Production processes

7.394 The European Communities and China point out that the USITC's decisive argument for aggregating the five different products into one single category was the vertical integration of the industry and the common production processes.[1112] The USITC, in this safeguard determination, was, again, required by its own stated methodology to use as criterion for determining a like product "its manufacturing process (i.e., where and how it is made)".[1113] The USITC paid "particular attention" to the "sharing of productive processes and facilities" which "is a fundamental concern in defining the scope of the domestic industry under Section 201".[1114] Moreover, the USITC considered itself required "to define like or directly competitive in a manner that reflects the realities of the market and at the same time accomplishes the fundamental purpose of Section 201, protection of the productive resources of domestic producers".[1115] Thus, the USITC's general methodology calls for the artificial aggregation of downstream products by directing the USITC to "pay particular attention" to a common integrated production base.[1116]

7.395 According to the European Communities, Japan, China, and Brazil, this criterion, however, has already been found to be at odds with the Agreement on Safeguards in *US – Lamb* well before the USITC started the steel safeguard investigation. Japan and Brazil also argue that the USITC found the "vast majority" of CCFRS to be produced by "firms that are involved in a number of the stages of processing".[1117] Consequently, these complainants contend that the USITC's like product analysis of CCFRS products is no more consistent with the Agreement on Safeguards than its faulty analysis in *US – Lamb*. 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".[1118] 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".[1119] The cascading nature of the production processes for various CCFRS products is irrelevant to the question of "like" products under the Agreement, as interpreted by the Appellate Body. The complainants argue that 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 overlap in the production, the element that drove the USITC analysis[1120], is irrelevant. What matters is the competitive relationship between the products, which helps to discern whether the products are "like" one another and whether, in turn, it makes sense to collapse them together.[1121] Japan considers that

[1112] USITC Report, Vol. I, pp. 30, 31, 37.
[1113] USITC Report, Vol. I, p. 30.
[1114] USITC Report, Vol. I, pp. 30 and 151.
[1115] USITC Report, Vol. I, p. 31.
[1116] European Communities' first written submission, paras. 249-251; China's first written submission, paras. 201-203.
[1117] USITC Report, Vol. I, pp. 37-39.
[1118] Appellate Body Report, *US – Lamb*, para. 90. *See* also para. 94.
[1119] Ibid. at paras. 92-93.
[1120] USITC Report, Vol. I, pp. 36-45 (Exhibit CC-6). These complainants argue that this is apparent from the USITC's reliance on the statement that the like product determination should be driven by the "fundamental purpose of Section 201, protection of the productive resources of domestic producers." USITC Report, Vol. I, p. 31 (Exhibit CC-6) (citing to *Carbon and Certain Alloy Steel Products*, Inv. No. TA-201-51, USITC Publication 1553, Washington, D.C. (July 1984), pp. 12-13).
[1121] European Communities' first written submission, para. 252; Japan's first written submission, paras. 121-122; China's first written submission, para. 204; Brazil's first written submission, paras. 100, 102, 105, 109, 111.

the USITC finding that a large percentage of domestic CCFRS 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.[1122]

7.396 Japan and Brazil also insist that the products undergo different production processes. The USITC found, for example, that the production processes for hot-rolled steel and cold-rolled steel differ in that cold-rolled steel is further reduced by 25% to 90%, and is often annealed and temper rolled. Coated steel differs from cold-rolled steel in that it has been processed on an electro-galvanizing or hot-dip galvanizing line.[1123]

7.397 Japan submits that even the USITC admits that the processes that make the various CCFRS products are distinct and that distinct products come out of them.[1124] A slab caster is a process unto itself, entirely separate from the hot rolling and Steckel plate mills. These mills are in turn separate from cold rolling mills, as are the coating lines that make corrosion resistant steel. Each process, in turn, makes a product that can either be used as feedstock for the next stage, or be sold as finished products for end-use purposes (except for slab, which is only used to make finished flat-rolled steel). The processes which make these products may be located on the same general premises and be owned by the same company, but this doesn't make the processes' output "like" one another. The separate facilities in which slab is made as compared with hot-rolled, cold rolled and corrosion resistant create separate products used for distinctly different purposes.[1125]

7.398 The European Communities and China finally argue that in essence, the USITC defined "like product" by reference to the "domestic industry". This turns on its head the requirement of Articles 2.1 and 4.1(c) of the Agreement on Safeguards which mandates the "domestic industry" to be defined by reference to producers of the "like product": the "identification of the products which are "like or directly competitive with the imported product" is the *first* step required by *US – Lamb* in defining the domestic industry, not the other way round. This is not a product-focused approach as required by the Appellate Body. Rather, it is an approach driven by the aim to give the widest possible blanket of protection to the domestic industry. The United States cannot arbitrarily replace the criteria upheld by the Appellate Body. The United States had to apply such criteria so as to ensure that prejudice caused by one imported product is not unjustifiably attributed to another imported product.[1126]

7.399 The United States insists that CCFRS includes steel at any of the following five stages of processing: slab, hot-rolled steel (sheet/strip/plate in coils), cut-to-length ("CTL") plate, cold-rolled steel, and coated steel.[1127] An important factor in the USITC's analysis, which the complainants' arguments ignore, was the fact that CCFRS at one stage of processing generally is feedstock for the next stage of processing. For example, slab is feedstock for hot-rolled steel (sheet, strip, and plate); hot-rolled steel is feedstock for cold-rolled steel and cut-to-length plate; and cold-rolled steel is feedstock for coated steel. The USITC acknowledged that the interrelationship between the products is most prominent at the earlier stages.[1128] Since earlier processed CCFRS is the feedstock for further

[1122] Japan's second written submission, para. 40.
[1123] Japan's first written submission, para. 117, footnote 183; Brazil's first written submission, para. 106.
[1124] USITC Report, pp. 40-41.
[1125] Japan's second written submission, para. 41.
[1126] European Communities' first written submission, para. 253; China's first written submission, para. 205.
[1127] USITC Report, p. 38.
[1128] For example, slab is dedicated for use in producing the next stage steel, hot-rolled steel, whether produced as sheet, strip, or plate. The majority of hot-rolled steel is further processed into cold-rolled steel. The remaining hot-rolled steel is about equally divided between being further processed into CTL plate or pipe

processed steel, such steel is produced using essentially the same production processes at least at the initial stages, with downstream steel merely employing later stages of processing. The USITC's analysis provided a detailed discussion of the five stages of processing CCFRS. The manufacturing processes for carbon steel involve three distinct stages that include: (1) melting or refining raw steel; (2) casting molten steel into semifinished form, such as slab; and (3) performing various stages of finishing operations, including hot-rolling, cold-rolling, and/or coating.[1129] All CCFRS is produced from slab, with the majority of such steel further processed into hot-rolled steel on hot strip or Steckel mills.[1130] Substantial quantities of earlier processed steel are internally transferred for production of further processed steel.[1131] This tends to blur product distinctions until the processing reaches its final stages since earlier stages simply are feedstock for the next stage. As part of its consideration of the manufacturing process (*i.e.*, where and how it is made), the USITC also recognized that there is commonality of facilities and substantial vertical integration in the industry.[1132]

7.400 The United States notes that the complainants challenge the USITC's consideration of production processes in determining the "like product" on the basis that "the Appellate Body in *US – Lamb* had ruled out this criterion for the like product determination".[1133] However, the United States maintains that contrary to the complainants' contentions, the Appellate Body in *US – Lamb* recognized that when confronted with the question of whether two articles are separate products, "it may be relevant to inquire into the production processes for those products".[1134]

7.401 The European Communities contends that the United States acknowledged the limited similarity and interchangeability and tried to defend it on the basis of a the "important factor" "feedstock" relationship, stating that a lack of similarity "would be expected for feedstock products".[1135] However, this only admits the commonsensical reason why the Appellate Body clearly ruled out a feedstock relationship between products as criterion for establishing likeness, if the

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and tube, and used in the manufacture of structural parts of automobiles and appliances. The majority of cold-rolled steel also is used as the feedstock for further processing into coated steel, with smaller amounts further processed into tin mill products or GOES.

[1129] USITC Report, p. OVERVIEW-7.

[1130] Moreover, the evidence shows that advances in technology have blurred the former differences in hot-rolled production processes for sheet/strip and plate. The Steckel mills permit rolling to thinner gauges than a traditional reversing mill thus permitting a producer to switch production between sheet and plate. Steckel mills also allow steelmakers to coil the finished plate, as on a hot-strip mill. Moreover, the addition of temper mills to CTL lines has made heavy gauge hot-rolled interchangeable with discretely produced plate. Without the temper mill process, coils cut into lengths tend to retain memory and "snap back" or bend after the initial flattening. While plate in coils can only be produced in thicknesses up to 3/4 inch and thus can only be substituted for CTL plate up to 3/4 inch thick, this portion of the CTL plate market is large. There is evidence that some mills can produce plate in coils in gauges up to one inch. Thus, the share of the CTL plate market which can be, and is being, supplied with plates cut from coil is substantial. USITC Report, p. 40-41.

[1131] Virtually all US-produced slab is internally consumed by the domestic slab producers in their production of hot-rolled steel (sheet, strip, or plate), with large shares of hot-rolled and cold-rolled steel also internally transferred. During the year 2000, 99.4% of the quantity of domestic producers' total US shipments of slab were internally transferred, as were 66% of the quantity of domestic producers' total US shipments of hot-rolled steel, and 58.7% of the quantity of total US shipments of domestically-produced cold-rolled steel. USITC Report, pp. FLAT-1 and 3, nn. 4 and 5.

[1132] United States' first written submission, paras. 121-122.

[1133] European Communities' first written submission, para 233; *see also* Korea's first written submission, paras. 32 and 35; Japan's first written submission, para. 103; China's first written submission, para. 141; Brazil's first written submission, para. 96; Switzerland's first written submission, para. 179; Norway's first written submission, para. 197.

[1134] Appellate Body Report, *US – Lamb*, para. 94, footnote 55.

[1135] United States' first written submission, paras. 136 and 140.

products are not otherwise found to be like. Had the USITC looked at the production process, i.e., how a product is made, as opposed to an irrelevant feedstock relationship, this would have only confirmed the finding that all five products are different. The European Communities alleges that the United States itself described the production processes of all these four products and thereby admits that they are different.[1136] As is readily apparent, the production processes differ considerably and accordingly, the texture and thickness of hot-rolled and cold-rolled steel is not similar. Similarly, the specific characteristics of coated sheet are due to the specific production processes of hot-dip galvanising or otherwise coating the cold-rolled sheets to make it corrosion resistant or give it other specific qualities.[1137]

7.402 The United States stresses that contrary to the complainants' allegations[1138], the USITC's definition of CCFRS as a single like product was not based solely on the vertical integration of the domestic CCFRS producers. It is clear from the USITC's determination, that it considered the factors it has traditionally used to evaluate like products in safeguard cases, and based its decision on all of the evidence before it. The complainants fail to acknowledge, although they do not dispute, the fact that CCFRS at one stage of processing generally is feedstock for the next stage of processing, which tends to blur product distinctions until the processing reaches its final stages since steel at the earlier stages simply are feedstock for the next stage. This interrelationship between types of CCFRS at different stages of processing clearly was an important factor in the USITC's analysis and finding, and is "product-oriented". The fact that the USITC recognized that substantial quantities of earlier processed steel are internally transferred for their production of further processed steel and that these substantial internal transfers of feedstock underscore the fact that domestic producers are highly integrated does not negate the USITC's entire like product analysis.[1139] These are facts about the interrelationship of CCFRS and its manufacturing process. Contrary to the complainants' statements, the USITC appropriately considered relevant other factors[1140] including the vertical integration of the domestic producers of CCFRS in its analysis.[1141] [1142]

[1136] United States' first written submission, para. 121.

[1137] European Communities' second written submission, paras. 277-279.

[1138] Japan's first written submission, paras. 121-122; Brazil's first written submission, paras. 103-105; Korea's first written submission, paras. 45-47 and 60; European Communities' first writtensubmission, paras. 249-254; New Zealand's first written submission, paras. 4.54-4.55; China's first written submission, paras. 201-206; Brazil's first written submission, paras. 103-105 and 109.

[1139] The evidence shows that domestic producers of hot-rolled steel shipped 94.7% of US shipments of cold-rolled steel and 84.8% of coated steel in 2000. INV-Y-207 at Table X-1 (US-27). Conversely, domestic producers of cold-rolled/coated steel shipped 89.1% of US shipments of hot-rolled steel in 2000. INV-Y-207 at Table X-2 (US-27).

[1140] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20 ("In applying the criteria cited in *Border Tax Adjustments* to the facts of any particular case, and in considering other criteria that may also be relevant in certain cases, panels can only apply their best judgement in determining whether in fact products are "like".).

[1141] As discussed above, contrary to complainants' misstatements, *US – Lamb* does not prohibit consideration of production processes and vertical integration as part of the like product analysis. The complainants ignore the Appellate Body's explicit recognition that consideration of production processes may be a relevant factor in defining like products. Specifically, the Appellate Body in *US – Lamb* added the following statement in a footnote:

We can, however, envisage that in certain cases a question may arise as to whether two articles are *separate products*. In that event, it may be relevant to inquire into the production processes for those products.

Appellate Body Report, *US – Lamb*, para. 94, footnote 55; Panel Report, *Japan – Alcoholic Beverages I*, para. 5.7 (Panel thought it was important to assess "likeness", as much as possible, on the basis of objective criteria, including, in particular, composition and manufacturing processes of the product, in addition to consumption habits.).

7.403 The European Communities notes that even if the USITC had consistently drawn the dividing lines between products on the basis of a feedstock relationship, such approach would be inconsistent with Article 2.1 of the Agreement on Safeguards, as clarified by the Appellate Body in *US – Lamb*. The European Communities submits that a mistake is not healed by repeating it.[1143]

Marketing channels

7.404 Brazil argues that the USITC found that there was overlap among the products in terms of channels of distribution in that the products were generally internally consumed or sold to end-users, although neither plate nor corrosion resistant steel is internally consumed in most cases.[1144] [1145]

7.405 The United States agrees that the USITC also considered the marketing channels and uses for CCFRS. The majority of CCFRS overall, and specifically for feedstocks products – slab, hot-rolled, and cold-rolled – is internally transferred. Thus, when CCFRS enters the commercial market, the primary marketing channel generally is directly to end-users.[1146]

7.406 China considers that marketing channels are not relevant criteria.[1147]

Competition

7.407 According to Japan, the USITC completely ignored the most basic principle that competition needs to exist between products found to be like. The choice of an overly broad CCFRS category – in respect of both imports and the domestic industry – made the USITC'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.[1148]

7.408 Similarly, Korea argues that Articles 2.1 and 4.1(c) of the Agreement on Safeguards, read as a whole, support the conclusion that an essential element of the like product analysis should relate to whether the products compete in the marketplace because this will determine the essential nature of the impact of imports on the domestic industry and whether they are causing serious injury. This essential element of "competitive effect" should have guided the USITC's analysis of like product. After all, the more attenuated the competitive effect, the less likely a causal relationship exists between increased imports of that product and serious injury. In this case, imports of hot-rolled coil do not have a comparable competitive effect on cold-rolled production and profitability, etc., as do imports of cold-rolled. This is because the two products have different physical characteristics and different end-uses and thus do not compete against each other in end-use market. The effect is even more attenuated between slab imports and galvanized products – i.e., one cannot make a car or any other finished product using slabs. Indeed, the actual competitive overlap of CCFRS products is

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[1142] United States' first written submission, paras. 138, 140.

[1143] European Communities' written reply to Panel question No. 11 at the second substantive meeting, quoting the Appellate Body Report, *US – Lamb*, para. 90.

[1144] USITC Report, p. 44.

[1145] Brazil's first written submission, para. 102.

[1146] In 2000, the marketing channels for certain carbon flat-rolled steel, except for CTL plate, ranged from 60% to 99.6% to end-users. USITC Report, Tables FLAT 12-15 and FLAT-17. The marketing channels for CTL plate were more evenly split with 45.2% to end-users and 54.8% to distributors. Ibid., Table FLAT-13.

[1147] China's second written submission, para. 78.

[1148] Japan's first written submission, para. 80.

marginal.[1149] New Zealand points out that the USITC acknowledged that slab "is dedicated for use in producing the next stage steel, hot-rolled steel".[1150] Slab may not, therefore, be applied to any of the uses for which other steel products may be used – it is exclusively an input good.[1151] The USITC analysis thus falls well short of establishing the "highest degree of competition" threshold for "likeness" that was spoken of in *US – Cotton Yarn*.[1152]

7.409 The United States responded that substitutability is not one of the traditional factors considered by the USITC in conducting its analysis of whether there are clear dividing lines between domestic products in order to define like product(s). The United States further added that there clearly is a competitive relationship between the imported and domestic products. The complainants have not disputed, and neither did the parties in the underlying investigation, that the imported and domestic products generally consist of the same types of steel, are interchangeable, and thus compete with each other. Moreover, within any defined like product and the corresponding specific imported product there exists a range or continuum of goods of different sizes, grades, or stages of processing. While goods along the continuum share identical or similar factors, individual items at the extremes of the continuum may not be as similar or substitutable. For example, a size 36 skirt is like a size 44 skirt, but are they substitutable? Or is size number 3 rebar substitutable for size number 18 rebar? Or are calves substitutable cattle at other stages of development (i.e., yearling or stocker cattle, feeder cattle, or fed cattle ready for slaughter)?[1153]

(iii) Relevance of other like product definitions in this case

7.410 Brazil argues that every one of the criteria used by the USITC to distinguish billets from downstream long products can also be used to distinguish slab from downstream flat products.[1154] The sole distinction put forward by the USITC was that each of the long products (i.e. hot-rolled bar, rebar and heavy structural shapes) produced from billets is made at one stage removed from the billet (i.e. there is a single rolling stage for each of the products) while for slab there are multiple additional stages of production (i.e. hot rolling, cold rolling, galvanizing) with each subsequent product also being an input into a downstream product until galvanizing. Thus, according to the United States, while hot-rolled flat products (plate and sheet) result from a single rolling stage with slab as an input, hot-rolled flat products are like slab because some hot-rolled products may also be an input into a subsequent rolling stage, cold rolling. However, again according to the United States, hot-rolled bar which, like hot-rolled flat products, results from a single rolling stage with billet as an input is not like billets because hot-rolled bar is not an input into a subsequent rolling stage. This logically leads to the anomalous result that CCFRS products one, two and three stages of processing removed from the semifinished product are determined to be "like" the semifinished product whereas long products only one stage removed from the semifinished product are not "like" the semifinished product. It also leaves unexplained why hot rolling of a billet creates a different like product when hot rolling of a slab does not. One might also ask why billets are not part of a like product category which includes wire rod (resulting from hot rolling of the billet), wire (which results from cold drawing of the wire rod) and galvanized wire (which involves application of a metallic coating to prevent corrosion). The relationships here are virtually identical in terms of one product being the feedstock for the next and the similarity of the subsequent processing as the relationships among CCFRS products. In the end,

[1149] USITC Report, Vol. II, p. FLAT-53 (Exhibit CC-6); *Respondents' Joint Framework Brief*, pp. 22-24 (Exhibit CC-50).
[1150] USITC Report, Vol. I, p 38.
[1151] New Zealand's first written submission, para. 4.62.
[1152] New Zealand's second written submission, para. 3.47.
[1153] United States' second written submission, paras. 71-72.
[1154] Brazil's second written submission, paras. 15-20.

the only distinction that the United States can find to justify different treatment of CCFRS and carbon long products is the only distinction which the Appellate Body has specifically stated is irrelevant to the determination of whether products are like each other, namely whether each product is made as part of a continuous line of production. Furthermore, even if this approach were acceptable, it does not justify any distinction between the treatment of CCFRS and stainless flat-rolled steel products, where the input/output relationship between the downstream products is identical. Finally, this approach is also of limited validity in distinguishing billets from finished long products in that it is inapplicable to the billets-wire rod-wire-galvanized wire grouping of products which have the same input to end product relationship from billets through galvanized wire as does CCFRS from slab through galvanized sheet.[1155]

7.411 Brazil further notes that the level of integration in both the production of stainless steel flat products (slab, plate, hot and cold rolled) and carbon long products (billets, hot-rolled bar, rebar, heavy structurals, and wire rod) is comparable to the level of integration in the production of CCFRS. The only difference is that virtually all stainless and the overwhelming majority of carbon long products are produced from steel made in electric furnaces, while a majority of CCFRS products are made from steel produced in blast furnaces and basic oxygen furnaces. This distinction on how the raw steel is made is not, however, relevant to the degree of vertical integration. Most producers of both stainless flat products and carbon long products, like most producers of CCFRS, are vertically integrated from the production of raw steel to the rolling of finished product.[1156] The CCFRS industry as a whole is less vertically integrated than either the stainless or long products industries. At least two producers of a full range of CCFRS finished products do not produce any slab, but purchase all of their slab requirements, almost exclusively from foreign sources.[1157] Brazil is not aware of any producers of stainless plate and sheet or of hot-rolled bars, rebars or heavy structurals that do not also produce the semifinished input product. Furthermore, with imports of carbon slab ranging as high as 7.4 million tons during the period investigated (compared to small quantities relative to domestic production of imported billets and stainless slab)[1158], it is evident that there is a substantial portion of total CCFRS production which is not vertically integrated. Nevertheless, there is no meaningful distinction between the level of vertical integration of the producers of CCFRS, billets and finished carbon long products, and stainless flat products, including stainless slab.[1159]

7.412 The United States insists that the definitions are based on the application of the like product criteria to the particular facts involved. Where the facts differ the definitions will differ. Thus, what Brazil contends are inconsistencies in where dividing lines were drawn, are differences in the underlying facts.[1160] There is a key difference between the relationship of carbon slabs with CCFRS and the relationship of carbon billets with carbon long products. CCFRS at different stages of processing has a sequential, or feedstock, relationship rather than the horizontal relationship between carbon long products. For example, 100% of carbon slab is further processed into either plate or hot-rolled steel. The sequential relationship continues with other types of CCFRS; the majority of hot-rolled steel is further processed into cold-rolled steel and the majority of cold-rolled steel is further processed into coated steel. Thus, carbon slab is dedicated for processing into hot-rolled steel

[1155] Brazil's written reply to Panel question No. 11 at the second substantive meeting.

