for all products and Mexico for certain products.[395] Upon receiving the report, the USTR requested additional information about potential country exclusions, including NAFTA countries.[396] The Commission submitted a report to the USTR that provided only a limited analysis of non-NAFTA imports and their effect on the U.S. industry.[397] Ultimately,

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390 *Id*.

391 *Id.* para. 144.

392 *Id.* para. 69.

393 *See* 19 U.S.C. § 3371(a) (**Exh. CC-47**).

394 *See* 19 U.S.C. § 3372(a)-(b) (**Exh. CC-47**).

395 *See ITC Report* at 2-8 (summarizing each Commissioner's determination), 49-50 (carbon and alloy flat-rolled products), 71-78 (tin mill products), 91-101 (carbon and alloy hot-rolled bar), 101-08 (carbon and alloy cold-finished bar), 108-116 (rebar), 157-170 (welded tubular products other than OCTG), 171-180 (carbon and alloy fittings), 205-214 (stainless steel bar and light shapes), 214-223 (stainless steel rod), 256-260, 280, 288, 301-302, 304, 342-347 (stainless steel wire) (**Exh. CC-6**).

396 Letter from Chairman Stephen Koplan, U.S. International Trade Commission to the Honorable Robert B. Zoellick, U.S. Trade Representative, (4 Feb. 2002) (hereinafter "ITC's 4 Feb. Letter") (**Exh. CC-11**).

397 *Id.* at 5 (carbon and alloy flat-rolled products), 5-6 (carbon and alloy hot-rolled bar), 6 (carbon and alloy cold-finished bar), 8 (carbon and alloy fittings), 8 (stainless steel bar), 10-11 (welded tubular products other than OCTG)

the President did not render independent determinations about NAFTA countries, but merely chose to exclude imports from both Canada and Mexico from each of the steel safeguards measures.

3. The ITC conducted only a cursory analysis of non-NAFTA imports to support its recommendations to exclude such imports from the measure

308 The safeguard measures in this case violate the principle of "parallelism" in Articles 2.1 and 2.2 because the President excluded NAFTA countries from the measure without an adequate and reasoned investigation of non-NAFTA imports. The ITC's perfunctory analysis of non-NAFTA imports in its report in this case was far too abbreviated and incomplete to pass muster under the Agreement on Safeguards. Nor did the ITC's *ex post facto* analysis of non-NAFTA imports in response to the USTR's request satisfy the parallelism requirement.

309 As an example, the ITC's analysis of total imports and non-NAFTA imports of flat-rolled steel[398] is summarized below. Even if one were to accept the ITC statements as accurate (they are not), the comparison demonstrates that the ITC's analysis is inadequate, particularly with respect to Canada which the ITC itself identified as "one of the top five suppliers of certain flat-rolled steel imports during the [period of investigation]."[399]

Comparison of the ITC's Analysis of Total and Non-NAFTA Imports on Flat-Rolled Steel

ITC's Analysis of Total Imports	ITC's Analysis from the Determinations Regarding Non-NAFTA Countries	ITC's Response to the USTR's Questions
Import Trends: Total imports of all flat products increased in actual and relative terms.[400]	Import Trends: Total imports and Canadian imports increased absolutely and as a share of domestic consumption, and Canadian imports declined but remained a substantial share of total imports.[401]	Import Trends: Non-NAFTA imports increased absolutely and as a share of domestic production. As to prices of non-NAFTA imports the ITC did not evaluate any specific fact, instead, it stated that "exclu[sion] of imports from Canada and Mexico from the database does not appreciably change import pricing trends." [402]

[398] This product category consists of slabs, plate, hot-rolled steel, cold-rolled steel, and corrosion-resistant steel. **(Exh. CC-60)** provides a similar table for each of the other product groups, demonstrating that the ITC conducted the same inadequate analysis for all products considered. We note that this claim applies to all the steel products subject to the U.S. safeguard measures.

[399] *ITC Report* at 66, (**Exh. CC-6**).

[400] *Id*. at 49-50.

[401] *Id.* at 66, 67 n. 319.

[402] ITC's 4 Feb. Letter at 5 (**Exh. CC-11**).