[1156] Brazil notes that in making like product distinctions between wire and various wire products (rope/cable/cordage and nails/staples/cloth categories), the USITC did note the limited degree of vertical integration between the producers of the upstream (wire) and downstream (various wire products) products. *Views of the Commission* – USITC Report, Vol.I, at 86-87.

[1157] Common Exhibit CC-52 from Brazil's first written submission, pp. 61-62.

[1158] Common Annex A and B from Brazil's first written submission.

[1159] Brazil's written reply to Panel question No. 12 at the second substantive meeting.

[1160] United States' written reply to Panel question No. 11 at the second substantive meeting.

whereas carbon billets are not dedicated for use into a single type of long product. Instead, carbon billets are used to produce five very different products – hot-rolled bar, rebar, heavy structural shapes, rails, and wire rod. Moreover, none of these five carbon long products produced from carbon billets is further processed into one of the other five carbon long products.[1161] Therefore, carbon billets are not dedicated for use for a single type of carbon long product as occurs for carbon slab; the horizontal relationship also continues between the very different long products. There are other distinctions as well in physical characteristics and manufacturing processes. For example, carbon slabs are typically made from pig iron and not scrap metal whereas almost 100% of carbon billets are made from scrap and scrap substitutes. Thus, there is less variance in purity between slabs with greater variance between billets. All carbon slabs are refined and subject to extensive metallurgical testing. Carbon billets, on the other hand, have a wide degree of variation in quality/purity depending on the type of carbon long product that they will be used to produce. Carbon billets have less sophisticated refinement generally, but may have more extensive testing for certain end-uses. For instance, billet used for rebar has limited metallurgical testing, whereas billet used for certain kinds of specialty bar may have extensive metallurgical testing. This results in differences in the sophistication necessary for the manufacturing processes. Many United States producers of carbon billets produce other carbon long products. However, because of the horizontal relationship between carbon long products, billets may be used to make hot-rolled bar, rebar, heavy structural shapes, rails, and wire rod, but none of these five products is used to make one of the other five. Thus, the integration of the production process is not in the same fashion as the production of CCFRS.[1162]

(iv) Like product definitions used in the anti-dumping and countervailing duty contexts

7.413 Korea recalls that the USITC has never determined that two or more CCFRS products should be treated as a single like product in an anti-dumping or countervailing duty investigation, nor has the USITC found that different CCFRS products are commercially interchangeable with other CCFRS. The USITC, at least, should have explained why the extensive analyses which justified its like product determinations of flat products in past trade remedy cases did not apply to the instant case.[1163] It is instructive that the USITC came to the opposite conclusion regarding the like product in the 1992 *CCFRS Products* anti-dumping/countervailing duty case[1164] based specifically on the fact that they (hot-rolled, cold-rolled, corrosion-resistant, and plate) "differ in physical characteristics and uses" and "the different physical properties of each like product dictate particular end-uses".[1165] [1166]

7.414 New Zealand and Brazil also argue that the aggregation of slab, plate, hot-rolled steel, cold-rolled steel and coated steel into one "like product" group also represents a departure from the USITC's own treatment of these products for the purposes of anti-dumping and countervailing duty investigations. In a number of instances since 1992, the USITC consistently dealt with the discrete steel products comprising the CCFRS category as separate like products. Japan concurs in this argument. In each case the USITC has acknowledged fundamental differences amongst the products in terms of physical properties, uses and interchangeability. In the present case the USITC seems to aggregate or disaggregate products at will. For example, while the USITC considered both semi-

[1161] Hot-rolled bar may be further processed into cold-finished bar, and wire rod may be further processed into wire and nails. However, these downstream products are distinct from each other and from the other products produced from billets (i.e., rebar is not used in the production of hot-rolled bar).

[1162] United States' written reply to Panel question No. 12 at the second substantive meeting.

[1163] Korea's first written submission, paras. 38-40.

[1164] *1992 Certain Flat-Rolled Products*, USITC Publication 2549, pp. 9-17 (Exhibit CC-32). (The USITC established four categories of flat-rolled products for its purposes and included investigation numbers 573-579, 581-592, 594-597, 599-609, 612-619. *See id.*, p. 3.)

[1165] *1992 Certain Flat-Rolled Products*, USITC Publication 2549, pp. 12-15 (Exhibit CC-32).

[1166] Korea's first written submission, para. 50.

finished carbon steel (slab) and finished flat carbon steel products together in the same like product category, it decided to treat semi-finished long products (billets) and semi-finished stainless products as separate from finished products.[1167]

7.415 According to the United States, the complainants' arguments that the USITC should have defined the like product the same as it has in certain prior anti-dumping and countervailing duty investigations fails to recognize that the definitions arrived at in those cases, as in safeguard investigations, are dependent on the imports subject to the particular investigation; thus the definitions have varied.[1168] The starting point for the USITC's like product analysis is the subject imports identified as within the investigation. In the present case, the USITC began with the subject imports which included a range of certain carbon and alloy flat steel and looked for clear dividing lines between the domestic steel that corresponded to these subject imports using well-established factors. Moreover, contrary to the complainants' allegations, the USITC was not required to begin with like product definitions found by the USITC in prior anti-dumping or countervailing duty cases, that may have been appropriate definitions in different contexts based on particular statutes and record, and make an array of comparisons. The anti-dumping and countervailing duty investigations generally begin with a more narrow starting point for the scope of subject imports so the analysis frequently involves whether the domestic like product should be defined more broadly than the subject imports, i.e., it starts small and looks at whether to broaden rather than starts large and looks where to divide. The complainants also fail to acknowledge that the anti-dumping and countervailing duty investigations have a purpose that is different from that in a safeguards investigation.[1169]

7.416 Japan responds that one might argue that safeguards investigations permit a broader definition of the industry than anti-dumping and countervailing duty investigations, given that the Agreement on Safeguards contains both "like" and "directly competitive" whereas the Anti-Dumping and Subsidies Agreements contain only the word "like". However, in this case, the USITC relied only on "like" and the concept of "like" is understood to be even more narrowly construed when it is juxtaposed against directly competitive. If anything, the USITC's decision should have been narrower. Furthermore, given the discussion above demonstrating that safeguards may be applied in only the most extraordinary of circumstances, Japan takes issue with the notion that the definition of like product may be broader in the safeguards context than in the anti-dumping and countervailing duty context.[1170]

7.417 According to Korea, the stated premise of the USITC's discussion of the legal relevance of anti-dumping and countervailing duty like product determinations is that the fundamental purpose of Section 201 is to protect domestic industries. Therefore, according to the USITC, it has more discretion in defining the like product more broadly than under countervailing and anti-dumping duty provisions. The USITC's statement of the object and purpose of Section 201 is not consistent with the object and purpose of the Agreement on Safeguards. The purpose of the Agreement on Safeguards, which is to be contrasted to the purpose of a corresponding domestic law (Section 201 in this case), is not to protect the domestic industry, but to provide a framework within which a safeguard measure may be applied. Hence, the USITC's like product decisions are seriously compromised.[1171] [1172] Korea also argues that the USITC actually relied extensively and explicitly on its factual findings in prior

[1167] New Zealand's first written submission, paras. 4.68-4.70; Brazil's second written submission, para. 12; Japan's first written submission, paras. 131-136.

[1168] United States' first written submission, para. 128, citing Japan's first written submission, para. 125-148; Korea's first written submission, paras. 34-44.

[1169] United States' first written submission, paras. 128-130.

[1170] Japan's second written submission, para. 38.

[1171] USITC Report, Vol. I, footnotes 69, 73-76, 80-82, 84-85, 95-102, 104, 109-117, 125, 127, 129-131, 947, 949-952 (Exhibit CC-6).

[1172] Korea's second written submission, paras. 51-52.

anti-dumping and countervailing duty decisions regarding the products and production processes but the USITC came to directly contrary conclusions based on the same factual findings.[1173] The method of the like product analysis is actually substantially similar as well. In both cases the USITC is seeking "clear dividing lines among possible like products" and applying similar factors to the facts of each case. However, the result of like product determinations for the current Section 201 steel investigation was obviously different from those in other investigations: in the anti-dumping cases beginning in 1992 and continuing through determinations made as recently as 2002 in the case of cold-rolled steel from Argentina, Belgium, Brazil, China, France, Germany, Korea, the Netherlands, New Zealand, Russia, South Africa, Spain, Taiwan, Turkey, and Venezuela[1174], the USITC has always determined that the "clear dividing lines" existed between hot-rolled, cold-rolled, corrosion-resistant, and plate.[1175] Korea concludes that the complainants have established that there are significant inconsistencies between the United States' approach in the anti-dumping and countervailing duty context and this safeguards discussion. In fact, the ten years of consistent precedent was brought specifically to the attention of the USITC. The USITC dismissed their relevance on grounds that are not consistent with the Agreement on Safeguards. The United States also failed to offer the Panel a legal basis to exclude the relevance of those findings.[1176] Therefore, those determinations provide significant evidence of the proper like product in this case.[1177]

(v) Relevance of like product definitions in previous safeguards investigations

7.418 The United States argues that, while the complainants rely on like product definitions in certain anti-dumping and countervailing duty investigations, they ignore the similar *1984 Steel* safeguards case, which involved carbon flat steel at various stages of processing similar to those in this investigation.[1178] The USITC defined like products in a manner similar in many respects to the present safeguards case and different from contemporaneous anti-dumping and countervailing duty decisions. Specifically, in *1984 Steel*, the USITC defined nine like products, each as discrete categories of closely-related products, that were like or directly competitive with the imported articles. Three of these categories involved carbon flat products: semi-finished, which included slabs as well as ingots, blooms, billets, and sheet bars; plate; and sheet and strip, which included hot-rolled, cold-rolled and coated steel (each of which had been defined as separate domestic like products in anti-dumping and countervailing duty investigations).[1179]

7.419 The USITC recognized in the present case that there had been a number of technological changes in the steel industry since the *1984 Steel* case. The advent of the continuous casting process for the production of slab rather than the ingot teeming process had resulted in less similarity among

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[1173] *See e.g.*, USITC Report, footnotes 69, 73-76, 80-82, 84-85, 95-102, 104, 109-117, 125, 127, 129-131, 947, 949-952 (Exhibit CC-6).

[1174] *Certain Cold-Rolled Steel Products from Argentina, Belgium, Brazil, China, France, Germany, Korea, the Netherlands, New Zealand, Russia, South Africa, Spain, Taiwan, Turkey, and Venezuela*, Invs. Nos. 701-TA-423-425 (Final) and 731-TA-964, 966-970, 973-978, 980, and 982-983 (Final), USITC Publication 3551 (November 2002).

[1175] Korea's second written submission, paras. 54-57.

[1176] United States' first written submission, paras. 85-90. The distinction made between safeguards and anti-dumping is simply the US argument that the purposes of the Agreements are different, so "like product" must be interpreted differently. *See* United States' first written submission, para. 108; USITC Report, Vol. I, pp. 30-31 (Exhibit CC-6).

[1177] Korea's second written submission, para. 60.

[1178] The 1984 Steel investigation included such carbon flat products as slab, hot-rolled, plate, as well as billets/blooms, wire rod, wire, railway-type products, bars, structural shapes, and pipes and tubes. USITC Publication 1553 at 10 (US-24).

[1179] USITC Publication 1553, pp. 10 and 15-23 (US-24).

the semifinished products (slabs, ingots, blooms, and billets) and processes and more continuity in the production processes between slab and hot-rolled products.[1180] Moreover, the evidence demonstrated that the distinction between the production of a semifinished and hot-rolled product had been further blurred due to the increased use of electric arc furnaces that produce "thin slabs" that continue immediately into hot-rolled production. The USITC also recognized in this investigation that in defining separate like products for plate and sheet/strip, the USITC in *1984 Steel* focused in part on differences in production. However, the evidence in this investigation shows that the production of plate, similar to the production of sheet/strip, has become more continuous, as the same or similar hot-strip or Steckel mills are often used to make both. Thus, the USITC found that the production processes and equipment for plate and sheet/strip products have become similar and slab production is less distinct with more continuity in the processing to the next hot-rolling stage than at the time of the *1984 Steel* safeguards case. Contrary to the complainants' proposals that the USITC should have applied certain like product definitions from anti-dumping and countervailing duty investigations, it is clear that if any other definitions should have been taken into account it would be those made for a safeguards case under the same provisions that also had a similar diversity of products within the investigation.[1181]

7.420 Korea responds that the United States' reasoning is circular. As the United States admits, the definition of like product utilized by the USITC in Section 201 is guided by the purpose of Section 201 – which is, according to the USITC, to protect domestic productive resources.[1182] Since this "purpose" is found in the Trade Act of 1974, any "guidance" to be gained from the USITC's 1984 safeguards decision as to "clear dividing lines" would be circular. The object and purpose of the Agreement on Safeguards, as opposed to the Trade Act of 1974, provides no basis to "move" the clear dividing line between like products that has been established in ten years of anti-dumping and countervailing duty cases defining "like" product.[1183]

(vi) Separate remedy for slab

7.421 New Zealand argues that although both the USITC and the President grouped slab together with a range of other steel products, a separate remedy recommendation and a separate remedy determination were made for slab: a tariff rate quota instead of a tariff. This rather novel approach of differentiating the remedy that it applied to what are supposedly "like" products represents an implicit acknowledgement that they are not really "like".[1184] Similarly, according to China and the European Communities, a final demonstration of the unsoundness of the United States' approach is that the USITC Report (and the Presidential Proclamation) determine a separate remedy for slab; one of the products aggregated into the CCFRS like product category. The different remedy cannot be anything other than an acknowledgement that this product is both physically different from other products in the category, and that it also faces vastly different competitive conditions.[1185]

[1180] USITC Report, pp. OVERVIEW-8-9. complainants' attempts to distinguish slab from CCFRS in other stages of processing fails to recognize that hot-rolled steel and cold-rolled steel also are primarily feedstocks or "semi-finished products" and the fact that technological advances have resulted in less similarity among such "semi-finished products" as slab, billets, ingots, and blooms than at the time of 1984 Steel. Japan's first written submission, paras. 81 and 114; Brazil's first written submission, para. 81; New Zealand's first written submission, paras. 4.60-4.62.

[1181] United States' first written submission, paras. 131-135.

[1182] USITC Report, Vol. I, pp. 30, 31 (Exhibit CC-6).

[1183] Korea's second written submission, para. 46.

[1184] New Zealand's first written submission, para. 4.70.

[1185] European Communities' first written submission, para. 255; China's first written submission, para. 207.

(b) Tin mill products

(i) General

7.422 Norway argues that the United States failed to correctly identify the domestic products which are "like or directly competitive" with the specific imported product in relation. Japan also challenged the like product determination given that the USITC failed to agree on a definition, meaning the United States failed to correlate the injury determination, like product definition, and the safeguard measure.[1186]

7.423 The United States insists that the USITC considered the facts, using long established factors and looked for clear dividing lines among the various types of certain carbon and alloy flat steel corresponding to imports subject to this investigation. The methodology employed by the USITC is unbiased and objective. The USITC's like product definitions regarding tin mill products are consistent with Articles 2.1 and 4.1 of the Agreement on Safeguards and should be upheld by the Panel.[1187]

7.424 The United States recalls that the USITC started this analysis with the range of steel broadly categorized as certain carbon and alloy flat products, all of which had been identified as imports subject to this investigation in the President's request (as well as the Senate Committee on Finance's request). The USITC then applied its long established factors in considering whether to analyse specific types of CCFRS separately or as a whole. After examining the evidence and conducting its analysis regarding the corresponding domestic certain carbon and alloy flat products, four Commissioners subdivided this category into three separate like products, one of which was defined as tin mill products, and two Commissioners determined that the steel in this category, including tin mill, should be defined as a single like product.[1188] [1189]

7.425 According to the United States, tin mill products are cold-rolled steel that have been coated with tin or chromium or chromium oxides.[1190] In defining tin mill products as a separate like product, Commissioner Miller found that the cold-rolled feedstock used to make tin mill products generally was further processed than was required to produce other finished products although she recognized that tin mill products shared common manufacturing processes with CCFRS and GOES.[1191] Commissioner Miller also found that tin mill products were overwhelmingly sold directly to end-users, were sold almost exclusively by long-term contract to those end-users[1192], and were used in the production of containers, packaging and shipping materials.[1193] She found that domestic and imported tin mill products shared the same physical attributes, generally were interchangeable, and were

[1186] Norway's first written submission, para. 216; Japan's first written submission, paras. 153-157.
[1187] United States' first written submission, para. 153.
[1188] Four Commissioners found clear dividing lines so as to define three separate like products within this category, and two Commissioners determined that this entire category was a single like product. Commissioners Okun, Hillman, Miller, and Koplan defined the following three separate like products: 1) certain carbon flat-rolled steel ("CCFRS"); 2) grain-oriented electrical steel ("GOES"); and 3) tin mill products. Commissioners Bragg and Devaney defined a single like product, consisting of carbon and alloy flat products (including slab, hot-rolled sheet and strip, cut-to-length plate, cold-rolled sheet and strip, corrosion resistant, grain oriented electrical steel, and tin mill products).
[1189] United States' first written submission, para. 143.
[1190] USITC Report, p. FLAT-4.
[1191] USITC Report, pp. 48-49.
[1192] USITC Report, p. 48; USITC Report, Table FLAT-18.
[1193] USITC Report, Table OVERVIEW-2 and p. FLAT-4.

primarily sold to end-users under contract for the same uses.[1194] In defining a single like product for carbon and alloy flat products, including tin mill, Commissioner Bragg found that these carbon flat products share certain basic physical properties, possess a common metallurgical base, and travel through similar channels of distribution.[1195] She recognized that there was limited overlap in end-uses, but found that production was shifted among these products. In defining a single like product for all flat products, including tin mill, Commissioner Devaney found that there was a continuous manufacturing process for flat steel products. Regarding tin mill steel, he indicated that it was dedicated at the inception of production as tin mill steel and used cold-rolled steel as its feedstock.[1196]

7.426 Norway argues that on the basis of WTO jurisprudence in other cases, it can be deduced that the United States should at least have looked at the following elements: (i) the physical properties of the products; (ii) the extent to which products are capable of serving the same or similar end-uses; (iii) 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 (iv) the international classification of the products for tariff purposes.[1197]

7.427 The United States contends that Norway's allegations regarding the USITC's like product definitions involving tin mill products are based on an erroneous interpretation of what factors the USITC was either "required or not permitted" to consider in making its like product decisions.[1198] Norway fails to recognize the factors suggested by the Working Party on *Border Tax Adjustments*, with respect to tax adjustments, were for a different purpose, and that "[n]o one approach to exercising judgement will be appropriate for all cases".[1199] Thus, the USITC was not required to consider the four factors derived from the Working Party that are urged by Norway.[1200]

(ii) Like product criteria

Physical properties

7.428 Norway submits that the majority of the Commissioners defined the domestic industry as "all producers of tin mill products"[1201], thus making no distinctions between the various products included in this group. The two other Commissioners employed even broader groupings related to all sorts of flat products. In Norway's view, a flat product which is not coated with "tin" cannot be "like" another product which is so coated. The first minimum requirement is thus that the products be coated. Also, thicknesses and surfaces vary greatly depending on the end-use of the product.[1202] This is well

[1194] USITC Report, p. 49.
[1195] USITC Report, pp. 272-273.
[1196] USITC Report, pp. 36, n.65, 38, n.83, 43, n.126, 45, nn. 137 and 139.
[1197] Appellate Body Report, *EC – Asbestos*, para. 101.
[1198] Norway's first written submission, paras. 222-232.
[1199] Appellate Body Report, *EC – Asbestos*, para. 101.
[1200] United States' first written submission, para. 146.
[1201] USITC Report, Vol. 1, footnote 367. (Exhibit CC-6)
[1202] Tin mill products is the description of mainly 6 different product categories with sub-divisions, made in tin mills:
1. Electrolytic coated tinplate – single reduced cold rolled, batch-annealed steel with a tin coating
1a. Electrolytic coated tinplate – single reduced cold rolled, continuos-annealed steel with a tin coating.
2. Electrolytic coated tinplate – double reduced cold rolled, batch-annealed steel with a tin coating.
2a. Electrolytic tinplate – double reduced cold rolled, continuos-annealed steel with a tin coating.
3. Tin free steel (TFS) – single reduced cold rolled, batch-annealed steel with chromium coating.
3a.Tin free steel (TFS) – single reduced cold rolled, continuos-annealed steel with chromium coating.
4. Tin free steel (TFS) – double reduced cold rolled, batch-annealed steel with chromium coating.

exemplified by the specific exclusions provided for in the initial request by the USTR[1203] where five categories of tin mill products are excluded from the request based on their coating (chromium), thickness, width, length and chemical composition.[1204] Further examples of the different products comprised within this group of products may be found in the later exclusions provided by the USTR, where ten different tin mill products were excluded from the United States' measures on 22 August 2002.[1205] Were one to look at flat products globally, as two Commissioners did, one would see that there are stark differences in thicknesses, shape and finished stage between e.g. slabs and tin mill products.[1206]

4a. Tin free steel (TFS) – double reduced cold rolled, continuos-annealed steel with chromium coating.

5. Polymer coated steel – single reduced cold rolled, batch-annealed steel with chromium coating, covered with a polymer top coating.

5a. Polymer coated steel – single reduced cold rolled, continuos-annealed steel with chromium coating, covered with a polymer top coating.

5b. Polymer coated steel – double reduced cold rolled, batch-annealed steel with chromium coating, covered with a polymer top coating.

5c. Polymer coated steel – double reduced cold rolled, continuos-annealed steel with chromium coating, covered with a polymer top coating.

6. Black plate – single reduced cold rolled, batch-annealed steel, temper rolled with no coating.

Thickness – Gauge – of the Tin mill products is in following range:
Tinplate: 0.10 mm – 0.375 mm.
Flat rolled tinplate: 0.375 mm – 0.90 mm.

Tempergrade – hardness – of the Tin mill products is in following range:
Batch annealed: T1 – T 2 – T 3 – T 4.
Continuos annealed: T 3 – T 4 – T 5 – T 6 – T 7.

Dimensions of the Tin mill products:
Plate: Rolling width min. 600 mm – max. 1100 mm. y)
Cut length min. 485 mm – max. 1180 mm.
Coil: Width min. 600 mm – max. 1180 mm.
Slitted: Width min. 25 mm – max. 510 mm.

Different surface structure.
Bright, Light stone, Stone, Matt, or Silver

End use of Tin mill products:
Food packaging.
Technical packaging. (Paint, lacquers, oil etc.)
Beer and beverage cans.
Aerosol cans.
Closures. (Jars for jam etc.)
Non – packaging applications. (Trays, oil-filters, convenience goods etc.)

[1203] Exhibit CC-1.

[1204] United States Trade Representative's (USTR) request to the United States International Trade Commission (ITC) to initiate a safeguard investigation under Section 201 of the Trade Act of 1974, at Annex II. (Exhibit CC-1).

[1205] USTR, "List of additional products to be excluded from the Section 201 safeguards measures, as established in Presidential Proclamation 7529 of March 5, 2002", August 22, 2002, available at the USTR website (Exhibit CC-92). This list shows that 10 different tin mill products, with specific product specifications, are excluded.

[1206] Norway's first written submission, para. 223.

7.429 In the United States' view, Norway's challenge is directed not only at the definition of a single like product for carbon flat products, but also to the definition of tin mill as a separate like product. Norway, on one hand, points out that tin mill products could be defined as 6 to 13 different like product categories and, on the other hand, refers to the different product exclusions requested and granted to infer that each should have been defined as a separate like product. Thus, the issue for Norway goes beyond whether the flat product is coated with "tin". Moreover, contrary to Norway's allegations, the level of product distinction considered necessary for a product exclusion does not warrant finding dozens of like products. The USITC looks for clear dividing lines in conducting its like product analysis which is far from the narrow or microscopic lines that Norway urges. While Norway alleges that there are different products within the tin mill group, it is not clear how narrow Norway would have the USITC consider the uses for the product. Norway also seems to ignore the fact that the USITC has no authority to exclude imports from those identified in the request or petition as subject to investigation.[1207]

End-use

7.430 Norway argues that the major end-uses of tin plate are the manufacture of welded cans. There are, however, considerable differences between the end-uses depending on the thickness of the tin mill plates. Oil filters for cars and soft drink cans require different thicknesses. The type of production of the buyer will thus require different types of tin mill products. In this category, as defined by the USITC and the President, chromium coated products are also included. The USITC explains, in footnote 403 of its report, that chromium coated products have a different use from tin coated products, due to differences in their surfaces. Tin-plate will be used for the can itself, because of its shinier surface (which also makes it more suitable for paint) while chromium coated plates are employed for the bottoms of cans. The USITC, in its discussion of the domestic industry producing tin mill products, does not distinguish between the different products within the group. Its brief discussion is premised on an assumption that all imports are a single article that is "like" the domestically produced products. End uses is only referred to in passing, stating that "[T]in mill products are used almost exclusively in the production of containers, such as beverage cans, packaging and shipping materials. They are unsuitable for other end-uses".[1208] Norway notes that it is, nevertheless, clear from this statement that tin mill products are not interchangeable with other flat products. Norway also points out that the procedures for exclusion request to be granted by the USTR as mandated in the Presidential Proclamation, details that the USTR will consider *inter alia* whether the product is currently being produced in the United States, whether substitution is possible and whether qualification requirements affect the requestor's ability to use domestic products.[1209] In light of the exclusions granted *ex post* it would seem that the original determination of one single like product is flawed.[1210]

7.431 In applying the traditional like product factors to the general category of carbon and alloy flat steel, four Commissioners found a clear dividing line between CCFRS and tin mill products.[1211] In particular, they found that cold-rolled feedstock used to make tin mill products was further processed than required to make CCFRS steel. In addition, tin mill is used, for example, for the production of

[1207] United States' first written submission, para. 148.

[1208] USITC Report, Vol. I, at pp. 48-49. The citation is from p. 48, with original footnotes omitted. (Exhibit CC-6)

[1209] "Procedures for Further Consideration of Requests for Exclusions of Particular products from Actions With Regard to Certain Steel products Under Section 203 of the Trade Act of 1974, as Established in the Presidential Proclamation 7529 of March 5, 2002", Federal Register/ Vol. 67, N° 75/ 18 April 2002, p. 19307 (Exhibit CC-19).

[1210] Norway's first written submission, paras. 224-228.

[1211] United States' first written submission, paras. 143-144; USITC Report, pp. 48-49.

containers, packaging, and shipping materials. In contrast, CCFRS was used primarily in production for the automotive and construction industries. Tin mill steel was overwhelmingly sold directly to end users, almost exclusively under long-term contracts, whereas the majority of CCFRS was internally transferred for use in later stages of processing CCFRS.[1212]

Consumer perception

7.432 Norway submits that consumers of tin mill products, here understood as end-users of the imported products and the like domestic products, should perceive that plates of different thicknesses and with different coatings have different uses. This is not discussed by the USITC in its report.[1213]

Tariff classification

7.433 Norway submits that, in the United States, the tin mill products covered by the measure were (before the imposition of extra duties) divided into four broad customs categories (7210.11.0000; 7210.12.0000; 7210.50.0000; and 7212.10.0000).[1214] This indicates that there could be several different "like" products. The different customs classifications are not discussed by the USITC in its report in respect of tin mill products. The only reference in passing can be found in footnote 176[1215] where reference is made to the fact that the USITC did not find consideration of customs treatment to be a useful factor for the carbon and alloy flat products in this investigation. In Norway's view, the United States failed to identify the domestic products that are "like or directly competitive" to the specific imported product or products, by not making comparisons – at a minimum – against the criteria for establishing likeness acknowledged in WTO jurisprudence. The findings of the United States thus fall short of the requirement imposed by Article 2.1 of the Agreement on Safeguards that the competent authorities determine that the domestic articles, the producers of which they want to group into one domestic industry, are either a "single like product" or one or more directly competitive products compared with specific imports.[1216]

7.434 In response, the United States recalls that, as the Appellate Body has stated, "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, all of the pertinent evidence".[1217] The tariff classifications are interrelated with the physical properties/characteristics criterion which the USITC clearly considered and found to be an important factor in its like product definitions. The USITC exercised its discretionary judgement to determine which factors were useful, and which were not, in examining the particular facts of this investigation. While Norway seems to allege that the USITC should have defined its like products using tariff classifications, the evidence does not comport with Norway's suggestions for 6 to 13 or more like products. There are four tariff classifications at the ten-digit level and two at the four-digit level covering tin mill products.[1218]

Production processes

7.435 Norway submits that because Congress intended Section 201 to "protect the productive resources of domestic producers", rather than ameliorate unfair trade practices, the USITC has

[1212] United States' written reply to Panel question No. 27 at the first substantive meeting.
[1213] Norway's first written submission, para. 229.
[1214] USITC Report, Vol. I, at p. 10 (Exhibit CC-6).
[1215] USITC Report, Vol. I, at p. 49 (Exhibit CC-6)
[1216] Norway's first written submission, paras. 230-232.
[1217] Appellate Body Report, *EC – Asbestos*, para. 102.
[1218] United States' first written submission, para. 149.

considered "both the 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.[1219] According to Norway, this clearly goes beyond the factors permitted by the Appellate Body is *US – Lamb* as other products produced at the same facilities should not be included when defining the domestic industry producing the like product. The six commissioners employed different groupings when considering tin mill products. Of the commissioners treating "tin mill products" as one "like product category", only one voted in favour of the measure. The two other commissioners voting in favour of imposing a safeguards measure employed broader product categories.[1220] The President, when determining that measures should be imposed on a category he termed "tin mill products", based himself on the views of three commissioners looking at a domestic industry producing: (i) tin mill products; (ii) carbon and alloy flat products; and (iii) all flat products respectively.[1221]

7.436 The United States submits that contrary to Norway's contentions, the Appellate Body in *US – Lamb* recognized that when confronted with the question of whether two articles are separate products, "it may be relevant to inquire into the production processes for those products".[1222]

(iii) Identification of domestic producers

7.437 Norway also argues that the United States failed to appropriately define the domestic industry of the like product and therefore acted inconsistently with its obligations under Articles 2.1 and 4 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[1223] The USITC Report does not explain who are the producers of the like product. The tables are deleted from the report.[1224] Norway requested the information of table FLAT-1 during the consultations, but no such information was forthcoming. Norway is, thus, unable to ascertain whether there, indeed, are domestic United States' producers of any specific tin mill products and is also unable to ascertain whether there indeed exists an industry injured by imports or the relevant ratios of imports to domestic production. This lack of information on the relevant domestic industry (companies and production) is a clear breach of Article 4.1(c) of the Agreement on Safeguards. When all informative tables are excluded regarding the domestic industry producing the like product, there is no way of ascertaining how the determinations are made, thus making it impossible to investigate a possible wrongdoing by the United States. As such, this is also a breach of Article 3.1 of the Agreement on Safeguards, and this information cannot be regarded as confidential information under Article 3.2. There is also a failure to ensure that only producers of domestic articles that are "like or directly competitive" to the specific imported product are grouped together in one domestic industry for the purpose of the investigation and determination. In respect of tin mill products, Norway refers to the USITC Report, Vol. 1 at page 72, where it is stated that an unspecified number of tin mill producers also produce a variety of other types of CCFRS, including slab, and also hot-rolled end products (slabs). There is no evidence that operating results from these parts of the firms have been singled out when addressing the grouping "tin mill products". There is, thus, a strong presumption that also for tin mill products, producers and facilities producing products that are not "like" have been included in the "domestic industry", contrary to the requirement of the Agreement on Safeguards.[1225]

[1219] USITC Report, pp. 30-31.

[1220] Commissioner Bragg, employed a category of "carbon and alloy flat products" (USITC Report, p. 272) and Commissioner Devaney employed a category of "all flat products", see USITC Report, Vol. I, p. 36, footnote 65. (Exhibit CC-6)

[1221] Norway's first written submission, paras. 216, 219-221.

[1222] Appellate Body Report, *US – Lamb*, para. 94, footnote 55.

[1223] Norway's first written submission, para. 238.

[1224] See USITC Report, p. I-72 and the asterisk for table FLAT-1 in volume II.

[1225] Norway's first written submission, paras. 233-237.

7.438 The United States responds that Norway's contentions that the USITC "exclud[ed] all informative tables regarding the domestic industry producing the like product"[1226] is erroneous and grossly misleading. The essence of Norway's allegation is that because the USITC did not release confidential responses of individual producers of tin mill products, it must be assumed that the USITC did not limit its analysis to producers of tin mill products. This allegation is only relevant to the determination of Commissioner Miller, since each of the definitions of like product and corresponding domestic industry made by Commissioners Bragg and Devaney considered data for the carbon and alloy flat products and not the tin mill specific data. This complaint centres on one table (Table FLAT-1) in the USITC Report which lists individual domestic producers responding to the USITC questionnaire and provides their individual production data by type of carbon and alloy flat steel that they produce. Individual firm data provided in response to the USITC questionnaires and the firms responding to the USITC questionnaires is considered confidential business information and not publicly released. Rather, the individual firm data generally is publicly released in aggregate form as it was here. Norway ignores the fact that individual tin mill production data was combined and publicly released in aggregate form in Table FLAT-18.[1227] Contrary to Norway's allegations, the fact that the USITC has not publicly released the identity of those responding to the questionnaires or the individual producer data does not provide a "strong presumption" that products other than tin mill products were included in USITC's domestic industry analysis.[1228] Norway fails to show how release of the individual firm data would show anything more than whether the USITC can simply add correctly. The Panel need not only have to rely on the USITC's representations alone concerning the proper aggregation of appropriate data on tin mill production. Parties to the underlying safeguards investigation did not challenge the USITC's aggregation of the tin mill data, including counsel to parties that had access to the contested table along with all other confidential business information, under Administrative Protective Order.[1229] [1230]

7.439 Norway responds that the USITC Report states that an unspecified number of tin mill producers also produce a variety of other types of CCFRS, including slab and also hot-end production (slabs).[1231] The crucial importance of this integration is the failure of the United States to ensure separation of operating costs and results for tin mill products as separate from CCFRS because of the diverging "like product analyses" involved.[1232] There is no evidence that the operating results from these parts of the firms have been separated out when establishing which firms are the "producers of the like product".[1233] When this is not done, one gets an incorrect assessment of injury to the tin mill industry, as the alleged injury may be caused to other parts of the operations of these firms. This is what happened for the analyses by at least Commissioners Bragg and Devaney. Norway still cannot understand why the names of the tin mill producers (as the USITC defines the industry) are confidential (and the United States has given no explanation of why this is necessary,) and does consider that this in itself represents a breach of Article 4.1(c) of the Agreement on Safeguards. Norway also notes that whatever counsels to individual firms may or may not know[1234] is irrelevant to

[1226] Norway's first written submission, para. 239.

[1227] USITC Report, Tables FLAT-10, FLAT-18, FLAT-26, FLAT-46, FLAT-57, FLAT-58, FLAT-59, FLAT-63, FLAT-75, FLAT-76, FLAT-78, FLAT-79, FLAT-80, and FLAT-C-8.

[1228] Norway's first written submission, para. 237.

[1229] Under US law, confidential business information is released to counsel for parties under administrative protective order.

[1230] United States' first written submission, paras. 150-154.

[1231] USITC Report, Vol. I, p. 72.

[1232] Norway's written reply to Panel question No. 20 at the second substantive meeting.

[1233] Norway's first written submission, paragraph 236.

[1234] United States' first written submission, paragraph 154

the United States' obligations under the Agreement on Safeguards towards other Member States to provide a report that details all relevant issues of law and fact.[1235]

7.440 Brazil adds that three of the principal producers of tin mill products – Bethlehem Steel, Weirton Steel, and US Steel are fully integrated mills producing a full range of CCFRS products, including slab.[1236] The fourth producer, Ohio Coatings, is a joint venture and, in effect, the tin mill line of vertically integrated Wheeling-Pittsburgh Steel, which produces a full range of CCFRS products and is 50% owner of Ohio Coatings.[1237] The fifth producer, US Steel-Posco is a joint venture between United States Steel Corporation and Posco of Korea, both vertically integrated producers of a full range of CCFRS products. However, US Steel-Posco is not vertically integrated. It has no raw steel making capacity, no slab production and no hot strip mill. Rather, it purchases domestic and imported CCFRS products and processes these products through cold rolling, galvanizing and tin mill lines.[1238] [1239]

7.441 The United States responds that, indeed, a number of tin mill producers also produce types of CCFRS. However, the United States does not agree with Norway's assertions that data for production of other types of steel were included in the data for tin mill products. Norway's contentions are erroneous. The essence of Norway's allegation is that because the USITC did not release confidential responses of individual producers of tin mill products, it must be assumed that the USITC did not limit its analysis to producers of tin mill products. Norway fails to recognize that the reason why this issue is only relevant to the determination of Commissioner Miller is because Commissioners Bragg and Devaney did not define tin mill as a separate like product. Thus, the fact that Commissioners Bragg and Devaney did not separate out tin mill data is because they did not find tin mill products to be a separate like product/domestic industry. They defined carbon and alloy flat steel, including tin mill, as a single domestic like product and, appropriately, looked at data for carbon and alloy flat products and not the tin mill-specific data. Norway's allegation centres on one table (Table FLAT-1) in the USITC Report which lists individual domestic producers responding to the USITC questionnaire and provides individual production data by type of carbon and alloy flat steel that each produces. Individual firm data provided in response to USITC questionnaires and the firms responding to the USITC questionnaires is considered confidential business information and not publicly released. Rather, the individual firm data generally is publicly released in aggregate form as it was here. The United States notes that it is not the only country that withholds the names of questionnaire respondents. Norway ignores the fact that individual tin mill production data was combined and publicly released in aggregate form in a number of tables, including Table FLAT-26, which includes financial data and operating results.[1240] Contrary to Norway's allegations, the fact that the USITC has not publicly released the identity of those responding to the questionnaires or the individual producer data does not provide a "strong presumption" that products other than tin mill products were included in the USITC's domestic industry analysis, nor may any presumption, strong or otherwise, be drawn.[1241] The United States submits that this complainant fails to show how release of the individual firm data would show anything more than whether the USITC can correctly tally the individual company information. In the USITC's questionnaire, domestic producers were clearly

[1235] Norway's second written submission, paras. 73-75.
[1236] *See Iron and Steel Works of the World* (14th Edition), Metal Bulletin Books Ltd. (2001), pp. 647-48, 714-715 and 717-718.
[1237] Ibid. at 693.
[1238] Ibid at 716.
[1239] Brazil's written reply to Panel question No. 20 at the second substantive meeting.
[1240] USITC Report, Tables FLAT-10, FLAT-18, FLAT-26, FLAT-46, FLAT-57, FLAT-58, FLAT-59, FLAT-63, FLAT-75, FLAT-76, FLAT-78, FLAT-79, FLAT-80, and FLAT-C-8.
[1241] Norway's first written submission, para. 237.

instructed to provide separate data for tin mill. Each domestic producer was required to certify the truthfulness of its questionnaire responses. The Panel need not rely solely on the USITC's representations concerning the proper aggregation of appropriate data on tin mill production. Parties to the underlying safeguards investigation had access to all of the individual company data; this included counsel to parties that had access to the contested table along with all other confidential business information, under administrative protective order.[1242] None of them challenged the USITC's aggregation of individual company data on tin mill material. The USITC is confident that the tin mill data provided in the USITC Report does not include data for other types of steel.[1243]

(c) Welded pipe

(i) General

7.442 Korea and Switzerland argue that for the category of welded pipe products, the USITC acknowledges that "welded pipe encompasses a range of products, including both commodity and speciality products"[1244], but analysed neither the various types of welded tubular products nor the different end-uses of those where "the various forms of welded pipe are made by the same process, largely by the same firms, in the same facilities and on the same equipment and are used for the same purposes, namely the conveyance of steam, water, oil, gas and other fluid".[1245] It declined to identify specific products by pointing to: (i) the common physical properties and characteristics of those products; (ii) their common end-use; (iii) the customs classification; and (d) consumer perceptions.[1246]

7.443 The United States insists that the USITC considered the facts present in this investigation using long established factors and looked for clear dividing lines among the various types of certain carbon and alloy pipe and tube subject to this investigation. The methodology employed by the USITC is unbiased and objective. The USITC's definition of certain welded pipe as a single like product is consistent with Articles 2.1 and 4.1 of the Agreement on Safeguards and should be upheld by the Panel.[1247] The USITC started this analysis with the range of steel broadly categorized as certain carbon and alloy pipe and tube, all of which had been identified as imports subject to this investigation in the President's request (as well as the Senate Committee on Finance's request). After examining the evidence and conducting its analysis regarding the corresponding domestic certain carbon and alloy pipe and tube, the USITC found clear dividing lines so as to delineate four separate like products.[1248] The USITC found that domestic certain welded pipe was like the corresponding

[1242] Under US law, confidential business information is released to representatives for parties, usually outside counsel and economic consultants, under administrative protective order.