ITC's Analysis of Total Imports	ITC's Analysis from the Determinations Regarding Non-NAFTA Countries	ITC's Response to the USTR's Questions
Injury and Causation: The ITC analyzed total import volumes, prices, average unit values (AUVs), effect of AD/CVD orders, domestic prices, the domestic industry's financial condition, domestic production, investment and ability to raise capital, capacity, capacity utilization, shipments, market share, profit and loss data, plant closings, wages and other employment-related data, productivity, capital expenditures, and research and development expenditures. Conditions of competition included demand for the various flat-rolled products, substitutability between domestic and imported products, changes in world capacity and production, and market conditions. The ITC also evaluated alternative causes, including certain decline in demand, increases in domestic capacity, poor management decisions, legacy costs, intra-industry competition, and buyer consolidation.[403]	Injury and Causation: No factual analysis for non-NAFTA imports; instead the ITC merely noted that "we would have reached the same result had we excluded imports from Canada from our injury analysis."[404]	Injury and Causation: No factual analysis, but the ITC concluded that "*the same considerations* that led us to conclude that increased imports of certain carbon flat-rolled steel are a substantial cause of serious injury to the domestic industry *are also applicable* to increased imports of certain carbon flat-rolled steel from all sources other than Canada and Mexico."[405]

310 Essentially, the ITC analyzed total imports, not the non-NAFTA imports and found that the increase was a substantial cause of serious injury. The President then excluded NAFTA imports from the safeguard measure.[406] Yet, the ITC's analysis of non-NAFTA flat-rolled steel imports was limited to whether the volume increase and the decline in average unit values (AUVs) were significant.[407] The ITC did not specifically establish causation between non-NAFTA imports and the domestic industry's serious injury. The general discussion of causation, and the role of alternative causes, never once mentions the role of non-NAFTA imports as distinguished from all imports.[408]

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403 *ITC Report* at 55-65, (**Exh. CC-6**).

404 *Id.* at 66 n.319. The ITC found that "imports from Canada did not contribute importantly to the serious injury suffered by the domestic industry." (*Id.* at 66), and thus implicitly acknowledged some contribution to injury by Canadian imports. The ITC never analyzed carefully the extent of Canada's contribution.

405 ITC's 4 Feb. Letter at 5 (emphasis added) (**Exh. CC-11**).

406 *Proclamation 7529*, 67 Fed. Reg. 10553, 10555 (7 Mar. 2002) (**Exh. CC-13**).

407 *ITC Report* at 66-67 n.319, (**Exh. CC-6**).

408 *Id.* at 55-65.

311 In the ITC's 4 February 2002 response to the USTR's request for additional information, the ITC did not elaborate on its analysis in the determinations. Again, the ITC focused on non-NAFTA import volumes and average unit values to the exclusion of causation.[409] The ITC's causation analysis boils down to conclusory assertions that "the same considerations" apply as in its analysis of all imports, without any evidentiary support or analysis. In comparison, in its original determination, the ITC expended more than ten pages to explain why increased total imports of flat-rolled steel were a substantial cause of serious injury.[410] Although length does not ensure quality, the ITC made no equivalent effort to explain why imports of non-NAFTA countries alone caused serious injury. The ITC's handling of causation underscores the extent to which its *ex post facto* analysis of non-NAFTA imports was driven by its analysis of all imports in violation of the parallelism requirement.

4. As in *U.S. – Wheat Gluten* and *U.S. – Line Pipe* the ITC failed to provide a "reasoned and adequate explanation" that explicitly established causation by non-NAFTA imports

312 The Appellate Body has found that a cursory ITC analysis of non-NAFTA imports does not meet the Agreement on Safeguards' requirement that a measure parallel the injury determination. The ITC apparently did not learn from these cases and followed the same flawed analysis in the *Certain Steel* case. Depending on the product category, the ITC included NAFTA imports in the injury analysis but recommended exclusion of these imports from the measure, which the President implemented. In its analysis, the ITC did not conduct any specific evaluation of non-NAFTA imports as required by parallelism. Instead, the ITC evaluated NAFTA imports and, though it found that imports from NAFTA countries contributed importantly to the domestic serious injuries in several cases, it made the conclusory assertion that the exclusion of NAFTA imports would not change its findings of injury and causation as to total imports.[411] Given the clear statements of the Appellate Body, the Panel should find that the United States' decision to exclude NAFTA imports violated the requirement for parallelism under the Agreement on Safeguards.