[1243] United States' written reply to Panel question 20 at the second substantive meeting.

[1244] USITC Report, Vol. I, p. 383.

[1245] USITC Report, Vol. I, pp. 154-155 (emphasis added) (Exhibit CC-6).

[1246] Korea's first written submission, paras. 61; Switzerland's first written submission, paras. 207-208.

[1247] United States' first written submission, para. 171.

[1248] Four Commissioners found clear dividing lines and defined four separate certain carbon and alloy pipe and tube like products from this category, and two Commissioners divided this category into three separate like products. Commissioners Okun, Hillman, Miller, and Koplan defined the following four separate like products: 1) welded pipe, other than OCTG ("certain welded pipe"); 2) seamless pipe, other than OCTG; 3) OCTG, welded and seamless; and 4) fittings, flanges, and tool joints. Commissioners Bragg and Devaney defined the following three separate like products: 1) carbon and alloy welded tubular products (including welded tubular other than OCTG and welded OCTG); 2) carbon and alloy seamless tubular products (including seamless tubular other than OCTG and seamless OCTG); and 3) carbon and alloy fittings, flanges, and tool joints.

imported certain welded pipe.[1249] The USITC applied its long established factors in considering whether there existed clear dividing lines between specific types of welded pipe.[1250] The USITC found that certain welded pipe included tubular products that have a weld seam that runs either longitudinally or spirally along the length of the product. Welded pipe is used in the conveyance of water, petrochemicals, oil products, natural gas, and other substances in industrial piping systems. The presence of a welded seam generally makes certain welded pipe slightly less reliable and durable than seamless tubular products. Thus, it is used to transport liquids at or near atmospheric pressure rather than for high pressure containment.[1251] The various types of welded pipe in this investigation include standard pipe and pipe used primarily for mechanical, line, pressure, and structural purposes.[1252] Welded pipe is generally produced on electric resistance weld (ERW) mills. The USITC found that the various forms of welded pipe are made by the same process, largely by the same firms, in the same facilities and on the same equipment and are used for the same purposes, namely the conveyance of steam, water, oil, gas, and other fluids at or near atmospheric pressure.[1253]

7.444 The European Communities submits that the United States has not adequately responded to the specific arguments why the products grouped as certain tubular products were not like due to their different physical properties and functions. On pages 147 and 148 of the USITC Report, the USITC did not do more than asserting that "there are four domestic industries producing articles like the corresponding imported articles subject to investigation within the tubular products category". The other reference, on page 158, after a discussion as to whether the domestic industry producing FFTJ (*sic*) should be defined as a separate industry, the USITC simply repeated its previous conclusion that "there are four domestic industries producing articles like or directly competitive with the corresponding imported articles subject to investigation within the tubular products category", although with a puzzling extension to the broader concept of "directly competitive" products without any supportive analysis between pages 147 and 157. This is neither a sufficient like nor directly competitive product analysis, because it is not based on a reasoned consideration of all relevant criteria as laid out above. Specifically, as can be learned from Chapter 73 of the HS, which is contained in exhibit CC-105, internationally agreed customs classifications at the four and six-digit level separate welded pipe on the basis both of size and function.[1254] This and all the arguments made by Korea and Switzerland in this respect, which the European Communities adopts, further corroborates that the products bundled as welded pipe are not "like or directly competitive".[1255]

7.445 The United States submits that no importance should be attached to the reference to "directly competitive" with respect to the USITC's consideration of welded tubular products. The USITC clearly made a finding for each of the four tubular products on the basis of a like product analysis and not on the basis of a directly competitive product analysis.[1256] Moreover, there is a footnote to this sentence in which the USITC explicitly states that it did not make findings on the basis of a directly competitive product analysis.[1257] The USITC's findings on the basis of a like product, and not directly competitive product, analysis for each of these four like products is clearly demonstrated in its discussion, its findings section and the noted footnote. The summation sentence which refers to

[1249] USITC Report, p. 147, footnote 893. This issue was not disputed in the underlying proceeding.
[1250] USITC Report, pp. 147-157.
[1251] USITC Report, p. TUBULAR-2.
[1252] Certain welded pipe used in the movement of oil and gas is produced to standards set by American Petroleum Institute (API), while many other forms of certain welded pipe are produced to standards set by the American Society for Testing and Materials (ASTM) and the American Water Works Association (AWWA).
[1253] United States' first written submission, paras. 156-157
[1254] Paras. 73.05 and 73.06.
[1255] European Communities' second written submission, paras. 283-285.
[1256] USITC Report, p. 147.
[1257] USITC Report, p. 147, footnote 893.

"domestic industr[ies] producing … article[s] like or directly competitive with … [the] imported article[s]"[1258] merely recites the United States' statutory language.[1259] The United States believe that, in spite of the inadvertent inclusion of "directly competitive", that it is clear that the USITC's findings were on the basis of a like product analysis.[1260]

7.446 The European Communities, Japan, Korea and Norway also submit that no significance should be attached to the mentioned reference. The European Communities notes that the assertion on page 157 of the USITC Report that imported welded pipe, fittings and flanges and domestic ones are "directly competitive" has been explained as "clerical error".[1261]

7.447 The United States submits that complainants who challenge the like product definition for certain welded pipe do not agree on what the definition should have been; Korea seems to propose two like products based on size and Switzerland seems to propose three like products based on function.[1262] [1263]

(ii) Like product criteria

General

7.448 Korea submits that the USITC rejected arguments that LDLP (16 inches or over) should be treated as a separate like product.[1264] The USITC analysis failed to address the key product characteristics of LDLP versus other welded pipe and their different applications (end-uses). Instead, just as with CCFRS, the USITC focused on the common United States' production facilities and "continuum" of production by United States producers for its like product determination while rejecting the utility of Customs classification as well as the like product determination in the concurrent anti-dumping and countervailing duty investigations of LDLP from Japan and Circular Welded Non-Alloy Pipe from China. The Appellate Body in *US – Lamb* rejected this "continuum" of production approach[1265] where, as here, the products are fundamentally different.[1266] [1267]

7.449 Switzerland contends that, if the USITC had actually applied its traditional methodology and applied, at least, the criteria of end-use, customs classification and physical properties, it would have come to the conclusion that the category of welded tubular products as it was defined could not serve

[1258] USITC Report, p. 157.
[1259] See Trade Act of 1974, § 202(c)(4), 19 USC. § 2252(c)(4).
[1260] United States' written reply to Panel question No. 22 at the second substantive meeting.
[1261] European Communities', Japan's, Korea's and Norway's written replies to Panel question No. 22 at the second substantive meeting.
[1262] *Korea's* first written submission, paras. 41-44; Switzerland first written submission, paras. 209-225. *See* the discussion in section VII.D.1(c).
[1263] United States' first written submission, para. 104.
[1264] While arguments could have been made that other products within the USITC's welded category were also separate like products, these other products in the welded category were much smaller in quantity than LDLP and, in large part, appeared to follow similar demand patterns as the largest component, standard pipe.
[1265] Appellate Body Report, *US – Lamb*, para. 90.
[1266] Moreover, the record does not even support the conclusion that there was an overlap in production. According to the USITC, "[o]f the seven firms that reported the capability to produce welded large diameter line pipe in 2000, [only] three of those firms also indicated that they produced smaller sizes of welded pipe in 1998." USITC Report, Vol. I, p. 155, footnote 952 (Exhibit CC-6).
[1267] Korea's first written submission, paras. 61-63.

as a basis in order to identify like or directly competitive products because it bundled together too many different products.[1268]

Physical properties

7.450 The United States argues that the USITC considered arguments that it should find that large diameter line pipe (pipe 16 inches or over in outside diameter) was a separate like product from other welded pipe.[1269] The evidence showed that while welded large diameter line pipe generally is made on mills designed to make large pipe, these mills also are capable of producing other types of large diameter pipe, such as pipe for water transmission, piling, and structural members.[1270] A substantial portion of welded large diameter line pipe is made by the ERW process[1271], which is the process used to make virtually all types of certain welded pipes.[1272] Moreover, many of the firms that produce welded large diameter line pipe also produce other welded pipe that is less than 16 inches in outside diameter. Large and small diameter welded pipe also share common physical characteristics, particularly a weld seam that has an effect on its uses relative to other tubular products such as seamless pipe. Based on this evidence, the USITC found large and small welded pipe to be part of a continuum of certain welded pipe and saw no reason to define large diameter line pipe separately from other certain welded pipe.[1273] An important factor in the USITC's finding of a clear dividing line between certain welded pipe and other tubular products was the physical characteristic of the welded seam. All welded pipe, large and small, share the common physical characteristic of a weld seam that runs either longitudinally or spirally along the length of the product and that has an effect on the pipe's uses relative to other tubular products such as seamless pipe. The presence of a welded seam generally makes certain welded pipe slightly less reliable and durable than seamless tubular products. The USITC found that welded pipe ranging from small to large shared similarities in physical characteristics, uses, marketing channels, and production processes as discussed above to be part of a continuum of certain welded pipe and saw no clear dividing lines to define separate like products within this continuum.[1274]

7.451 Switzerland submits that the USITC considered that all the pipes belonged to the same category. However, pipes are made out of very different and subtle chemical compositions of steel, depending on the purpose of their use. The difference is due to the diversity of the alloys (aluminium, boron, etc.) added to the steel. There are approved norms indicating the tolerance of the various chemical components possibly entering into the composition of the steels. These various nuances in composition have precise consequences namely on the resistance, the elongation, the harden ability and the cold forming of steels. In other words, the different and very subtle compositions of steels are determinant in characterising their quality, and therefore the quality of the products made of them.[1275]

[1268] Switzerland's second written submission, para. 55.

[1269] Prehearing Brief of European Steel Tube Association (September 12, 2001), pp. 3-6 (US-30).

[1270] USITC Report, p. 154, citing *Certain Welded Large Diameter Line Pipe From Japan and Mexico*, USITC Publication 3400, pp. I-5-6 (March 2001) (US-29).

[1271] In 2000, 45.6% of domestic welded large diameter line pipe was produced by the ERW process as compared to 54.4% by the SAW process. *Certain Welded Large Diameter Line Pipe From Japan and Mexico*, USITC Publication 3400, Table 1-2, p. I-14 (March 2001) (US-29). ERW pipe is normally produced in sizes from 2 3/8 inches through 24 inches outside diameter. Id. at I-5.

[1272] *Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Invs. Nos. 701-TA-253 (Review) and 731-TA-132, 252, 271, 273, 276, 277, 296, 409, 410, 532-534, 536, and 537 (Review), USITC Publication 3316, p. CIRC-I-19 (July 2000) (US-31).

[1273] United States' second written submission, para. 90.

[1274] United States' second written submission, para. 91.

[1275] Switzerland's first written submission, para. 209.

7.452 Korea rejects the United States' argument that that welded non-OCTG pipe has a "weld" so it was treated as a single like product. Korea submits that this is at best a perfunctory analysis.[1276] The other two products in the pipe and tube category, OCTG and pipe fittings, also have a weld but they were treated as separate like products by the USITC in the same investigation. The United States refers to this as a deciding factor but do not explain its lack of significance for "welded" OCTG which was grouped with seamless OCTG as a single like product.[1277] [1278]

7.453 Switzerland recalls that the USITC Report only mentions that the physical differences begin with the chemistry of the steel in the billet or hot-rolled strip, and continue through the forming and finishing process. It also says that seamless pipes are more reliable, and that pipe used in OCTG applications must meet higher standards than pipe used in line pipe, which in turn must meet higher standards than so-called standard pipe.[1279] Switzerland considers that this analysis is too vague and that it does not reflect the importance that the United States claims the USITC did give to this factor. Switzerland submits that the USITC did not analyse the common properties and physical characteristics of the products it compared in depth enough and therefore could not draw any conclusion in this respect.[1280]

End-use

7.454 Korea submits that the USITC itself said in the introductory section describing its like product determination that there were grounds to distinguish the five like products in the tubular category as follows: "Most pipe is made to standards that reflect its intended use, and this affects the physical properties of the pipe.... Pipe used in OCTG applications must meet higher standards than pipe used in line pipe, which in turn must meet higher standards than so-called standard pipe.[1281] Yet, the USITC did not reach the obvious conclusion that these major distinctions in end-use should have resulted in a separate like product for LDLP as well.[1282] [1283]

7.455 Korea points out that LDLP is primarily used in the transmission of oil and gas so that demand for LDLP correlates with changes in oil and gas prices and the level of activity in the energy sector more generally (*i.e.*, investment in large-scale pipeline projects).[1284] In contrast, the remaining products in the non-OCTG welded pipe category (standard pipe being the largest component) tend to track general economic conditions.[1285] As a consequence, demand trends for line pipe depend on the level of activity in the energy sector while the demand for other tubular products tends to move in line with general economic conditions.[1286] The USITC actually acknowledged the "recent increase in

[1276] United States' first written submission, para. 157; United States' written reply to Panel question No. 148 at the first substantive meeting.

[1277] United States' written reply to Panel question No. 148 at the first substantive meeting; United States' written reply to Korea's question No. 1(d) at the first substantive meeting.

[1278] Korea's second written submission, paras. 75-76.

[1279] USITC Report, Vol. I, p. 151

[1280] Switzerland's second written submission, paras. 62-63.

[1281] USITC Report, Vol. I, p. 151 (Exhibit CC-6).

[1282] Korea's second written submission, paras. 71-72 and 84.

[1283] USITC Report, Vol. I, p. 149 (footnote omitted; emphasis added) (Exhibit CC-6).

[1284] *Joint Respondents' Prehearing Brief for Welded Other*, p. 33 (Exhibit CC-78); *Joint Respondents' Posthearing Brief for Welded Other*, Exhibit 1 – pp. 24-25, 29-30, 35-37, 40-45 (Exhibit CC-79).

[1285] USITC Report, Vol. II, p. TUBULAR-43 (Exhibit CC-6).

[1286] USITC Report, Vol. II, p. TUBULAR-43 (Exhibit CC-6) ("Demand for tubular products will depend on both general economic conditions, as increased production and construction spurs demand for seamless and welded, and conditions in the somewhat counter-cyclical oil and gas industry, as increased energy prices spur increased drilling, extraction, and refining (and thus demand for both OCTG and line pipe)").

demand for large diameter line pipe" and projected "growth due to rising demand for pipeline projects" in the context of its threat of injury analysis but completely failed to address these separate demand conditions and applications in the like product analysis.[1287] In fact, demand was falling for standard pipe at the end of the investigation period but increasing for large diameter line pipe.[1288] Commissioner Okun, in her separate remedy recommendation specifically referenced "the diverse nature of demand … in particular the divergent trends in demand for pipeline projects and for other applications".[1289] Therefore, the USITC was aware of these important distinctions between LDLP and other welded pipe. It simply ignored those differences for purposes of their like product analysis.[1290]

7.456 Switzerland also argues that, contrary to what the USITC said, welded tubular products (other than OCTG) can be divided into three large categories: the "pipes" whose finality is to conduct fluids (e.g. oil carried by pipelines); the mechanical tubes used for mechanical purposes (e.g. scaffoldings); and the precision tubes intended to conduct forces and used by the automotive industry (e.g. assembled camshafts, shock absorbers, etc.). In addition, precision tubes falling under the category of welded tubular products (other than OCTG) are intended to conduct forces and used by the automotive industry. They have a different end-use as other products falling in the above-mentioned categories as their purpose is not to convey steam, water, oil, gas and other fluids. They are of high quality because of their chemical properties and because also of the precision of their manufacturing. The consistency of that quality is determinant for security reasons.[1291] Switzerland adds that some of the tubes are indeed used to conduct fluids (e.g. oil carried by pipelines), while others are precision tubes intended to conduct forces and used by the automotive sector (e.g. camshafts used in internal combustion engines to actuate valves at precise timing intervals). Although hydraulic fluids also go through precision tubes, this is just a mechanism to convey forces and not the end-use of such tubes, the end-use being to make for instance a car work. On the contrary, tubes for the purpose of the conveyance of water, oil or gas have as their end-use the conveyance of such fluids for instance to consumers.[1292]

7.457 In the United States' view, Switzerland seems to contend that the USITC should have separated certain welded pipe into at least three separate like products, primarily by function or use – pipes used to conduct fluids, mechanical tubes used for mechanical purposes, and precision tubes intended to conduct forces and used by the automotive industry.[1293] However, it also seems to argue that separate like products should have been defined by tariff classification (40 like products)[1294], different physical properties such as different chemical composition[1295], specific use in the automotive industry, particularly for precision tubes (8)[1296], and consumer perceptions (8).[1297] [1298]

[1287] USITC Report, Vol. I, p. 166 (Exhibit CC-6).

[1288] USITC Report, Vol. I, p. 166 (Exhibit CC-6) (ITC acknowledging the increase in demand for large diameter line pipe and the projections for continued growth but noting that overall demand for the category stabilized, when both standard and line pipe products are viewed together).

[1289] USITC Report, Vol. I, "View of Vice Chairman Deanna Tanner Okun on Remedy", p. 482 (Exhibit CC-6).

[1290] Korea's first written submission, paras. 66-68.

[1291] Switzerland's first written submission, paras. 210-219.

[1292] Switzerland's second written submission, para. 56.

[1293] Switzerland's first written submission, para. 210.

[1294] Switzerland's first written submission, paras. 220-223.

[1295] Switzer*l*and's first written submission, para. 209.

[1296] Switzerland's first written submission, paras. 211-219. For example, they discuss eight types of precision tubes used in the automotive industry which they seem to imply should have been defined as separate like products. Based on their descriptions, it is evident that many of these precision tubes contain hydraulic

7.458 Switzerland contends that the USITC considered that all welded tubular products (other than OCTG) are used in the conveyance of water, petrochemicals, oil products, natural gas, and other substances in industrial piping systems. In reality, however, the USITC grouped into this category also products which are used as precision tubes to convey forces – e.g. in cars – which are products very different from the ones mentioned by the USITC. If products so different are bundled together, the standard of likeness becomes impossible to apply.[1299]

7.459 The United States insists that the USITC found that certain welded pipe included tubular products that have a weld seam that runs either longitudinally or spirally along the length of the product. Certain welded pipe is used in the conveyance of water, petrochemicals, oil products, natural gas, and other substances in industrial piping systems. The presence of a welded seam generally makes certain welded pipe slightly less reliable and durable than seamless tubular products. Thus, it is used to transport liquids at or near atmospheric pressure rather than for high pressure containment.[1300] The various types of certain welded pipe in this investigation include standard pipe and pipe used primarily for mechanical, line, pressure, and structural purposes.[1301] Certain welded pipe is generally produced on electric resistance weld (ERW) mills. The USITC found that the various forms of certain welded pipe are made by the same process, largely by the same firms, in the same facilities and on the same equipment and are used for the same purposes, namely the conveyance of steam, water, oil, gas, and other fluids at or near atmospheric pressure.[1302]

7.460 Korea notes that the end-use of LDLP determined that the demand was more similar to OCTG (oil and gas demand) than the other welded pipe (general economic trends). The USITC record confirms that demand for LDLP was based on its distinct use for the movement of oil and gas and the demand trends were distinct.[1303] [1304] Korea submits that the United States does not deny that LDLP does not compete with other welded pipe due to differences in specifications and use.[1305] In fact, a critical factor for finding welded and seamless OCTG as single like product was that they both "compete with each other" and are "often used interchangeably".[1306] Yet, this factor was ignored for LDLP. The United States seeks to avoid the question on competition by referring to the physical characteristics – "welded seam" – as an important factor. As noted, welded-OCTG also has a welded seam, so Korea does not see that this can qualify as a "clear dividing line".[1307]

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fluid; the carrying of fluids, however, was used as a factor to allege that "pipes" could be distinguished as a separate like product.

[1297] Switzerland's first written submission, paras. 224-225.

[1298] United States' first written submission, para. 169.

[1299] Switzerland's second written submission, para. 53.

[1300] USITC Report, p. TUBULAR-2.

[1301] Certain welded pipe used in the movement of oil and gas is produced to standards set by American Petroleum Institute (API), while many other forms of certain welded pipe are produced to standards set by the American Society for Testing and Materials (ASTM) and the American Water Works Association (AWWA).

[1302] United States' second written submission, para. 89.

[1303] USITC Report, Vol. I, p. 166 (Exhibit CC-6). Accord *Certain Welded Large Diameter Line Pipe From Japan*, USITC Publication 3464, pp. 14-15 (Exhibit K-8).

[1304] Korea's second written submission, paras. 85-86.

[1305] United States' replies to questions from other Parties, para. 44.

[1306] USITC Report, Vol. I, p. 152 (Exhibit CC-6).

[1307] Korea's second written submission, paras. 87-88.

Consumer perception

7.461 Switzerland submits that having very different end-uses, consumers would perceive precision tubes intended to conduct forces and used by the automotive industry as different from tubes used for the purpose of conveyance of steam, water, oil, gas and other fluids.[1308]

Tariff classification

7.462 Korea argues that the USITC never analysed whether HS classifications could provide a useful starting point for the analysis of whether LDLP should be considered a separate like product. In fact, HTS categories 7305.11-7305.19 apply only to LDLP.[1309] This distinction between the HS classifications of line pipe and the HS classifications of the other welded pipe confirms a significant difference in the products themselves and should have been considered by the USITC. The USITC ignored other significant evidence in the record and its own precedent which demonstrated that there are significant differences in the products.[1310] The USITC acknowledged that pipe used in line pipe applications must meet higher standards than "so-called standard pipe"[1311] and that the distinct physical characteristics of each product reflect their distinct use.[1312] [1313] Korea adds that the difference in tariff classifications reflects the fact that the large diameter *line* pipe which is included in this investigation (small diameter line pipe imports are subject to a separate safeguards case and thus are not subject to this investigation) is produced to completely different specifications.[1314] [1315]

7.463 Similarly, Switzerland argues that the USITC also rejected the use of the customs classifications of tubular products as not "useful" because of the large number of HTS categories. With respect to pipe and tube, the USITC correctly noted that "the (non-OCTG) welded pipe in this investigation includes standard pipe and pipe used primarily for mechanical, line, pressure, and structural purposes".[1316] As respondents in opposition to import relief further specified, the USITC's

[1308] Switzerland's first written submission, para. 224.

[1309] Small diameter line pipe was excluded from the case since safeguard measures already applied to that product. (Exhibit CC-1, Annex II.)

[1310] Joint Respondents' Prehearing Brief for Welded Other, pp. 9-10 (Exhibit CC-78); Joint Respondents' Posthearing Brief for Welded Other, Exhibit 1 – pp. 29-30 (Exhibit CC-79) (suggesting in response to USITC questions that data should have been collected separately on at least two like products in Category 20); USITC Report, Vol. II, p. TUBULAR-43 (Exhibit CC-6) (noting that "[s]ome respondent welded importers divide the welded market into large diameter welded for line pipe (which they estimate as 20-30% of the US welded market) and other welded, generally standard pipe").

[1311] USITC Report, Vol. I, p. 151 (Exhibit CC-6) (the USITC cited this same factor as a basis for treating OCTG as a separate like product than other tubular products).

[1312] Standard pipe is pipe "ordinarily used for low-pressure conveyance of air, steam, gas, water, oil, or other fluids used for mechanical applications. It is used primarily in machinery, buildings, sprinkler systems, irrigation systems, and water wells *rather than in pipe lines* or utility distribution systems. It may carry fluids at elevated temperatures which are not subject to external heat applications. It is usually produced in standard diameters and wall thicknesses to ASTM . . . specifications." USITC Report, Vol. I, p. 149, n. 912 (Exhibit CC-6) (quoting the American Iron and Steel Institute (AISI) definition of standard pipe) (emphasis added). "AISI defines line pipe as pipe 'used for the transportation of gas, oil, or water generally in a pipeline or utility distribution system. It is produced to API . . . and AWWA (American Water Works Association) specifications.'" USITC Report, Vol. I, p. 149, n. 912 (Exhibit CC-6).

[1313] Korea's first written submission, paras. 64-66.

[1314] USITC Report, Vol. I, p. 149 (footnote omitted; emphasis added) (Exhibit CC-6).

[1315] Korea's second written submission, para. 84.

[1316] USITC Report, Vol. I, p. 149.

welded pipe category included circular welded standard pipe[1317], LDLP, structural pipe, square and rectangular pipe, and piling pipe.[1318] The category also included mechanical tubing and boiler tubing, which accounted for a small percentage of the imports.[1319] LDLP, the second largest single import component of USITC Category 20, after circular welded standard pipe, accounted for approximately 30% of world imports of Category 20 in interim 2001 and is easily identified.[1320] The LDLP products were easily segregated from the rest of the welded category based on the USITC's concurrent anti-dumping investigation of that industry.[1321] A breakdown of the HTS numbers covering LDLP products subject to the 201 investigation, and the correlating import statistics for LDLP, were placed on the record early in the investigation by Joint Respondents in opposition to relief.[1322] These figures formed the basis for a variety of separate analyses of the vastly different market forces affecting the large diameter line pipe industry. Yet, the USITC rejected the use of customs classification as relevant to the segregation of LDLP from other circular welded pipe and tube. Switzerland submits that the lack of any analysis of tariff classification runs counter the guidance provided by the Appellate Body in *EC – Asbestos* where it clarified that customs classifications provide important indications for the like-product determination which must be considered. The existence of many different classifications is no excuse for not considering them at all for the purpose of the like product determination. To the contrary, this suggests that the products concerned are not alike.[1323]

7.464 The United States submits that Korea and Switzerland mistakenly contend that the primary basis for the USITC's like product definitions should have been tariff classification. They focus on the products of interest to them in arguing that tariff classifications would have permitted the USITC to segregate these types of certain welded pipe. Under their approach, the USITC would arguably have had to define separate like products for each of the 40 classifications using the ten-digit level, despite similarities in physical characteristics, uses, marketing channels, and production processes for the continuum of certain welded pipe.[1324] The Appellate Body has stated, "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence".[1325] In spite of the complainants' contentions, the USITC clearly considered all of the evidence pertinent to defining the appropriate like product. The tariff classifications are interrelated with the physical properties/characteristics criterion which the USITC clearly considered and found to be an important factor in its like product definitions. In particular, the physical characteristic of the welded seam was an important factor in the USITC's definition of certain welded pipe as a single like product. The USITC exercised its discretionary judgement to determine which factors were the most pertinent in examining the particular facts of this investigation. The USITC clearly found the physical characteristics factor to be useful but, given the large number

[1317] None of the tariff classifications within the welded pipe group included welded line pipe of an outside diameter that does not exceed 406.7 millimeters (16 inches), which was covered by Section 201 relief on line pipe.

[1318] Joint Respondents' Prehearing Brief in Opposition to Import Relief for Welded Tubular Products Other than OCTG (Category 20) (11 September 2001), p. 9.

[1319] Joint Respondents' Prehearing Brief in Opposition to Import Relief for Welded Tubular Products Other than OCTG (Category 20) (11 September, 2001), p. 9.

[1320] Joint Respondents' Prehearing Brief in Opposition to Import Relief for Welded Tubular Products Other than OCTG (Category 20) (11 September 2001), p. 10.

[1321] Certain Welded Large Diameter Line Pipe from Japan, Inv. No. 731-TA-919 (Final), Publication 3464 (November 2001).

[1322] Joint Respondents' Prehearing Brief in Opposition to Import Relief for Welded Tubular Products Other than OCTG (Category 20) (11 September 2001), Exhibit CC – 78.

[1323] Switzerland's first written submission, paras. 220-223.

[1324] The two tariff classifications using the 4-digit level – 7305 and 7306 – for certain welded pipe are also used for seamless pipe and thus do not provide a clear dividing line.

[1325] Appellate Body Report, *EC – Asbestos*, para. 102.

of tariff classifications, found tariff classifications not to be useful because they provided no clear dividing lines between products.[1326]

7.465 Switzerland responds that the cumbersomeness of a methodology, however, cannot be used as an argument for not applying it. If the United States chose to investigate on a very large number of steel products, the fact that the investigation becomes very extensive because of the large number of different products involved, is not a reason not to use a certain methodology. This is all the more so, as the criterion of customs classification is not only used by the USITC but is a fundamental criterion to be used according to the Appellate Body. The assertion that tariff classifications were not useful because they provided no clear dividing lines between the products[1327] is not correct as the customs classification provides several dividing lines, for instance between products used for oil or gas pipelines and other products. Such a customs classification supports the conclusion found using the end-use criteria, i.e. that products used to convey oil or gas are different from other tubular products. the HS tariff classifications contained in Chapter 73 differentiates welded pipe at the four digit level and even more at the six digit level.[1328] [1329] It is clear therefore, that this product (welded pipe) is not a single product but is further defined by size and/or use and thus the United States should have at least followed the clear distinctive lines set by the HS.

7.466 The European Communities notes that United States failed to rebut the Swiss and Korean argument that the primary basis for distinguishing the many different products bundled together should have been tariff classifications by claiming that the ten-digit level contains too many different entries.[1330] As can be learned from Chapter 73 of the HS[1331], internationally agreed customs classifications at the four and six-digit level separate welded pipe on the basis both of size and function.[1332] This further corroborates that the products bundled as welded pipe are not "like or directly competitive".[1333]

Production processes

7.467 Switzerland submits that the USITC used the vertical integration of the industry and the common production processes to aggregate the five different products into one category. More particularly, Switzerland contends that the USITC paid "particular attention" to the "sharing of productive processes and facilities" which "is a fundamental concern in defining the scope of the domestic industry under Section 201".[1334] Moreover, the USITC considered itself to be required "to define like or directly competitive in a manner that reflects the realities of the market and at the same time accomplishes the fundamental purpose of Section 201, protection of the productive resources of domestic producers".[1335] Switzerland insists that the United States ignored the guidance given in *US – Lamb* and, again, relied on "productive facilities" rather than on "the product" itself.[1336] According to Switzerland, it is simply irrelevant, under the Agreement on Safeguards, that there is a continuous line

[1326] United States' first written submission, paras. 167-168.
[1327] United States' first written submission, para. 168
[1328] Exhibit CC-105 a
[1329] Switzerland's second written submission, paras. 58-60.
[1330] United States' first written submission, para. 167.
[1331] Exhibit CC-105
[1332] The European Communities refers to paras. 73.05-73.06.
[1333] European Communities' second written submission, paras. 283-285.
[1334] USITC Report, Vol. I, pp.30 and 151
[1335] USITC Report, Vol. I, p. 31
[1336] Switzerland's second written submission, paras. 66-69.

of production between the input product and the end-product … producers of these products, if it cannot be established otherwise that these input products are like products.[1337]

7.468 Switzerland contends that the USITC explains that it traditionally establishes the "likeness" on the basis of the five characteristics: physical properties of the product, its customs treatment, its manufacturing process, its uses, and the marketing channels through which the product is sold.[1338] However, for this specific case, the USITC used a different methodology, as it "focused [its] analysis in this investigation primarily on the degree to which the products in question are produced in common production facilities and using similar production processes"[1339] [1340] The USITC paid "particular attention" to the "sharing of productive processes and facilities" which "is a fundamental concern in defining the scope of the domestic industry under Section 201".[1341] Moreover, the USITC considered itself to be required "to define like or directly competitive in a manner that reflects the realities of the market and at the same time accomplishes the fundamental purpose of Section 201, protection of the productive resources of domestic producers".[1342] Switzerland insists that the United States ignored the guidance given in *US – Lamb* and, again, relied on "productive facilities" rather than on "the product" itself.[1343] Korea further argues that the United States has failed to acknowledge that OCTG is also made by the same producers who make standard pipe[1344], but it is no more "like" standard pipe than line pipe is. The United States also does not explain how shared production facilities was an important factor for treating LDLP as other welded but not for treating OCTG as a single like product with all other welded pipe made in the same production facilities in its answers to questions.[1345] [1346]

7.469 In the United States' view, the complainants mistakenly challenge the USITC's consideration of production processes in determining "like product" on the basis of the Appellate Body Report in *US – Lamb*. Contrary to the complainants' contentions the Appellate Body in *US – Lamb* recognized that when confronted with the question of whether two articles are separate products, "it may be relevant to inquire into the production processes for those products".[1347]

7.470 The United States submits that the specific allegations raised by Korea and Switzerland regarding the USITC's certain welded pipe like product definition are based on their erroneous interpretation of what factors the USITC was either "required or not permitted" to consider in making its like product definitions.[1348] The complainants can identify nothing in the Agreement on Safeguards addressing what factors may or may not be considered in determining like products. They instead assert that the USITC was bound to use the four factors suggested by the Working Party on *Border Tax Adjustments*. These factors, which were suggested for use in border tax adjustments, were for a different purpose, and the Appellate Body has recognized that "[n]o one approach to exercising

[1337] Switzerland's first written submission, para. 226-233.
[1338] USITC Report Vol. I p. 30.
[1339] USITC Report, Vol. I, p. 151
[1340] Switzerland's second written submission, paras. 54, 65.
[1341] USITC Report, Vol. I, pp. 30 and 151
[1342] USITC Report, Vol. I, p. 31
[1343] Switzerland's second written submission, paras. 66-69.
[1344] Korea's written reply to the Panel question No.148 at the first substantive meeting, noting that five to eight producers of "welded other" pipe also make welded-OCTG in contrast to only three of the seven producers of LDLP which manufacture "welded other;"; United States' replies to questions from other Parties, para. 47, referring to "*many*" *producers of* LDLP which also produce other welded.
[1345] United States' replies to questions from other Parties, para. 44.
[1346] Korea's second written submission, paras. 75-76.
[1347] Appellate Body Report, *US – Lamb*, para. 94, n.55.
[1348] Switzerland's first written submission, paras. 207-233.

judgement will be appropriate for all cases".[1349] Thus, the USITC was not required to consider these four factors.[1350]

7.471 Korea reiterates that welded OCTG is just like all other pipe in the other welded category has a weld and is produced by the same producers. The United States does not deny this. This is very significant because the USITC's principal and overriding considerations in treating LDLP as a single like product with non-OCTG pipe is the common production facilities and the existence of a "weld".[1351] Thus, clearly, these characteristics do not create a "clear dividing line" between OCTG, LDLP, or other welded pipe. Instead, the United States says that the USITC relied on the outside "finishing operations" which are sometimes used after the OCTG has been produced to distinguish OCTG. However, the USITC opinion is clear that the critical aspect of this distinction was the physical attributes conferred by this additional processing and not the mere (separate) process itself.[1352] [1353]

Marketing channels

7.472 Switzerland stresses that this factor is used by the USITC, although it is not used in the traditional WTO approach regarding like products. The USITC, however, seems not to apply this factor, even if it recognizes that the channel of distribution for the various pipe and tube products tends to be specialized depending on the market served. Some distributors specialize in certain forms of pipe, other in certain products sold primarily to the construction industry for use in HVAC (heating, ventilating, and air conditioning) and other piping systems that allow for the transmission of water, steam, oil, gas, and chemicals in commercial and residential structures, including high-rise structures.[1354] In the case of welded pipe other than OCTG the USITC indicated that although large pipe is more likely than small diameter pipe to be sold directly to end-users, there is substantial overlap in the channels of distribution of all welded pipe. The USITC said in its report that specialty tubes that require more heat-treatment or testing are often sold directly to end-users.[1355] If the marketing channels were to be part of the methodology used to determine likeness, in this case the proper application of this criterion would have supported what has been shown thus far, namely that many different products were unduly bundled and therefore no proper analysis of likeness could take place.[1356]

Other factors

7.473 Korea also argues that the USITC's aggregation of large diameter line pipe and standard pipe is in direct conflict with its findings that OCTG should be a separate like product from the rest of the tubular category. The USITC specifically cited as one of the bases for its determination that OCTG is a separate like product from other pipe and tube the fact that "OCTG products and other pipe and tube products are sold into different markets and *demand is driven by different economic factors*".[1357] In particular, the USITC explained, "[d]emand for OCTG products is driven primarily by the level of oil

[1349] Appellate Body Report, *EC – Asbestos*, para. 101.
[1350] United States' first written submission, para. 159.
[1351] USITC Report, Vol. I, pp. 154-155.
[1352] It is also worth noting that the distinction the United States makes between "production facilities" and the "finishing operations" is a false distinction. The OCTG is produced before it goes to the finishing operations. USITC Report, Vol. I, p. 148.
[1353] Korea's second written submission, paras. 82-83.
[1354] USITC Report, Vol. I, p. 150.
[1355] USITC Report, Vol. II, TUBULAR-39
[1356] Switzerland's second written submission, para. 64.
[1357] USITC Report, Vol. I, p. 154 (emphasis added).

and gas exploration, while demand for other products is driven primarily by the overall level of activity in the general economy, which do not necessarily coincide and can, in fact, move in opposition to one another".[1358] As demand for LDLP is similarly driven by activity in the oil and gas sector, and not by the level of activity in the general economy, it too should have been treated as a separate like product in the USITC's analysis of injury and remedy. At the very least, the differences in applications and demand factors between LDLP and other welded pipe should have been considered by the USITC in determining whether LDLP should have been segregated from the other carbon tubular products.[1359]

(iii) Definitions proposed by the complainants

7.474 The United States points out that both Korea and Switzerland challenge the USITC definition of certain welded pipe as a single like product, but that each complainant has different proposals for what the appropriate definitions should have been. Korea contends this single like product should have been divided into at least two like products, primarily by diameter size, and Switzerland contends it should have been divided into at least three like products, primarily by function.[1360]

7.475 Switzerland responds that it argued that the precision tubes were incorrectly grouped in the same category of products as large diameter welded pipe for the conveyance of steam, water, oil, gas and other fluids. In making this argument, Switzerland did not at all propose that the category of welded pipe/tubular products be subdivided into three categories. Switzerland mentioned the three different tubes as examples, in order to explain the differences of the products bundled together in the category of welded tubular products and to show that the United States grouped together products which are so different that they should not have been grouped together. Switzerland is of the view that it is not its task to propose what the proper category should be and that the Panel need not decide which breakdown of categories presented in the complainants' submissions is most appropriate.[1361]

7.476 Korea insists that it is not arguing for a like product division for welded pipe based on diameter size, as the United States incorrectly asserts.[1362] This is a convenient but inaccurate characterization of Korea's like product argument for welded pipe. Korea maintains that LDLP should have been considered a separate like product from other welded pipe. The basis for that like product distinction is not the size of the pipe but rather the distinct physical characteristics and the distinct end-uses of the two products.[1363]

(iv) Relevance of like product definitions used in the anti-dumping and countervailing duty contexts

7.477 The United States submits that the complainants' arguments[1364] fail to recognize that the like product definitions in anti-dumping and countervailing duty investigations, as in safeguard investigations, are dependent on the imports subject to that particular investigation and thus the definitions have varied.[1365] The starting point for the USITC's like product analysis is the imports identified as within the investigation by the President's request. In the present case, the USITC began with the subject imports which included a range of welded and tube and looked for clear dividing

[1358] USITC Report, Vol. I, p. 154 (Exhibit CC-6).
[1359] Korea's first written submission, paras. 69-70.
[1360] United States' first written submission, para. 158.
[1361] Switzerland's second written submission, paras. 46-47.
[1362] United States' first written submission, para. 104.
[1363] Korea's second written submission, para. 69.
[1364] *See* paras. 7.448 and 7.463 above.
[1365] Korea first written submission, paras. 41-44.

lines between the domestic steel pipe and tube products that corresponded to these subject imports, using well-established factors. The anti-dumping and countervailing duty investigations generally begin with a more narrow starting point for the scope of subject imports so the analysis frequently involves whether the like product definition should be defined more broadly than the subject imports, i.e., it starts small and looks at whether to broaden rather than starts large and looks where to divide. The complainants also fail to acknowledge, as discussed above, that the anti-dumping and countervailing duty investigations have a purpose that is different from that in a safeguards investigation.[1366] The USITC considered and rejected the argument that should have defined at least two like products – certain welded large diameter pipe (16 inches or over) ("LDLP") and other welded pipe in making its like product definition in this safeguard investigation. The USITC did not have before it in either of these anti-dumping investigations the issue of a scope of subject imports that included both of these types of certain welded pipe as it did in this safeguard investigation and thus did not decide to treat them as separate domestic like products in a single investigation. Rather the USITC defined separate domestic like products in two separate investigations; each like product definition was coextensive with the narrow scope of imports subject to investigation.[1367] The USITC did not consider whether it was appropriate to broaden the like product to include other types of certain welded pipe that did not correspond to the subject imports in either of these anti-dumping cases. In this investigation, the USITC considered arguments that it should find that large diameter line pipe (pipe 16 inches or over in outside diameter) was a separate like product from other welded pipe.[1368] The evidence showed that while welded large diameter line pipe generally is made on mills designed to make large pipe, these mills also are capable of producing other types of large diameter pipe, such as pipe for water transmission, piling, and structural members.[1369] A substantial portion of welded large diameter line pipe is made by the ERW process[1370], which is the process used to make virtually all types of certain welded pipes.[1371] Moreover, many of the firms that produce welded large diameter line pipe also produce other welded pipe that is less than 16 inches in outside diameter. Large and small diameter welded pipe also share common physical characteristics, particularly a weld seam that has an effect on its uses relative to other tubular products such as seamless pipe. Based on this evidence, the USITC found large and small welded pipe to be part of a continuum of certain

[1366] United States' first written submission, paras. 161-162

[1367] Contrary to Korea's allegations, the "ITC did not treat LDLP as a like product with standard pipe" in *Certain Welded Non-Alloy Steel Pipe from China* because it was not part of the scope of investigation in that anti-dumping case; the issue of whether to include LDLP in the domestic like product also was not raised by any parties to that investigation nor was it considered by the USITC. *Circular Welded Non-Alloy Steel Pipe from China, Indonesia, Malaysia, Romania, and South Africa*, Investigation Nos. 731-TA-943-947 (Preliminary), USITC Publication 3439, pp. 3-5 (July 2001) (US-28); *Circular Welded Non-Alloy Steel Pipe from China*, Investigation No. 731-TA-943 (Final), USITC Publication 3523, pp. 3-5 (July 2002) (CC-80); *see also Certain Welded Large Diameter Line Pipe From Japan and Mexico*, Inv. Nos. 731-TA-919-920 (Preliminary), USITC Publication 3400, pp. I-5-6 (March 2001) (US-29); *Certain Welded Large Diameter Line Pipe From Japan*, Inv. No. 731-TA-919 (Final), USITC Publication 3464 (November 2001) (CC-81).