313 The table below demonstrates how the ITC applied the same, inadequate practice in *Certain Steel* as it had in *Line Pipe*, the U.S. safeguards measure most recently reviewed by the Appellate Body.

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[409] ITC's 4 Feb. Letter at 5-11 (**Exh. CC-11**).

[410] *ITC Report* at 55-65 (**Exh. CC-6**). The ITC found that "imports from Canada did not contribute importantly to the serious injury suffered by the domestic industry." (*Id.* at 66), and thus implicitly acknowledged some contribution to injury by Canadian imports. The ITC never analyzed carefully the extent of Canada's contribution.

[411] For example, in the ITC's flat-rolled steel analysis, the ITC found that imports from NAFTA accounted for a substantial share of total imports and Mexican imports contributed importantly to the serious injury caused by imports (*ITC Report* at 66); in its hot-rolled bar and cold-finished bar analysis, the ITC found that Canadian imports represented a substantial share of total imports and contributed importantly to serious injury caused by imports (*ITC Report* at 100, 107.) (**Exh. CC-6**).

Comparison of the ITC's Analysis in *Certain Steel* to its Analysis in *Line Pipe*

Certain Steel: ITC's Analysis from the Determinations Regarding Non-NAFTA Countries	Certain Steel: ITC's Response to the USTR's Questions on Non-NAFTA	Line Pipe: ITC's Non-NAFTA Analysis
Import Trends: Total imports and Canadian imports increased absolutely and as a share of domestic consumption, and Canadian imports declined but remained a substantial share of total imports.[412]	Import Trends: Non-NAFTA imports increased absolutely and as a share of domestic production. As to price of non-NAFTA imports, the ITC did not evaluate any specific fact, instead, it stated that "exclu[sion] of imports from Canada and Mexico from the database does not appreciably change import pricing trends." [413]	Import Trends: The volume of non-NAFTA imports fluctuated during the period, but increased overall – absolutely and in terms of market share. Non-NAFTA imports were among the lowest-priced imports.[414]
Injury and Causation: No factual analysis for non-NAFTA imports; instead the ITC merely noted that "we would have reached the same result had we excluded imports from Canada from our injury analysis."[415]	Injury and Causation: No factual analysis, but the ITC concluded that "the same considerations that led us to conclude that increased imports of certain carbon flat-rolled steel are a substantial cause of serious injury to the domestic industry are also applicable to increased imports of certain carbon flat-rolled steel from all sources other than Canada and Mexico."[416]	Injury and Causation: No factual analysis, but the ITC noted that "we would have reached the same result had we excluded imports from Canada and Mexico from our analysis."[417]

314 In *U.S. – Line Pipe*, the Appellate Body held that the ITC's unsupported conclusion that it "would have reached the same result" did not meet the parallelism requirement.[418] Yet, the ITC used precisely the same language in the *Certain Steel* report to justify excluding NAFTA countries from the recommended measure. Again, the ITC's *ex post facto* analysis provided virtually no additional evaluation, and restated the conclusion in different words. The United States had an obligation to explain how the facts support a finding that non-

412 *ITC Report* at 66, 67 & n.319 (**Exh. CC-6**).

413 ITC's 4 Feb. Letter at 5 (**Exh. CC-11**).

414 *U.S. – Line Pipe*, para. 189 (*citing Line Pipe 201*, at I-26 to I-27 n. 168) (**Exh. CC-42**).

415 *ITC Report* at 67 n. 319 (**Exh. CC-6**).

416 ITC's 4 Feb. Letter at 5 (**Exh. CC-11**).

417 *U.S. – Line Pipe*, para. 189 (*citing Line Pipe 201*, at I-26 to I-27 n. 168) (**Exh. CC-42**)).

418 *Id.*, para. 194.

NAFTA imports alone caused serious injury or threat of serious injury.[419] Listing a few facts that might form the basis of a causal link is not enough.