[1368] Prehearing Brief of European Steel Tube Association (September 12, 2001), pp. 3-6 (US-30).

[1369] USITC Report, p. 154, citing *Certain Welded Large Diameter Line Pipe From Japan and Mexico*, USITC Publication 3400, pp. I-5-6 (March 2001) (US-29).

[1370] In 2000, 45.6% of domestic welded large diameter line pipe was produced by the ERW process as compared to 54.4% by the SAW process. *Certain Welded Large Diameter Line Pipe From Japan and Mexico*, USITC Publication 3400, Table 1-2, p. I-14 (March 2001) (US-29). ERW pipe is normally produced in sizes from 2 3/8 inches through 24 inches outside diameter. Id. at I-5.

[1371] *Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Invs. Nos. 701-TA-253 (Review) and 731-TA-132, 252, 271, 273, 276, 277, 296, 409, 410, 532-534, 536, and 537 (Review), USITC Publication 3316, p. CIRC-I-19 (July 2000) (US-31).

welded pipe and saw no reason to define large diameter line pipe separately from other certain welded pipe.[1372]

(d) FFTJ

7.478 In the view of the European Communities, the USITC did not show that imported flanges are like domestically produced fittings, although the USITC explicitly recognized the heterogeneity of fittings, flanges and tool joints, and that this "category contains a mix of *products*".[1373]

7.479 The United States submits that neither the European Communities nor any other complainant provides further arguments to the Panel on this like product definition.[1374]

7.480 The European Communities further submits that the USITC has not done what is its essential obligation under WTO law and its own self-set task: to compare the domestic products with the imported products and to determine whether these are like in accordance with Articles 2.1 and 4.1(c) of the Agreement on Safeguards. Instead, the USITC only attempts to explain why it groups together different domestic products into a bundle that "consists of about one-third flanges, one-third butt-weld pipe fittings, and one-third other products".[1375] However, it does not establish that all the elements it bundles together are like the imported products. Even in its irrelevant attempt to justify the bundling of a heterogeneous group of domestic products, the USITC misapplied its own self-set criteria. First, the USITC did not even consider tariff classifications and concessions. However, fittings and flanges are subject to different customs treatment even at the six-digit level and subject to different concessions. Second, the different classifications reflect well-known different physical properties of fittings and flanges, which were equally not mentioned by the USITC. As illustrated by the two photos attached as Exhibit CC-104, fittings are made from pipes by cutting and forming them.[1376] They do not contain holes as flanges do. These holes are necessary to disassemble flanges. This directly leads to the third point, the different *uses* of both products. The USITC essentially relied on some "common use" argument by claiming that "fittings, flanges, and tool joints are all used to join or cap pipe". However, this broad statement fails to take account of different end-uses of fittings and flanges. The USITC itself acknowledged that flanges are used to join pipe in non-permanent connections, and are designed to facilitate the disassembly of lengths of pipe.[1377] Butt-weld-pipe fittings, by contrast, are used to create a permanent joint.[1378] Because of their different technical properties (flanges contain holes and fittings do not), fittings and flanges are not even substitutable. Finally, if the USITC was entitled to look at common production processes (*quod non*), even the production processes for flanges and fittings only confirm the distinctions between these products. The USITC itself had to acknowledge that flanges are produced by forging carbon steel billets. Fittings, by contrast are made from pipes by cutting and forming them.[1379] The USITC's assertion that these processes are similar because they typically incorporate "heat-treating, machining, beveling, and washing"[1380] raises the question why it then has not included also knives and forks in its product mix.[1381]

[1372] United States' first written submission, paras. 163-166.
[1373] USITC Report, Vol. I, pp. 175 and 179.
[1374] United States' first written submission, para. 114, footnote 139.
[1375] USITC Report, Vol. I, pp. 156 and 157.
[1376] USITC Report, Vol. I, p. 148.
[1377] USITC Report, Vol. I, p. 150.
[1378] USITC Report, Vol. I, p. 150.
[1379] USITC Report, Vol. I, p. 148.
[1380] USITC Report, Vol. I, p. 157.
[1381] European Communities' written reply to Panel question No. 146 at the first substantive meeting.

7.481 The European Communities submits that the United States does not attempt to rebut the European Communities' specific claims that the bundling of FFTJ was not justified.[1382] The USITC's determination is the conclusion made before the reasoning (and unsupported by the subsequent reasoning) that "there are four domestic industries producing articles like the corresponding articles subject to investigation within the tubular products category … (fittings, flanges, and tool joints)".[1383] The second reference provided by the USITC then directly contradicts this statement by stating that "purchasers of fittings and flanges reported that imported and domestically produced fittings and flanges produced to the same grade and specification are used in the same applications"[1384], thereby confirming the acknowledgement given by the USITC elsewhere that this is a heterogeneous product mix.[1385] The United States also concedes that there are even separate markets for fitting and flanges.[1386] [1387]

7.482 The European Communities notes that the United States did not respond to the specific claim that the products bundled as "FFTJ" were not even "like" each other. Thus, all determinations based on such imported product "FFTJ" and the domestic industry producing "FFTJ" should be found incompatible with the Agreement on Safeguards.[1388]

F. INCREASED IMPORTS

1. Introduction

7.483 Brazil and Japan argue that the United States failed to meet the threshold requirement of increased imports under Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX(a) of the GATT 1994.[1389] Similarly, China and Switzerland believe that the condition of increased imports was not fulfilled.[1390] Korea affirms that the USITC's analysis of increased imports for flat-rolled and tin mill products was not consistent with Articles 2, 3 and 4 of the Agreement on Safeguards as well as Article XIX of the GATT 1994.[1391] New Zealand claims that the United States has failed to comply with the requirement of Article 2.1 of the Agreement on Safeguards that there be an increase in imports before a safeguard measure is imposed.[1392]

7.484 The European Communities submits that the United States has not demonstrated that the steel products covered by its safeguard measures are "being imported … in such increased quantities" as required by Article 2.1 of the Agreement on Safeguards. The USITC applied a methodology that plainly ignores the conditions set by Article 2.1 of the Agreement on Safeguards, as clarified by the Appellate Body. The USITC has committed essentially three methodological errors rendering all its conclusions on the existence of increased imports for each individual product flawed and inconsistent

[1382] United States' first written submission, para. 114, which does not respond to the specific claims in the European Communities' first written submission, paras. 218, 230 and European Communities' reply to Panel question 146.

[1383] USITC Report, Vol. I, p. 147.

[1384] USITC Report, Vol. I, p. 175.

[1385] See references in European Communities' first writtensubmission, paras. 218 and 230.

[1386] United States' written reply to Panel question No. 149 at the first substantive meeting.

[1387] European Communities' second written submission, para. 286.

[1388] European Communities' second written submission, para. 286; European Communities' written reply to Panel question 22 at the second substantive meeting.

[1389] Brazil's first written submission, para. 117; Japan's first written submission, para. 175.

[1390] China's first written submission, para. 210; Switzerland's first written submission, para. 244; Norway's first written submission, para. 250; Norway's second written submission, para. 81.

[1391] Korea's first written submission, para. 71.

[1392] New Zealand's first written submission, para. 4.93.

with Article 2.1 of the Agreement on Safeguards. Thus, it (i) fails to consider intervening downward trends, in particular at the sensitive end-point of the investigation as reflected in the most recent data available for 2001, (ii) it generally fails to calculate and consider the trends in imports over the entire period of investigation, and (iii) it only aims at finding a "simple increase" without considering and establishing through a reasoned and adequate explanation that such increase was sufficiently recent, sudden, sharp and significant. The European Communities therefore considers that the United States has not demonstrated that the steel products covered by its safeguard measures are "being imported … in such increased quantities … as to cause or threaten to cause serious injury" to its domestic industry, as required by Article 2.1 of the Agreement on Safeguards.[1393]

7.485 In Japan's view, perhaps the most glaring deficiency of the United States' 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 Government of the United States 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.[1394]

7.486 In response, the United States asserts that the requirement of "increased imports" of the Agreement on Safeguards was satisfied.

2. The Legal Standard

(a) Recent increase

7.487 The European Communities submits that a safeguard measure may only be taken if there is an extraordinary surge in imports ("such increased quantities and under such conditions"). Moreover, a safeguard measure may only be taken if that product continues "being imported" in such increased quantities.[1395]

7.488 The European Communities, Japan, Korea, Switzerland and Norway emphasize that, as the Appellate Body has clarified in *Argentina – Footwear (EC)*[1396], the use of the present tense "is being imported" in Article 2.1 of the Agreement on Safeguards means that competent authorities must show a sharp and significant increase in imports which continues until the very recent past.[1397] In interpreting this requirement, WTO panels have focused on the last one to three years.[1398] Norway and Switzerland add that allowing a WTO Member to take a decision on whether to adopt safeguards measures by ignoring available data from the most recent past would disregard the extraordinary nature of safeguard measures, which must be taken into account when "construing the prerequisites

[1393] European Communities' first written submission, paras. 282-290; European Communities' second written submission, paras. 142-147.

[1394] Japan's first written submission, para. 176.

[1395] European Communities' first written submission, para. 143.

[1396] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.

[1397] European Communities' first written submission, para. 271; Japan's first written submission, paras. 184-185; Korea's first written submission, para. 71; Norway's first written submission, para. 256; Norway's second written submission, para. 87; Switzerland's first written submission, para. 238.

[1398] Panel Report, *Argentina – Footwear (EC)*, paras. 8.160 and 8.162; Panel Report, *US – Wheat Gluten*, paras. 8.32 and 8.33; Panel Report, *US – Line Pipe*, para. 7.204.

for such actions".[1399] Similarly, Brazil and Japan argue that the present tense in Article 2.1 of the Agreement on Safeguards – "such product *is being imported*" (emphasis added) – indicates that the increase in import volume must be in the present, that is to say, as of the time of the safeguards investigation, and not in the past.[1400]

7.489 The United States argues that the Agreement on Safeguards does not specify how long the period of investigation in a safeguards investigation should be, or whether or how that period should be segmented for purposes of analysis.[1401]

7.490 As regards the question of how "recent" the increase in imports must be, the United States argues that the Appellate Body's statement that the investigation period must be the recent past must be read in the light of other findings. The Appellate Body Report in *US – Lamb* made clear that, in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period.[1402] *US – Lamb* involved a determination of threat of serious injury, which by definition is future oriented, and 21 months as the length of the investigation period was deemed too short. Presumably, therefore, the Appellate Body would accept a considerably longer period of investigation for a serious injury determination. The United States submits that the complainants also attempt to downplay the panel report in *US – Line Pipe*[1403], which states that it is not necessary to find that imports are still increasing in the period immediately preceding the competent authority's determination, or up to the very end of the period of investigation.[1404] If the Agreement on Safeguards prevented the application of a safeguard measure any time that imports abated, however slightly, after an increase, Members would have to commence safeguard proceedings immediately after detecting an increase in imports. This likelihood would create a major disincentive against waiting to see whether the domestic industry could cope on its own.[1405]

7.491 In response, China submits that the United States is trying to create confusion between the requirement, on the one hand, to give specific attention to the most recent imports and, on the other hand, the requirement to consider trends in imports rather than making an end-point comparison.[1406] Japan, Korea, China, New Zealand and Brazil contend that reliance on *US – Lamb* is misplaced. In that case, the Appellate Body was not examining increased imports, but the appropriate period for assessing the state of the domestic industry with regard to threat of serious injury.[1407] [1408]

7.492 The United States responds that the complainants draw an artificial distinction. Import data are part of the overall data to be assessed by competent authorities. If the question of the temporal focus of data evaluation did not encompass import data, the Appellate Body would not have referred in the *US – Lamb* Report to its discussion of increased imports in *Argentina – Footwear (EC)*.[1409] [1410]

[1399] Norway's first written submission, para. 256; Switzerland's first written submission, para. 246.
[1400] Brazil's first written submission, para. 121; Japan's first written submission, para. 180.
[1401] United States' first written submission, para. 174.
[1402] Appellate Body Report, *US – Lamb*, para. 137.
[1403] Panel Report, *US – Line Pipe*, para. 7.207.
[1404] United States' first written submission, paras. 182-190.
[1405] United States' written reply to Panel question No. 40 at the first substantive meeting, para. 82.
[1406] China's second written submission, para 92.
[1407] Appellate Body Report, *US – Lamb*, paras. 137-138.
[1408] Japan's second written submission, para. 84; Korea's first written submission, para. 96; China's second written submission, para. 96; New Zealand's second written submission, para. 3.63; European Communities' first written submission, para. 172.
[1409] Appellate Body Report, *US – Lamb*, para. 138, footnote 88.

7.493 The European Communities, Japan, Korea, Norway, New Zealand and Brazil further argue that in *US – Line Pipe*, the Panel was confronted with a slight and brief decrease in the absolute level of imports at the very end of the investigation period, imports which remained at high levels and continued to increase in relative terms.[1411] [1412] Thus, *US – Line Pipe* does not in anyway diminish the Appellate Body's interpretation of the timing of the increased imports – *i.e.*, that they must be recent. Rather, *US – Line Pipe* stands for the proposition that a modest and short decline in imports at the end of the period of investigation, that started in the last half year of the five and a half year period, does not exclude a finding that imports "remain" at "such increased quantities" if such finding is based on an explicit analysis of intervening decreasing trends and supported by a reasoned and adequate explanation.[1413] This does not mean, as the United States implies, that any increase in imports at any time during the period of investigation, no matter how remote in time and even if followed by a significant and continuing decline, satisfies the requirement of increased imports.[1414] The increase in imports was fully 30 months in the past by the time the United States initiated its safeguard investigation, hardly what one would term "immediately after detecting an increase in imports".[1415]

(b) Evaluation of trends

7.494 The European Communities, Japan, Korea and China further point out that the Appellate Body has also made clear that there is an obligation to evaluate trends in imports over the entire period of investigation, rather than simply comparing end-points. Where imports have declined "continuously and significantly", a product is no longer "being imported in such increased quantities" and the purpose of the safeguard remedy to address an urgent situation is not met.[1416] [1417] Norway and Switzerland submit in summary that an increase in imports should be evident both in an "end-point-to-end-point comparison and in an analysis of the intervening trends over the period".[1418] [1419]

7.495 According to the United States, the complainants also misconstrue the Appellate Body finding in *Argentina – Footwear (EC)* regarding trends in imports over the period of investigation. The Appellate Body addressed trends in order to show that consideration of end points alone was insufficient, and that an examination of intervening points must be made. The Appellate Body did not state that a comparison of the end points of a period of investigation is entirely irrelevant or impermissible. The United States also notes that Article 4.2(a) of the Agreement on Safeguards requires an evaluation of "the rate and amount of the increase in imports," and thus trends do not trump the amount of imports. The Appellate Body also did not state that trends must show a constant increase in imports or an increase that lasts for the entire period of investigation.[1420]

[1410] United States' second written submission, para. 104.

[1411] Panel Report, *US – Line Pipe*, paras. 7.210 and 7.213.

[1412] Norway's first written submission, para. 245; Norway's second written submission, para. 88.

[1413] European Communities' first written submission, paras. 175-180; Korea's first written submission, para. 104; New Zealand's second written submission, para. 3.64.

[1414] Japan's second written submission, para. 85; Brazil's second written submission, paras. 48-50.

[1415] Brazil's second written submission, para. 60.

[1416] Panel Report, *Argentina – Footwear (EC)*, para. 8.162, confirmed in Appellate Body Report, *Argentina – Footwear (EC)*, para 129.

[1417] European Communities' first written submission, paras. 272-274; Japan's first written submission, para. 186; Korea's first written submission, para. 72; China's first written submission, paras. 88-89.

[1418] Panel Report, *Argentina – Footwear (EC)*, para. 8.157.

[1419] Norway's first written submission, para. 246; Norway's second written submission, para. 89; Switzerland's first written submission, para. 239.

[1420] United States' first written submission, para. 178-180.

7.496 Japan responds that there must be some examination of the relative trends in imports over the period of investigation in terms of their nature, extent, and magnitude vis-à-vis the recent imports. It is similar to the point the Appellate Body made in *US – Lamb* regarding serious injury – that the real significance of short term trends at one point in a period of investigation "may only emerge when these short term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation".[1421] Japan and New Zealand submit that the point is to consider trends in context, in comparison with longer-term trends. Undertaking such an analysis is separate from the issue of causation, which concerns the "effect" of the increase.[1422]

7.497 With regard to the relative importance of trends and of recent imports, the European Communities argues that the most recent imports are part of an overall trend. However, as clarified by the Appellate Body, the most recent import trends should be the focus of safeguard determinations on the increased imports requirement contained in Article 2.1 of the Agreement on Safeguards. Overall trends over a longer period of time are particularly important to determine whether the first prong of the increased imports analysis, i.e., "such increased quantities", is met. GATT and WTO jurisprudence require an "abnormal development in the imports of the product in question"[1423], or as the Appellate Body has put it an "unforeseen" or "unexpected" or "sudden, sharp and significant" increase in imports.[1424] As argued by the European Communities, to establish this, the competent authorities are obliged to: (i) identify the rate and amount of imports over a longer period; and (ii) to compare the recent developments to previous import developments and to show that an abnormal increase took place. The USITC failed to consider these essential issues, but contended itself with "any increase" in imports. The European Communities submits that this has already been explicitly ruled out by the Appellate Body in *Argentina – Footwear (EC)*.[1425] Recent imports are decisive to establish that a product continues "being imported" in such increased quantities. The Panel's report in *US – Line Pipe* did not contradict the unambiguous obligation clarified by the Appellate Body to consider any intervening trend and in particular the sensitive end points of an investigation. The USITC did not even do what was required by the Panel in *US – Line Pipe*, that is, to establish for all products through a reasoned and adequate explanation imports that have at least remained at recently, sharply and suddenly increased levels. Instead, the United States invoked a passage of the Panel's report in *Argentina – Footwear (EC)*, allegedly rejecting the argument of the European Communities that only a "sharply increasing trend in imports at the end of the investigation can satisfy this requirement" and adding that there might be a "temporary downturn", which would nevertheless not invalidate a finding of increased imports.[1426] According to the European Communities, the first reference is irrelevant, because the United States has (far from establishing that imports continue increasing in the interim 2001 period) not even demonstrated that imports remained at sharply increased levels although the most recent interim 2001 data confirmed a steady and significant decline. Even if temporary and insignificant declines do not necessarily exclude a finding that a product is being imported at increased levels, the existence of more than a half-year downward trend requires an explanation why such trend is only considered temporary and insignificant. The USITC did not do so

[1421] Appellate Body Report, *US – Lamb*, para. 138.
[1422] Japan's second written submission, para. 91; New Zealand's second written submission, paras. 3.61-3.62.
[1423] *US – Fur Felt Hats*, para. 4.
[1424] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[1425] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[1426] United States' second oral statement, para. 37, referring to Panel Report, *Argentina – Footwear (EC)*, para. 8.165.

for any of the products. This is particularly glaring, since for many of those products countervailing duty and anti-dumping orders were in place, therefore making such trends predictable.[1427] [1428]

7.498 Japan submits that there are both a temporal element and a comparative element embodied in the "increased imports" requirement. As interpreted by the Appellate Body in *Argentina – Footwear (EC)*, the temporal element requires that increased imports must be "sudden and recent".[1429] The comparative element requires a comparison: "between recent import trends … and import trends over the entire period of investigation".[1430] This is why the Appellate Body emphasized that an authority must examine recent imports and imports over the entire period of investigation.[1431] China submits that, on the one hand, only the consideration of trends allows determinations as to whether the evolution of imports meets the requirements of Article 2.1 of the Agreement on Safeguards and Article XIX of GATT 1994. In this regard, the requirement to consider trends is of a methodological nature. On the other hand, among the different trends, specific attention should be granted to the most recent ones in order to determine whether they showed an increase in imports that was recent. In this regard, the requirement to consider recent imports is rather of a qualitative nature.[1432] Norway asserts that the trend confirming that there actually is a recent, sudden, sharp and significant increase in imports, of the magnitude required by the Agreement on Safeguards, must continue until the very recent past. When the trend in the recent past is a decrease in imports, the condition for imposing a safeguard measure no longer exists. As such, the importance of a confirming trend in the very recent past has a very high importance.[1433] New Zealand submits that both trends and recent imports have been recognized as important in *Argentina – Footwear (EC)*, which also confirmed that a simple comparison of end-points will not suffice.[1434] In the present case, the requirement of a "recent" increase in imports was not satisfied because in the most recent period (interim 2001), imports actually decreased by 40%. Moreover, this was simply an acceleration of the downward trend in imports since 1998.[1435]

7.499 Korea argues that the primary focus must be recent imports. The Appellate Body in *Argentina – Footwear (EC)* stated in its report that "it is necessary for the competent authorities to examine recent imports, and not simply trends in imports".[1436] It further stated that "the investigation period should *be* the recent past".[1437] Trends are relevant to the relationship between increased imports, on the one hand, and causation on the other, in accordance with Article 4.2 of the Agreement on Safeguards. The United States refers to the Panel in *Argentina – Footwear (EC)* as authority for the proposition that the Panel rejected the EC's argument that imports had to be "sharply increasing" at the end of the period. However, the United States is referring to the Panel analysis of increased imports in *Argentina – Footwear (EC)* where the Appellate Body specifically commented that "the Panel's interpretation of [the increased imports] requirement [is] somewhat lacking".[1438] [1439]

[1427] USITC Report, Vol. II, Table OVERVIEW-3.
[1428] European Communities' written reply to Panel question No. 14 at the second substantive meeting.
[1429] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[1430] Japan's second written submission, para. 82.
[1431] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[1432] China's written reply to Panel question No.14 at the second substantive meeting.
[1433] Norway's written reply to Panel question No.14 at the second substantive meeting.
[1434] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.
[1435] New Zealand's written reply to Panel question No.14 at the second substantive meeting.
[1436] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[1437] Appellate Body Report, *Argentina – Footwear (EC)*, footnote 130.
[1438] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[1439] Korea's written reply to Panel question No. 14 at the second substantive meeting.