315 The ITC's analysis of non-NAFTA imports therefore did not meet the Appellate Body's parallelism standard as set forth in *U.S. – Line Pipe*, which requires a "reasoned and adequate explanation that establishes explicitly" that such imports alone caused serious injury to the domestic industry. As the Appellate Body already has found, conclusory statements that the ITC would have reached the same result if it had excluded such imports from the injury analysis or that the same considerations were applicable are neither "reasoned" nor "adequate." The ITC also failed to establish that non-NAFTA imports alone caused serious injury. Again, to be explicit, the ITC "must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous."[420] The ITC's conclusions about the causal link between non-NAFTA imports and serious injury were vague at best. The ITC's rationale was not distinct or clear or unambiguous. The ITC merely implied or suggested why non-NAFTA imports alone caused serious injury. The ITC's analysis therefore did not satisfy the parallelism requirement.

316 As a result, the Panel should find that, as in *U.S. – 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 Canada and Mexico from the application of the safeguard measure, without providing a reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources alone satisfied the conditions for the application of a safeguard measure."[421]

G. The Measure Imposed Is More Restrictive Than Necessary, and Therefore Is Inconsistent With Articles 3.1 and 5.1 of the Agreement on Safeguards

1. Articles 3.1 and 5.1 require the measures to be limited only to the extent necessary to fulfill the intent of the Agreement

317 Article 5.1 provides that safeguard measures are to be applied "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." Under the plain meaning of this provision, the scope of a safeguard measure must be calibrated to remedy only the serious injury inflicted by imports, and not the serious injury inflicted by factors other than imports.

318 The Appellate Body in *Korea – Dairy* stated that:

> . . . the wording of this provision leaves no room for doubt that it imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is commensurate

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[419] *Id.*, para. 195.

[420] *Id.*, para. 194.

[421] *Id.*, para. 197.

> with the goals of preventing or remedying serious injury and of facilitating adjustment. . . . [T]his obligation applies regardless of the particular form that a safeguard measure might take. Whether it takes the form of a quantitative restriction, a tariff or a tariff rate quota, the measure in question must be applied "only to the extent necessary" to achieve the goals set forth in the first sentence of Article 5.1.[422]

319 In *U.S. – Line Pipe*, the Appellate Body held that Article 5.1 requires safeguard measures to be no more restrictive than necessary to remedy the serious injury caused by imports, as "separated" and "distinguished" under Article 4.2(b).[423] Article 4.2(b) has two purposes. First, as discussed above, the Article prevents authorities from inferring a causal link between increased imports and serious injury when several factors cause injury at the same time.[424] Second, it is a "benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports" and, therefore, it "informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1."[425]

320 Article 3.1 provides that a safeguard measure may only be applied after an investigation in which all parties have an opportunity to present their views, followed by a report containing "findings and reasoned conclusions on all pertinent issues of fact and law." The Appellate Body explained this provision in *U.S. – Line Pipe*:

> The Member imposing a safeguard measure must . . . meet several obligations under the *Agreement on Safeguards*. And, meeting those obligations should have the effect of clearly explaining and "justifying" the extent of the application of the measure. By separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports, as required by Article 4.2(b), and by including this detailed analysis in the report that sets forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c), a Member proposing to apply a safeguard measure should provide sufficient motivation for that measure.[426]

321 The Appellate Body, therefore, has clarified that an authority must not only avoid attributing causation to factors other than increased imports (Article 4.2(b)), but must also ensure that the measure is limited to the extent necessary to address the serious injury caused by increased imports (Article 5.1) and must justify the measure clearly (Article 3.1).

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[422] *Korea – Dairy*, para. 96 (emphasis in original).

[423] *U.S. – Line Pipe*, para. 260.

[424] *Id.*, para. 252.

[425] *Id.*, para. 252.

[426] *Id.*, para. 236.

2. The ITC violated Article 5.1 because it failed to tailor the measure by "distinguishing and separating the injurious effects of other factors"

322 As discussed above, the ITC failed to "distinguish" and "separate" the serious injury caused by increased imports in violation of the non-attribution requirement of Article 4.2(b). Therefore, there was no benchmark by which the ITC could determine how any measure could be tailored to the harm caused by imports alone.[427] Nor did the ITC attempt to limit the measure to that portion of the domestic industry's injury caused by increased imports, as required by Article 5.1. The ITC merely concluded, without factual support, that "the actions . . . will not exceed the amount necessary to remedy the serious injury we find to exist."[428] These are independent and distinct violations of the Agreement.[429]

323 In its determinations, for example, the ITC recommended a 20-percent tariff on flat-rolled steel based on a vague economic analysis[430] demonstrating that such a tariff would provide "a significant amount of additional revenues over 2000 levels" and would "enable firms . . . to begin to return to pre-import surge levels of profitability."[431] The ITC's report provided only a limited summary of demand conditions, such as demand from certain end-use applications; supply conditions, including differences within the U.S. flat-rolled industry (*i.e.*, integrated producers and minimills), large post-employment benefits to workers, recent bankruptcies, and global capacity; and the industry adjustment plans, which explain how each producer will use the period of the measure to adjust to import competition.[432] The ITC made no attempt to quantify the serious injury caused by imports (as opposed to these other factors) so that it could craft a remedy carefully tailored to such injury caused by imports.

324 Moreover, the ITC relegated to a footnote its consideration of the substantial degree of import protection already afforded by AD/CVD actions against the countries responsible for increased imports in 1998 and 2000.[433] A supplemental report, describing the economic model used to evaluate the various remedy alternatives, never once mentions the impact of AD/CVD actions and fails to factor them into the quantitative analysis.[434] The ITC essentially disregarded the fact that safeguard measures against imports already restrained by AD/CVD orders are more restrictive than necessary by definition -- a point respondents made

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427 *U.S. – Line Pipe*, para. 236.

428 *ITC Report* at 359 (**Exh. CC-6**).

429 We note that this claim applies to all the steel products subject to the U.S. safeguard measures.

430 *ITC Report* at 364 n. 60 (citing EC-Y-050 at 13) (EC-Y-050 (**Exh. CC-10**) is the ITC Staff Report containing estimates of the effects of different remedies on certain carbon and alloy flat steel market.).

431 *ITC Report* at 364 (**Exh. CC-6**).

432 *Id*. at 359-362.

433 *Id*. at 364 n.59.

434 ITC Staff Memorandum (EC-Y-046) to the Commission, "Investigation No. TA-201-73: STEEL – Remedy Memorandum" at FLAT-1 to FLAT-30 (21 Nov. 2001) (**Exh. CC-10**).

repeatedly.[435] The United States therefore failed to assess adequately the separate and distinct effect of increased imports on the domestic industry in deciding what measure to impose, in violation of Article 5.1.

3. Even if the ITC's findings pursuant to Article 5.1 were acceptable, the President imposed safeguard measures on most products that are more restrictive than the ITC's recommendations, without investigation or explanation, in violation of Article 3.1

325 Notwithstanding the ITC's recommended 20-percent tariff on flat-rolled products, and its finding that the even higher tariffs proposed by petitioners were unnecessary, the President imposed a 30-percent tariff for the first year of the measure.[436] Furthermore, the President imposed his measure on a different group of countries than suggested by the ITC; whereas the ITC proposed to exclude only Canada for most products,[437] the President excluded Canada, Mexico, Jordan and Israel for all products and developing countries for most products.[438] No analysis accompanied these contrary decisions, and no attempt was made to explain how the 30 percent tariff, applied to a different group of countries, was no more restrictive than necessary.

326 Because the President's measure is more strict than the ITC's recommendation, the ITC's report cannot, as a matter of logic, support it. The President should have abided by the "investigation" requirements of Article 3.1, including the requirement to provide a report setting forth "findings and reasoned conclusions reached on all pertinent issues of fact and law."[439] In particular, the President made no attempt to explain how his safeguard measures are no more restrictive than necessary under Article 5.1. The President, therefore, did not "clearly explain and 'justify' the extent of the application of the measure."[440]

327 The absence of any report containing the required findings and reasoned conclusions is especially surprising given that the USTR conducted its own independent investigation on behalf of the President, inviting parties to comment and respond to the comments of other parties on remedy options. On 26 October 2001, the USTR issued a notice to the public, requesting input on the measure to be imposed.[441] Specifically, the USTR asked for

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[435] *See* Japanese Respondents' Prehearing Remedy Brief: General Issue (Flat-Rolled Products) (29 Oct. 2001) at 2-8. (**Exh. CC-56**); *also* Japanese Respondents' Posthearing Remedy Brief: General Issues and Amendments to Exclusions (Flat-Rolled Products) (14 Nov. 2001) at 1-3, 10-11, 14 and 27-28 (**Exh. CC-57**).