7.500 Korea also notes that the United States relies heavily on the analysis of the increased imports requirement in the Panel report in *US – Line Pipe*.[1440] Korea fundamentally disagrees with the analysis of the Panel in that case. Korea submits that it is important to recall that the Panel in *US – Line Pipe* interprets a fundamental modification of the Appellate Body's holding in *Argentina – Footwear (EC)*. The Panel in that case concluded that the Appellate Body's reliance on the phrase "is being imported" had to be considered in light of the rest of the sentence, which referred to "increased" (as opposed to "increasing") imports (*i.e.*, "in such increased quantities"). To the Panel, this "supported" an interpretation that imports could have increased in the recent past rather than the "present" as long as they remained at high levels. First, Korea does not agree that the phrase "is being imported" can mean anything other than that the increase must be present. After all, the Appellate Body specifically found that "it is necessary for the competent authorities to examine recent imports, and not simply *trends* ... during any ... period of several years". (emphasis added) The Appellate Body holding that the increase also had to be sudden, sharp, and significant bolsters this interpretation since those terms conform to the emergency nature of safeguards. Nor does Korea read the use of the *adjective* "increased", which clearly modifies "imports" and denotes a greater quantity, as somehow modifying the present tense of "is being imported". Finally, such a reading does not clarify what the adjective "increased" refers to (relative to what time period?) as opposed to the Appellate Body ruling that makes clear that the increase must be recent (*i.e.*, the "present tense") and not in the past. It is also significant that in *US – Line Pipe*, the Panel states that the temporary nature of the decrease was a factor in its analysis of the imports in that case since "a temporary change in the behaviour of the imports may not be sufficient to reverse an overall trend".[1441] In the present case of flat-rolled, however, there was solid evidence that these declines in imports were not temporary because they were directly the result of the anti-dumping and countervailing duties margins at high levels on hot-rolled.[1442] In fact, the six-month decline in imports in the interim period for line pipe contrasts with the two and one-half-year decline in flat-rolled imports in the present case. One final comment on the panel in *US – Line Pipe*. That Panel cited to the Appellate Body in *US – Lamb* as authority. However, the Appellate Body was addressing a separate question in that case of relative importance of domestic industry threat data over the period. The Appellate Body properly concluded in that case that, given the extraordinary nature of safeguard relief, the United States had to consider data during any time in the period that called into question whether the data actually demonstrated a threat of serious injury.[1443] Korea submits that this finding is not at all inconsistent with the Appellate Body holding in *Argentina – Footwear (EC)* that the condition of "increased imports" must be "present". Korea argues that the United States' tactic is to try to diminish the significance of *Argentina – Footwear (EC)*, but that decision is consistent with each and every subsequent decision by the Appellate Body concerning the Agreement on Safeguards, including *US – Lamb*. In every case, the Appellate Body has interpreted strictly the provision of the Agreement on Safeguards in light of the extraordinary nature of these actions. It is fundamental that increased imports must exist and must be present, or emergency action is no longer justified.[1444] [1445]

7.501 Finally, regarding trends and recent imports, in Korea's view, the United States implies that, for the complainants, the existence of an independent increased imports requirement excludes consideration of the relationship between increased imports and causation and serious injury. Korea submits that, in fact, it does not and the complainants have not made such a claim. The Agreement on Safeguards requires both a separate quantitative and qualitative analysis of increased imports and, if

[1440] United States' second written submission, para. 92.
[1441] Panel Report, *US – Line Pipe*, footnote 182 (in para. 7.210).
[1442] Korea's first written submission, paras. 81, 89-93; Korea's second written submission, para. 120.
[1443] Appellate Body Report, *US – Lamb*, paras. 136-138.
[1444] Korea's written reply to Panel question No. 14 at the second substantive meeting.
[1445] Korea's written reply to Panel question No. 14 at the second substantive meeting.

imports have increased, an analysis of the relationship between increased imports and causation and serious injury. The United States asserts that it is not possible or reasonable to analyse increased imports separate and apart from causation.[1446] Korea argues that that is contradicted by the language of Article 2.1 and by the Appellate Body precedents: In fact an analysis of "recent", "sudden", and "significant enough" explain the context, extent, and nature of the increase. In *Argentina – Footwear (EC)*, the Appellate Body found *no* increased imports and questioned why the panel had bothered to analyse causation.[1447]

7.502 Brazil would not categorically state that trends are more important than recent imports in an analysis of increased imports or vice-versa. Brazil submits that trends are obviously important because Article 2.1 specifies that imports must be increasing in order to impose safeguard measures and whether or not imports are increasing depends on the trend in imports. Trends are also important because they provide context for determining whether the increase in imports is sudden, sharp and significant. It is difficult, for example, to see how a uniform and gradual increase in imports over a 66-month investigative period could be sudden or sharp, although it might be significant. Thus, the increase must be viewed in the context of trends over the period of investigation. At the same time, recent imports are necessarily important in light of the fact that Article 2.1 refers to increased imports in the present tense – "is being imported". Recent imports, of course, must also be looked at in the broader context. Thus, in *US – Line Pipe* a brief decline in the absolute level of imports at the end of the period of investigation was not important in the broader context because imports remained at high levels and, even in the most recent period, continued to increase relative to domestic production.[1448] The importance of the most recent period would also seem to depend on how long that period is (three months, six months, one year) and whether it continued a trend or reversed a trend and, if so, how decisively. In other words, how important the most recent period is may depend on the particular facts of the period in question and the context.[1449]

7.503 The United States submits that the complainants' insistence on the importance of recent data, to the point of excluding trend analysis, is misplaced and overlooks a significant amount of Appellate Body and panel analysis indicating that both trends and recent imports must be considered. According to the United States, in *Argentina – Footwear (EC)*, the Appellate Body found that "it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the last five years".[1450] In *US – Lamb*, the Appellate Body cited the language from *Argentina – Footwear (EC)* but then found that, "although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation ... . [I]n conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period".[1451] Finally, the Panel in *US – Line Pipe* found that "the same considerations apply when it comes to which part of the period of investigation is the most relevant in a determination of increased imports".[1452] Both Appellate Body and panel reports endorse the idea that a competent authority must consider both trends throughout the period of investigation and recent imports. The panel in *US – Line Pipe* went on to reject Korea's claim that the USITC's finding of increased imports was inconsistent with Article 2.1.[1453] The USITC applied precisely the

[1446] United States' second oral statement, para. 38.
[1447] Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.
[1448] Brazil's first written submission, paras. 49-50.
[1449] Brazil's written reply to Panel question No.14 at the second substantive meeting.
[1450] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[1451] Appellate Body Report, *US – Lamb*, para. 138.
[1452] Panel Report, *US – Line Pipe*, para. 7.208.
[1453] Panel Report, *US – Line Pipe*, para. 7.214.

same analysis in its steel determinations as in its line pipe determination, namely, considering both trends and recent imports in its analysis.[1454] [1455]

(c) Rate and amount of the increase

7.504 Brazil and Japan claim that the competent authorities are required, under Article 4.2(a), to evaluate "the rate and amount of the increase in imports in absolute and relative terms". In order to be meaningful, this provision by necessity requires that imports have a positive rate of increase – that is, an acceleration.[1456] 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).[1457]

7.505 The United States objects to Japan's and Brazil's assertion that imports must be increasing at an accelerating pace.[1458] The dictionary definition of "rate" adduced by Japan as "speed of movement, change, etc.; rapidity with which something takes place" does not necessarily require an acceleration in the amount by which imports increase.[1459] The "rate" of an increase in imports can be stated by observing that imports increased by a certain percentage from one year to the next.[1460] The United States submits that, more importantly, Article 4.2(a) does not require an accelerating rate of increase.[1461]

(d) "Sharp" and "significant" increase

7.506 The European Communities argues that in addition to the above qualitative requirements for "increased imports", the Appellate Body has made clear that there is a quantitative criterion: the increase must be "sharp" and "significant". According to the European Communities, Japan and Norway, this requirement is derived from the expression "in such increased quantities" where "such" clarifies that not any increase is sufficient.[1462] The Agreement on Safeguards does not specify which particular rate of increase is sufficient to meet the requirement of a sharp and significant increase, but it obliges the competent authorities to correctly evaluate the trends in imports over a longer period. On the basis of a proper evaluation of such trends, panels can review whether import surges are sufficiently sharp and significant.[1463] China adds that the WTO standard is much higher than the simple demonstration of imports in increased quantities required by United States law.[1464]

7.507 China and Switzerland recall that safeguard measures are measures of extraordinary nature. These "emergency measures" do not allow a finding on increased imports where there has been such a

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[1454] Contrary to Korea's assertion at the second panel meeting, the panel in *US – Line Pipe* specifically endorsed the USITC's finding that subject imports had increased *absolutely* despite a recent decline in import volume. Panel Report, *US – Line Pipe*, para. 7.210.

[1455] United States' written reply to Panel question No.14 at the second substantive meeting.

[1456] *New Shorter Oxford English Dictionary* at 2481 (1993) (defines "rate" as "speed of movement, change, etc.; rapidity with which something takes place").

[1457] Brazil's first written submission, para. 123; Japan's first written submission, para. 182.

[1458] Japan's first written submission, para. 182

[1459] United States' first written submission, para. 181.

[1460] The word "rate" is defined as "a fixed relation (as of quantity, amount, or degree) between two things." *Webster's Third New International Dictionary*, p. 1884.

[1461] United States' first written submission, para. 218.

[1462] European Communities' written reply to Panel question No. 37 at the first substantive meeting; Japans' written reply to Panel question No. 37 at the first substantive meeting; Norway's first written submission, para. 83.

[1463] European Communities' first written submission, paras. 275-277.

[1464] China's first written submission, para. 223.

steady and gradual increase of imports over a longer period that the domestic industry could have adjusted to.[1465] New Zealand and Norway add that a "steady increase" could very well be the natural and foreseeable consequence of tariff concessions.[1466]

7.508 Brazil and Japan add that the increase in import volume must be "such" as – *i.e.*, sufficient – to cause or threaten serious injury to the domestic industry producing the like or directly competitive product. It would therefore be insufficient to find a minor increase in imports even if there were a 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.[1467]

7.509 New Zealand affirms that a Member wishing to impose safeguard measures thus faces a high threshold when making determinations with respect to increased imports. A competent authority must analyse the trend in imports over the period of investigation to establish that there is a sharp and sudden increase. It must also examine the direction of the most recent imports – any sharp sudden increase needs to have occurred in the "very recent past". Finally, it must consider the significance of any increase – both in quantitative and qualitative terms.[1468]

7.510 China and Japan also point out that the panel must asses whether the USITC explicitly demonstrated that increases in imports have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".[1469]

7.511 According to the United States, the Agreement on Safeguards does not set out absolute standards for how recent, sudden, sharp or significant an increase in imports must be. Indeed, the Agreement on Safeguards contains none of those descriptive terms. The Appellate Body's use of those terms can only have been intended to provide a shorthand exposition of the requirement that increased imports must ultimately be found to be enough to cause serious injury or threat to the relevant domestic industry.[1470]

7.512 New Zealand submits that the United States seems determined to divert attention from the "recent", "sudden", "sharp" and "significant" references of the Appellate Body. These references seem to disappear in the United States argumentation, replaced with an emphasis that imports must simply be "enough" with none of the adjectives employed by the Appellate Body to describe what really informs the test. The United States casts no real light on how the USITC could, on any reasonable basis, have arrived at a determination of increased imports. It is clear from the rapidity with which the United States follows its statement that there is no absolute standard[1471] to determine increased imports, with a statement that "an increase in either absolute or relative import levels alone" may suffice[1472], that the United States continues to be attached to the notion that "any increase" meets the standard.[1473]

[1465] China's first written submission, para. 216; Switzerland's first written submission, para. 249.
[1466] New Zealand's written reply to Panel question No. 42 at the first substantive meeting; Norway's written reply to Panel question No. 42 at the first substantive meeting.
[1467] Brazil's first written submission, para. 122; Japan's first written submission, para. 181..
[1468] New Zealand's first written submission, para. 4.76.
[1469] China's first written submission, para. 220; Japan's first written submission, para. 185.
[1470] United States' first written submission, para. 216.
[1471] United States first written submission, para 216.
[1472] Ibid, para. 217.
[1473] New Zealand's first written submission, para. 3.70.

7.513 The United States argues that the complainants misconstrue or ignore the Appellate Body and panel reports addressing the "increased imports" requirement of the Agreement on Safeguards. They misconstrue the Appellate Body's report in *Argentina – Footwear (EC)* by arguing that an increase in imports must be recent, sudden, sharp, and significant, according to some absolute standard. It is clear that there are no such absolute standards for how recent, sudden, sharp or significant the increase in imports must be. As the Appellate Body said, it is not a "mathematical or technical determination".[1474] The Appellate Body was very clear – the imports must be recent enough, sudden enough, sharp enough, and significant *enough* to cause or threaten serious injury. These are questions that are answered as competent authorities proceed with the remainder of their analysis (*i.e.*, with their consideration of serious injury/threat and causation). These analyses need not form a part of the evaluation of the threshold issue of whether the imports have increased either absolutely or relative to the domestic industry.[1475] The United States notes that Article 4.2(a) of the Safeguards Agreement (which the Appellate Body was interpreting when it spoke of "recent enough, sudden enough, sharp enough, and significant enough") encompasses the entire investigative responsibility of competent authorities under the Safeguards Agreement. The United States adds that the fact that the drafters of the Agreement on Safeguards did not intend to impose a specific "increased imports" standard is reinforced by a comparison with Article 5 of the Agreement on Agriculture, in which the drafters laid out specific numeric standards for measuring increased imports and setting specific measures for each level of imports.[1476]

7.514 The European Communities and Japan respond that they have not argued that a quantitative analysis is a purely mathematical or technical determination according to some absolute numerical standard. Rather, such determination should be made on a case-by-case-basis, by carefully analysing import trends in the most recent period and by contrasting them with trends in earlier parts of the investigation period.[1477] Japan adds that a competent authority must not declare that increased imports exist, for example, simply because imports have increased by some negligible amount over the period of investigation. There are quantitative and qualitative judgments to be made regarding the existence, as opposed to the effect, of increased imports.[1478] New Zealand adds that a "mathematical or technical determination" is in fact at the heart of the United States approach to "increased imports". Behind the United States position that "there is no minimum quantity by which imports must have increased; a simple increase is sufficient" is the notion that "any increase" can suffice.[1479]

7.515 Japan and Brazil respond that the qualitative and quantitative requirements concerning increased imports should be viewed within the context of the purposes of safeguard measures – that is "emergency action" against a product. The word "emergency" is defined as "a situation, especially of danger or conflict, that arises unexpectedly and requires urgent action; a condition requiring immediate treatment"[1480], implying something that has happened quickly or suddenly.[1481] Since the increase in imports is supposed to be causing serious injury, this would seem to imply more than an insignificant or small increase. While this aspect ultimately relates to the issue of causation, Korea and Brazil argue that it remains a threshold issue separate from the issue of causation; it concerns the extent of the increase rather than the effect of the increase.[1482] In contrast, the United States attempts

[1474] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[1475] United States' first written submission, para. 177.
[1476] United States' second written submission, para. 96.
[1477] European Communities' first written submission, para. 149; Japan's second written submission, para. 90.
[1478] Japan's first written submission, para. 90.
[1479] New Zealand's second written submission, para. 3.67.
[1480] The New Shorter Oxford English Dictionary (1993) at 806.
[1481] Japan's second written submission, para. 87.
[1482] Korea's first written submission, para. 91; Brazil's first written submission, paras. 52-53.

to collapse the "increased imports" requirement with the separate "causation test".[1483] According to New Zealand, the United States in effect says that the increased import requirement simply forms part of the causation analysis required under Article 4.2(b) of the Agreement on Safeguards. But there is no support to be found for this assertion in the law.[1484]

7.516 The United States responds that, on the contrary, the United States recognizes that the Agreement on Safeguards contains a separate "increased imports" requirement. However, unlike the complainants, the United States does not invest this requirement with more significance than is warranted by the text of the Agreement on Safeguards. This separate "increased imports" requirement is satisfied, in the first instance, by any increase in imports, absolute or relative to domestic production. However, this does not mean that ultimately "any increase will do". As competent authorities consider the other conditions necessary for imposition of a safeguard, they determine as directed by the Appellate Body in *Argentina – Footwear (EC)*, whether the increase in imports was recent enough, sudden enough, sharp enough, and significant enough to cause or threaten serious injury.[1485] The United States submits that for each of the products for which the United States applied a safeguard measure, the USITC found that the pertinent domestic industry was seriously injured or threatened with serious injury and found the requisite causal link between the increased imports and that injury or threat. This analysis, taken as a whole, established that the increases in imports were "recent enough, sudden enough, sharp enough, and significant enough"[1486] to cause serious injury or the threat of serious injury.[1487]

7.517 The United States also argues that the complainants seek to support their position that the increased imports requirement encompasses temporal, quantitative and qualitative conditions that are independent of the causation analysis by pointing to the fact that the Appellate Body addressed the question of increased imports as "a stand-alone issue" in *Argentina – Footwear (EC)*.[1488] The fact that the Appellate Body organized its Report in *Argentina – Footwear (EC)* in a certain way (i.e., with subheadings entitled "Increased Imports", "Serious Injury", and "Causation" – all under the heading of "Interpretation and Application of Articles 2 and 4 of the Agreement on Safeguards") does not detract from the fact that the Appellate Body was interpreting Article 2.1, which encompasses the entire investigative responsibility of competent authorities under the Agreement on Safeguards.[1489]

7.518 Korea submits that the reason emergency action is permitted under the Agreement on Safeguards is that the unforeseen and sudden increase in imports is still occurring – *i.e.*, the need for emergency action is still present.[1490] Korea also argues that high volume imports having a significant presence in the market, if they are not suddenly and sharply increasing, either absolutely or relatively, cannot serve as a basis for concluding that an "emergency" exists caused by the imports. There is nothing extraordinary about import levels *per se*.[1491]

7.519 The European Communities submits that the term "in such quantities" read contextually with "as a result of unforeseen developments" and "emergency action", requires some extraordinary and unexpected increase in import volumes which must be established by comparing recent import