[436] *Proclamation 7529*, 67 Fed. Reg. 10583, 10587 (7 Mar. 2002) (reducing the measure to 24 percent in the second year and 18 percent in the third year) (**Exh. CC-13**).

[437] See *ITC Report* at 358, (**Exh. CC-6**).

[438] *Proclamation 7529*, 67 Fed. Reg. 10555 (7 Mar. 2002) (**Exh. CC-13**).

[439] As discussed above, the fact that, under U.S. law, the President rather than the competent authority, *i.e.*, the ITC, makes the final decision in safeguards cases does not absolve the USG of the obligation to abide by Article 3.1. If the President deviates from the ITC recommendations (which should be supported by its report, even if such was not in the case here), the President is required to provide a reasoned and adequate explanation for his decision. (Political expediency – the apparent reason for the decision – is not sufficient.)

[440] *U.S. – Line Pipe Safeguards*, para. 236.

[441] Trade Policy Staff Committee; Public Comments on Potential Action Under Section 203 of the Trade Act of 1974 With Regard to Imports of Certain Steel, 66 Fed. Reg. 54321 (26 Oct. 2001) (**Exh. CC-59**). The Trade

comments on: (a) what form the measure should take (*i.e.*, tariff, quota, tariff-rate quota, etc.); (b) the duration of any action; and (c) any other actions that would facilitate the domestic industry's adjustment to import competition.[442] Numerous interested parties submitted comments, but the President never issued a report explaining how the 30-percent tariff -- applied to a different group of countries than those recommended by the ITC -- was tailored to the harm sustained as a result of imports from those countries. One cannot even infer a justification from the interested parties' comments, because none of the parties recommended a 30-percent tariff for flat-rolled products.[443] Nor did any of the parties have any idea which specific countries would ultimately be excluded. Given that excluded developing countries represented by far the largest portion of the beginning-to-end increase in flat-rolled imports, the President should have explained why an even higher 30-percent tariff was necessary to counteract relatively stable imports from the countries to which the measure actually was applied.

328 The President had an obligation under Article 5.1 to ensure that the measure is limited to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Basic procedural fairness, as articulated in Article 5.1, demands an explanation setting forth the authority's "findings and reasoned conclusions." Absent a clear explanation and justification for the measure imposed, the President's decision violates Articles 3.1 and 5.1 of the Agreement on Safeguards.

H. The Safeguard Measures Are Inconsistent With Article 2.2 of the Agreement on Safeguards and Article I:1 of GATT 1994 Because They Exempt Imports From Non-Developing-Country Members With Which the United States Has Signed Free Trade Agreements

1. Article 2.2 of the Agreement on Safeguards and Article I:1 of GATT 1994 require most-favored-nation application of safeguard measures, with very limited exceptions

329 Article 2.2 of the Agreement on Safeguards sets forth the general requirement that safeguard measures must be applied on a most favored nation ("MFN") basis: "Safeguard measures shall be applied to a product being imported irrespective of its source." Under the plain meaning of "irrespective of its source," safeguard measures must be applied on an MFN basis, subject only to the Article 9 exception for developing countries. More specifically, the MFN principle embodied in Article 2.2 requires that once a Member conducts an investigation of total products imported and the effects of imports on its domestic industry, any safeguard measures imposed on the basis of that investigation must be applied to imports

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Policy Staff Committee ("TPSC") is an interagency committee, chaired by the USTR, which is charged with advising the President on what action to take pursuant to safeguards investigations.

[442] *Id.* at 54323.

[443] ITC Staff Memorandum (EC-Y-046) to the Commission, "Investigation No. TA-201-73: STEEL – Remedy Memorandum" at FLAT-13 (21 Nov. 2001) (**Exh. CC-10**). Note that this memorandum summarized briefs submitted to the ITC, not interested party comments in response to the USTR's 26 October 2001 notice. However, the parties did not change their position in response to the USTR's request for comments, but merely elaborated on their prior arguments.

from all sources, even imports from countries with which the Members have a specific agreement prohibiting the application of safeguard measures.

330 Moreover, Article I:1 of the GATT 1994 provides that:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* *any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.* (Emphasis added.)

Like Article 2.2 of the Agreement on Safeguards, Article I:1 of GATT 1994 requires Members to treat imports from other Members similarly. If an "advantage, favour, privilege or immunity" is granted to any Member, the same courtesy must be accorded "immediately and unconditionally" to all other Members.[444] In the context of a safeguards measure, this MFN principle requires the United States to treat imports equally. If the President decides to exclude countries that are members of a free trade agreement ("FTA") – which is clearly an "advantage, favour, privilege or immunity" because the FTA countries would not be subject to the measure – the President must also extend the exclusion to other WTO members (absent an exception, such as those afforded to customs union members and developing countries, in certain circumstances).

331 As discussed above in Section E, the Appellate Body has interpreted Article 2.2, in conjunction with Article 2.1's standard for investigating and imposing safeguard measures, to require measures to "parallel" the determination that imports caused serious injury (or threat thereof) to the domestic industry. A violation of the MFN principle is easier to ascertain. With the exception of Article 9, which permits exemption of developing countries under certain conditions, the Agreement requires application of the measure to all imports, *i.e.*, on an MFN basis. Article 2.2 prohibits Members from exempting other countries, such as those

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[444] *See, e.g.*, Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139,142/AB/R, adopted 19 Jun. 2000, para. 84 (The "object and purpose [of Article I:1] is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis."); *Canada – Certain Measures Affecting the Automotive Industry*, Panel Report, WT/DS139,142/R, unadopted, para. 10.23 ("The purpose of Article I:1 is to ensure unconditional MFN treatment. In this context, we consider that the obligation to accord 'unconditionally' to third countries which are WTO Members an advantage which has been granted to any other country means that the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin.").

with which the Member has signed a free trade agreement. In this case, the United States violated the MFN principle by exempting Canada and Mexico, which are signatories to the North American Free Trade Agreement, and Israel, which is a signatory to the United States-Israel Free Trade Area.

2. The special treatment the United States accorded NAFTA countries under Sections 311 and 312 of the NAFTA Implementation Act in this case violates Article 2.2 and GATT Article I:1

332 As discussed above, under Section 311 of the NAFTA Implementing Act, in the event of an affirmative injury determination based on imports overall, the ITC must render a separate determination on whether imports from Canada and Mexico: (a) individually account for a substantial share of total imports; and (b) contribute significantly to the serious injury, or threat thereof, caused by total imports.[445] The ITC must report its findings on these two factors to the President; in practice, the ITC incorporates them into its remedy recommendations. Under Section 312 of this Act, the President "shall" make determinations on the same two factors for NAFTA countries, and "shall" exclude a NAFTA country from a safeguard measure if a negative determination is made on either ground with respect to that country.[446]

333 In this case, the President did not render his own determinations on these two factors, but merely chose to exclude Canada and Mexico from the measures on all steel products.[447] Accordingly, when the ITC determined either that a NAFTA country's imports either were not a substantial share of total imports, or did not contribute significantly to serious injury, the President excluded that country from the safeguard measure.

334 The President's decision to exclude Canada and Mexico violated the requirement to apply the measure to imports irrespective of their source. The ITC's analysis, focusing on non-NAFTA countries, does not cure the U.S. violation. Safeguards measures are intended to be global in nature. Any country-specific exclusion (with the exception of developing countries under Article 9) violates this principle. Provisions within free trade agreements are no exception and cannot justify the departure from the non-discrimination principle. The United States plainly breached its obligation to apply the safeguard measure to a product "irrespective of its source."

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[445] *See* 19 U.S.C. § 3371(a) (**Exh. CC-47**).

[446] *See* 19 U.S.C. § 3372(a)-(b) (**Exh. CC-47**). This section is intended to explain U.S. law and practice. Japan is not challenging the U.S. law on its face, but argues that the U.S. application of the NAFTA Implementation Act in this case violated the Agreement on Safeguards.

[447] *Proclamation 7529*, 67 Fed. Reg. 10553, 10555 (7 Mar. 2002) (**Exh. CC-13**). We note that this claim applies to all the steel products subject to the U.S. safeguard measures.

3. The special treatment the United States accorded Israel under Section 403 of the Trade and Tariff Act of 1984 in this case is a violation of Article 2.2 and GATT Article I:1

335 Section 403(b) of the Trade and Tariff Act of 1984 provides that in any report the ITC provides the President, for any article for which reduction or elimination of any duty is provided under a trade agreement with Israel, the ITC shall state whether and to what extent its findings and recommendations apply to such an article when imported from Israel.[448] In instances where the resulting trade action involves the suspension of existing duty reduction or elimination, under Article 403(c) the ITC must determine in the course of its investigation that serious injury resulted from the reduction or elimination of any duty provided under any agreement with Israel.[449]

336 Section 403(a) establishes that the President "may" by proclamation apply safeguard measures to Israel.[450] The legislative history to Section 403 makes clear that in response to an affirmative injury finding by the ITC, the President may impose relief on other import sources while establishing a margin of preference for Israel that maintains the duty reduction or elimination on Israeli articles.[451]

337 When the President uses his discretion under Section 403 to exclude or grant preferences to imports from Israel, it cannot be said that the safeguard measure applies to a product "irrespective of its source," consistent with the Agreement. In this case, the President exempted Israel from the measures and therefore violated Article 2.2 of the Agreement on Safeguards and Article I:1 of GATT 1994.[452] As discussed above with respect to NAFTA countries, the fact that the United States and Israel are joined in a free trade area does not override the requirement for global application of the safeguards measure. The measures therefore are inconsistent with these Agreements.

Ⅳ. CONCLUSION

338 For the reasons set forth below, Japan respectfully requests the Panel:

(a) to find that the safeguard measures imposed by the United States on certain steel products are inconsistent with the Agreement on Safeguards and GATT 1994, including:

- the requirement to define the domestic industry as those producers producing a product *like or directly competitive* with the imported product, particularly with regard to the various flat-rolled products, as set forth in Articles 2.1 and 4.1(c) of the

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[448] *See* 19 U.S.C. § 2112(b) (*see* Historical and Statutory Notes for further elaboration on the U.S. provisions relevant to the US-Israel Free Trade Agreement) (**Exh. CC-47**). As discussed above, this section is intended to explain U.S. law and practice. Japan only challenges the U.S. application of its laws in this case.

[449] *See id*.

[450] *See id*.

[451] *United-States-Israel Free Trade Area*, H.R. Rep. No. 98-1092, at 13, *reprinted in* 1984 U.S.C.C.A.N. 5096 (**Exh. CC-47**).

[452] *Proclamation 7529*, 67 Fed. Reg. 10553, 10555 (7 Mar. 2002) (**Exh. CC-13**).

Agreement on Safeguards and Article XIX:1 of GATT 1994, and to make such a decision in a uniform, impartial, and reasonable manner as required by Article X:3(a) of GATT 1994;

- the requirement to find that increased imports of tin mill and stainless wire products had caused serious injury to the industries producing those specific products, or identifying a *published report* supporting such decisions, as required by Articles 2.1, 3.1 and 4.2(c) of the Agreement on Safeguards, and to make such a decision in a uniform, impartial, and reasonable manner as required by Article X.3(a) of GATT 1994;

- the requirement that the measures be imposed only if *increased imports* exist, as set forth in Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1 of GATT of 1994;

- the requirement that increased imports *cause* serious injury to a domestic industry producing a like or directly competitive product, and that such injury is *not* falsely *attributed* to imports, as set forth in Articles 2.1 and 4.2(b) of the Agreement on Safeguards and Article XIX:1 of GATT 1994;

- the requirement that the sources of imports covered by an affirmative injury finding *parallel* the sources against which the measures are imposed, as set forth in Articles 2.1 and 2.2 of the Agreement on Safeguards and Article XIX:1 of GATT 1994;

- the requirement that the measure be applied *only to the extent necessary*, as required by Articles 3.1 and 5.1 of the Agreement on Safeguards and Article XIX:1 of GATT 1994; and

- the requirement that measures be imposed on imports *irrespective of their source*, as set forth in Article 2.2 of the Agreement on Safeguards and Article I:1 of GATT 1994.

(b) to find, pursuant to Article 3.8 of the DSU, that as a consequence of the infringement of the above cited provisions, the United States has nullified and impaired the benefits accruing to Japan under the Agreement on Safeguards and GATT 1994;

(c) to recommend that the DSB request that the USG bring its safeguard measures on certain steel products into conformity with the WTO Agreement; and

(d) to suggest to the DSB that in order to conform, the United States must terminate the measure.