[1483] Korea's first written submission, para. 90.
[1484] New Zealand's second written submission, paras. 3.60-61.
[1485] United States' second written submission, para. 93.
[1486] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[1487] United States' second written submission, para. 94.
[1488] Japan's written reply to Panel question No. 36 at the first substantive meeting.
[1489] United States' second written submission, para. 97.
[1490] Korea's first written submission, para. 93.
[1491] Korea's first written submission, para. 110.

volumes against those in earlier parts of the investigation period.[1492] China argues that the United States attempts to create confusion between the requirement that a product is being imported in increased quantities, on the one hand, and the requirement that the increased imports cause or threaten to cause serious injury, on the other. According to the European Communities, China and Norway, the Appellate Body has clearly stated, in *Argentina – Footwear (EC)*, that there are three separate conditions to be met for the application of safeguard measures[1493], hence the increased imports requirement should be subject to separate analysis and determination.[1494] The European Communities adds that the analysis of whether there is a substantial and genuine link between increased imports and serious injury is qualitatively something different than showing an abnormal import development.[1495]

7.520 Japan adds that a comparison is required, not so much to determine the effect of increased imports in a causal sense, but to determine the existence of increased imports in light of the relative trends in imports. The comparison is made between recent import trends, which are at the heart of the increased imports inquiry, and import trends over the entire period of investigation. It serves as a litmus test to determine if an emergency exists and, therefore, if emergency action is required.[1496]

7.521 The European Communities and Switzerland further argue that the more gradual and steady or otherwise "normal" and foreseeable an increase in imports becomes, the higher is the burden for a WTO Member wishing to take a safeguard measure to analyse import volumes and explain to its trading partners why it considers that their exports have increased more than expected.[1497]

3. Requirement of reasoned and adequate explanation

7.522 Korea adds that, at a minimum, Articles 2.1 and 4.2(a) of the Agreement on Safeguards required the USITC to explain and reconcile its conclusion that imports had increased with the fact that imports were declining.[1498]

4. Case-specific arguments

(a) Consideration of 2001 data

(i) Full-Year 2001 data

7.523 The European Communities, China[1499], Norway[1500] and Switzerland[1501] further argue that the USITC ignored import trends in the most recent past, i.e. 2001. The import data for the full year of 2001 were available when the USITC updated its Report and completed its determination in February 2002, but there is no explanation why the USITC did not use this information about crucial developments, i.e. import decreases, in the "very recent past". These data are relevant for determining

[1492] European Communities' first written submission, para. 156; European Communities' written reply to Panel question No. 4 at the second substantive meeting.
[1493] Appellate Body Report, *Argentina – Footwear (EC)*, para.92.
[1494] European Communities' first written submission, paras. 157-160; China's first written submission, paras. 83-85; Norway's second written submission, paras. 81-82.
[1495] European Communities' first written submission, para. 160.
[1496] Japan's second written submission, para. 82.
[1497] European Communities' first written submission, para. 166; Switzerland's first written submission, para. 76.
[1498] Korea's first written submission, para. 73.
[1499] China's first written submission, para. 231.
[1500] Norway's first written submission, para. 255-256.
[1501] Switzerland's first written submission, para. 247.

whether a product still "is being imported …".[1502] In any event, according to the European Communities and Japan[1503], the full year data for 2001 were available to the President when he took the decision to impose the safeguard measures.[1504] They had to be taken into account even if they had not been available to the USITC[1505] and, according to Brazil, the European Communities and New Zealand[1506], they confirmed the decreases already present in interim 2001[1507], and showed that they were no temporary phenomenon.[1508]

7.524 According to the United States, fundamental legal and practical considerations should lead the Panel to reject the complainants' attempts to expand the period of investigation to encompass full-year 2001 data that are not on the record of the USITC's investigation that began in early July 2001. The United States submits, first, that to the extent that the complainants are suggesting that the USITC should have relied on full-year 2001 data without giving interested parties an opportunity to comment on those updated data, the complainants' position is directly at odds with Article 3.1 of the Agreement on Safeguards.[1509]

7.525 The United States points out that if the USITC had updated the import data to include full-year 2001 figures, it would also have had to update all the data in the record, including data concerning injury and causation because increased imports must be examined in the context of their effects on the domestic industry. By the time that this could have been accomplished, full-year 2001 data would no longer be the most current. Thus, the complainants' proposed use of full-year 2001 data would have required an endless process of updating data that would preclude any final decision in a safeguards investigation. The United States submits that it is obvious that competent authorities must be permitted to set the end of a period of investigation at a point that will permit them to gather, compile and analyse not only import data but also information concerning the condition of the domestic industry and the overall market environment. It is also clear that in setting the end of the period of investigation at 30 June 2001, the USITC was gathering the most recent information it could.[1510]

7.526 The United States adds that the complainants are also wrong in suggesting that, even if the USITC could not, the President should have taken into account full-year 2001 data. Such an approach would sever the connection between the investigation by a Member's competent authorities and the Member's decision to take a safeguard measure. This would be inconsistent with the fundamental premise of the Agreement on Safeguards that a measure should only be taken following a proper investigation by a Member's competent authorities.[1511]

(ii) Interim 2001 data

7.527 New Zealand sees no need to rely on 2001 full-year data to make its case. Annualized 2001 import volume data based on the interim 2001 data[1512] recorded in the USITC Report should have

[1502] European Communities' written reply to Panel question No. 38 at the first substantive meeting; Norway's written reply to Panel question No. 38 at the first substantive meeting.
[1503] Japan's written reply to Panel question No. 38 at the first substantive meeting.
[1504] European Communities' first written submission, para. 284-286.
[1505] Japan's written reply to Panel question No. 39 at the first substantive meeting.
[1506] New Zealand's written reply to Panel question No. 38 at the first substantive meeting.
[1507] European Communities' written reply to Panel question No. 39 at the first substantive meeting.
[1508] Brazil's written reply to Panel question No. 38 at the first substantive meeting.
[1509] United States' first written submission, para. 202-204.
[1510] United States' first written submission, paras. 205-206.
[1511] United States' first written submission, para. 207.
[1512] Interim 2001 data divided by first half interim 2000 data multiplied by full year 2000 data.

indicated to the USITC by the middle of 2001 the sharply decreasing trend in import volumes and market share.[1513] These annualized trends were, as it turned out, almost exactly matched by the full year 2001 data which was available at the time the two Supplementary Reports were made by the USITC.[1514] [1515]

7.528 Similarly, the European Communities notes that the United States accepts that full year 2001 data was available to the USITC when it considered for the first time whether non-FTA imports had increased, i.e., in February 2002. However, the United States denies that the Second Supplementary Report was a "determination" within the meaning of Article 2.1 of the Agreement on Safeguards and submits that the USITC's determination for the purpose of the Panel's review were the determinations on pages 1, 17 and 18 of the original USITC Report issued on 22 October.[1516] The European Communities submits that even if the Panel agreed with the United States that full year 2001 data was not available when the USITC made its "determination", the use of "full year 2001" data is not "critical" to the complainant's case. The European Communities built its case on the lack of proper consideration of the most recent import data available, be it interim 2001 or full year 2001. Upon "clarification" by the United States that only the USITC Report from October 2001 forms the relevant determination, the graphs illustrating the import trends provided by the complainants in common Annex A to the first written submission were revised so as to strictly reflect only annualized interim 2001 data that was available to the USITC at the time of the original report in October 2001. The European Communities explains that annualizing the interim 2001 data does not mean to "double" them.[1517] The European Communities annualized the interim 2001 data according to the following formula: annualized interim 2001 = (interim 2001/interim 2000) x full year 2000. The European Communities submits that this approach fully preserves the USITC's assumption of seasonal fluctuations and essentially compares interim 2001 data with interim 2000 data, as was done by the USITC during the investigation, while allowing to fit the resulting trend onto a yearly graph and therefore to discern an overall trend.[1518]

7.529 Brazil submits that the 2001 data points can be represented in various ways. Given that the United States had full 2001 data while it was both still considering whether to impose safeguard measures and obtaining additional information from the USITC, one could rely on actual 2001 data. In the alternative, one could construct a surrogate for full year 2001 data in various ways, including deriving the second half of 2001 based on actual first half 2001 data adjusted by the ratio of first and second half 2000 data. Brazil submits that what is important is not how it is done, but why. The objective is to determine how import levels during the first half of 2001, the interim period, compared with import levels during the entire period of investigation. Because import levels for 1996, 1997, 1998 and 1999 are only provided based on annual levels, in order to measure the magnitude of interim 2001 imports, it is necessary to convert these imports into a full year equivalent basis in order to put interim 2001 import levels in the proper context.[1519]

[1513] New Zealand's first written submission, Figures 2 and 3 (p. 50).

[1514] Compare New Zealand's first written submission, Figure 2 (p. 50) with the European Communities' first written submission, Figure 5 (para 299).

[1515] New Zealand's first written submission, para. 3.71.

[1516] The European Communities disagrees with the United States and submits that because the October 2001 USITC Report only analyzed imports from all sources, the determination violates the parallelism principle. See European Communities' second written submission, paras. 40-51, 186.

[1517] United States' oral statement at the second substantive meeting, para. 41; European Communities's second written submission, para. 188; European Communities's written reply to Panel question No. 16 at the second substantive meeting.

[1518] European Communities' written reply to Panel question No. 16 at the second substantive meeting.

[1519] Brazil's written reply to Panel question No. 16 at the second substantive meeting.

7.530 According to the United States, interim data was available to the USITC in the course of the investigation, and interim data was used by the USITC. The United States submits that no complainant has been able to show that a competent authority is required to do more than the USITC did in gathering or using the most recent and complete data set available at the time the determinations were made. Interim data for 2001 should be compared to interim data for 2000, while interim data should be segregated from full-year data. With regard to the argument by the European Communities that "annualizing" interim data would preserve the proportionate relationship between interim 2000 data and interim 2001 data while allowing them to be placed on the same chart as annual data, the graphic representation would suggest that the "annualized" 2001 data were comparable to full year 1996, 1997, 1998, 1999, and 2000 data, the United States submits that that is simply not the case.[1520]

7.531 While the USITC gathered data for the first half of 2001 (interim 2001), in the European Communities' and Switzerland's view, it did not properly consider them.[1521] Whenever the interim 2001 data showed a decrease, the weight was given to the 1996-2000 development. This general approach could not, in itself, demonstrate that imports are "being imported" in increased quantities.[1522]

7.532 The United States argues that the complainants' criticism that the USITC failed to give enough weight to interim 2001 import data when these showed a decrease in imports is unfounded. An exclusive focus on import data in interim 2001 would disregard the annual data in preceding years, and the trends examined must cover the entire period of investigation.[1523]

7.533 The European Communities further submits that the USITC's approach does not explicitly analyse the intervening decreasing trends discernible from 2001 data and does not give an adequate and reasoned explanation why such development would still justify a determination that imports remain at "such increased quantities". Instead, the USITC did nothing more than describing the 2001 interim data or stating that despite the decrease in the interim data, the statutory criterion was still satisfied.[1524]

7.534 China contends that it was not possible for the USITC to consider the very last portion of the period of investigation when determining trends in imports because the amount of imports for a half-year period cannot be compared to the amount of imports for a full-year period. It would also be false to assume that a trend in imports can be determined for the very last portion of the period of investigation by comparing interim 2001 with interim 2000. China submits that this comparison can only reveal whether the amount of imports during the first half of 2001 was more or less important than the amount of imports 12 months earlier, but not what happened between the two periods and how imports fluctuated over the period of the last 18 months, which would be necessary in order to determine a trend. Hence, the USITC did not give most recent imports all the importance that they deserved.[1525] China notes that it is not suggesting that the United States should have disregarded the 2001 data. Indeed, the 2001 data constitute the most recent data and China is of the opinion that the USITC should have given proper attention to the most recent trends which, for most of the products, as for instance CCFRS, show a clear declining trend. However, China is of the view that the United

[1520] United States' written reply to Panel question No. 16 at the second substantive meeting.
[1521] United States' written reply to Panel question No. 16 at the second substantive meeting.
[1522] European Communities' first written submission, para. 280, 287; Switzerland's first written submission, para. 247.
[1523] United States' first written submission, para. 196.
[1524] European Communities' first written submission, para. 182; European Communities's second written submission, paras. 169-182.
[1525] China's first written submission, para. 227-231.

States should have considered the full year data for 2001, since the final determinations were made after the end of 2001 at a time were full-year data for 2001 were available. In doing so, the United States would have allowed to analyse the overall trend and to verify the USITC's assumption of seasonal fluctuations, which is used to justify the comparison between interim 2000 and 2001 data.[1526]

7.535 The European Communities also argues that the 2001 data (full year or interim) constitute the most recent data and are decisive to determine whether products "are being imported" at increased quantities. The European Communities considers that the USITC failed to give proper weight to the interim 2001 data.[1527] Brazil submits that the interim 2001 data is extremely important for two reasons. First, it confirms that the downward trend in CCFRS imports begun in 1999 continued and, in fact, accelerated, toward the end of the period of investigation. Second, it confirms that CCFRS imports at the end of the period of investigation had reached the lowest level of the entire investigation period. Given that interim 2001 was the most recent period investigated by the USITC, Brazil sees no basis for ignoring the import levels during this period. Furthermore, since the period encompassed a full six months and the declines during the period followed declines in imports during the immediately preceding semi-annual period, the sharp decline shown in CCFRS imports during the interim period cannot be considered either temporary or an aberration.[1528] Korea notes that the fact that 2001 is "interim" does not prevent a direct comparison of imports relative to production – the percentages are directly comparable. Moreover, the fact that the period is six months in length does not prevent a meaningful analysis of the import data *per se*. In the case of flat-rolled, the interim data is particularly telling.

(b) Period of investigation

7.536 The European Communities and Norway[1529] argue that the choice of 1996 as a base year apparently served the purpose of disguising significant and steady decreases in imports for eight of the ten product groups since a peak in 1998 or later. With very few exceptions, the USITC does not rely on the trends over the years between 1996 and 2001.[1530] [1531] New Zealand argues that the USITC manifestly failed to consider trends throughout the period of investigation.[1532] China adds that the USITC's approach, in line with its tradition, of considering import trends over the most recent five and a half-year period prevented the USITC from considering fully the most recent imports.[1533]

7.537 The United States argues that the complainants' assertion that the USITC selected 1996 as a base year in order to achieve a particular result has no merit. The USITC followed its established practice in safeguards investigations of using a period of investigation of five years plus whatever interim period is available.[1534] The United States also rejects China's assertion that the USITC's period of investigation prevented the USITC from "considering fully the most recent imports"[1535] The

[1526] China's written reply to Panel question No. 15 at the second substantive meeting.
[1527] European Communities's first written submission, para. 284 and 287; European Communities' written reply to Panel question No. 15 at the second substantive meeting.
[1528] Brazil's written reply to Panel question No. 15 at the second substantive meeting.
[1529] Norway's first written submission, para. 254.
[1530] The only two exceptions are the findings on certain tubular products, and certain carbon alloy fittings and flanges, the only products for which the 2001 data did not reveal a manifest decrease in imports and therefore supported the predetermined conclusion. USITC Report, Vol. I, pp. 157 and 171.
[1531] European Communities' first written submission, paras. 280 and 283.
[1532] New Zealand's first written submission, para. 4.78.
[1533] China's first written submission, paras. 224 and 226.
[1534] United States' first written submission, para. 194.
[1535] China's first written submission, para. 226.

period of investigation must be long enough to draw appropriate conclusions regarding the state of the domestic industry.[1536]

7.538 China responds that the methodology of investigating the last five and a half years does not allow meaningful conclusions to be drawn as far as the assessment of increased imports is concerned.[1537]

7.539 The United States objects to the view that the USITC's practice of reviewing imports over a five-year period precludes the USITC from considering trends within that period, including recent trends in imports, as directed by the Appellate Body in *Argentina – Footwear (EC)*.[1538] As an initial matter, the panel in *US – Line Pipe* has already upheld the USITC's use of a five-year period of investigation because it allows an analysis of recent trends in imports, consistent with the Appellate Body's rulings.[1539] Moreover, the record demonstrates that for each of the ten measures at issue in this proceeding, the USITC in fact examined trends within the five-year period, including recent trends in imports.[1540]

7.540 The complainants respond that the United States has misunderstood them. The complainants contest the failure to properly consider intervening trends and the failure to show that where, unusually, imports did increase, this was extraordinary and unexpected.[1541]

(c) Method of analysis of increased imports

(i) Quantitative analysis required?

7.541 The European Communities claims that the United States was not entitled to content itself with finding a "simple increase" in imports as opposed to a sudden, sharp and significant or otherwise extraordinary surge in imports. The complete lack of a quantitative analysis particularly affects the two exceptional cases where imports had increased (tubular products and fittings and flanges). The USITC should have explained why imports should have been considered to have increased sharply and significantly enough, as opposed to merely gradually, so as to cause or threaten to cause serious injury to the domestic industry.[1542] New Zealand argues that the USITC manifestly failed to place any weight on the extent to which increased imports have been "recent enough, sudden enough, sharp enough, or significant enough both quantitatively and qualitatively" to justify a positive determination.[1543] Norway and Switzerland also point to a flaw in the USITC's methodology affecting the findings concerning all products resulting from the lack of a quantitative analysis. Nowhere has the USITC demonstrated that an alleged increase of imports was sharp and substantial.[1544]

7.542 The United States argues that the complainants' position that the USITC failed to engage in an adequate "quantitative analysis" of the import data is unfounded. Competent authorities are not required to analyse the import data in every possible permutation when the data speak for themselves. The USITC described the import data in a clear and straightforward manner and, accordingly, acted in

[1536] United States' first written submission, para. 195.
[1537] China's second written submission, para. 100.
[1538] Appellate Body Report, *Argentina – Footwear (EC)*.
[1539] Panel Report, *US – Line Pipe*, para. 7201.
[1540] United States' second written submission, para. 25.
[1541] European Communities' second oral statement "Scope and Standard of Review" on behalf of the complainants, para. 16.
[1542] European Communities' first written submission, paras. 288-289.
[1543] New Zealand's first written submission, para. 4.78.
[1544] Norway's first written submission, paras. 252, 259; Switzerland's first written submission, para. 249.

conformity with the Agreement on Safeguards. The United States submits that the complainants erroneously support their arguments by focusing only on the "Increased Imports" section for each product in the USITC Report. This section, however, must be read together with the "Serious Injury" and "Substantial Cause" sections, to evaluate the USITC's determination that a product is "being imported … 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".[1545]

7.543 In counter-response, Korea submits that the USITC completely failed to conduct a quantitative and qualitative analysis showing that import surge was of such a *nature* as to cause serious injury or threat thereof.[1546] For the counter-responses of the European Communities, see sections F.2.(b) and (d).

(ii) End-point analysis

7.544 The European Communities, Norway[1547] and Switzerland[1548] contend that the USITC applied an erroneous methodology for evaluating increased imports, rendering all findings on increased imports inconsistent with Article 2.1 of the Agreement on Safeguards. The USITC's methodology as applied in this case only aimed at finding a "simple increase" in imports at some point during the investigation period without considering whether such increase was sufficiently recent, sudden, sharp and significant.[1549] Korea argues that this basically turns the "increased import" requirement into a mere "import" requirement.[1550] The European Communities, New Zealand, Norway and Switzerland argue that the USITC failed to focus on the most recent past and to find a sudden and recent increase, but rather based its determinations on an end-point-to-end-point comparison of import data from 1996 and 2000.[1551] [1552]

7.545 The United States claims that for each of the ten steel products with respect to which it has taken a safeguard measure, the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were imports in such increased quantities, and under such conditions, as to cause or threaten serious injury to the domestic industry.[1553]

7.546 According to the United States, the complainants' claims that the United States made methodological errors are without merit. First, the USITC did not engage in a simple-end point analysis of comparing import data in 1996 with import data in 2000, and it did not fail to consider intervening movements or trends in imports over the entire period of investigation. The USITC considered trends in imports over the entire period of investigation for each product, often stating the absolute and relative imports for each year of the period of investigation and for the interim periods.[1554]

[1545] United States' first written submission, para. 198-199.
[1546] Korea's first written submission, para. 106.
[1547] Norway's first written submission, para. 250.
[1548] Switzerland's first written submission, para. 250.
[1549] European Communities' first written submission, para. 143.
[1550] Korea's first written submission, para. 98.
[1551] USITC Report, Vol. I, pp. 49, 71, 91, 101, 109, 157, 171, 205, 213, and 234.
[1552] European Communities' first written submission, paras. 280, 282-283; New Zealand's first written submission, para. 4.78; Norway's first written submission, paras. 252-254; Switzerland's first written submission, paras. 243, 245.
[1553] United States' first written submission, paras. 221, 232, 246, 255, 266, 276, 288, 302, 317.
[1554] United States' first written submission, para. 193.

7.547 The European Communities responds that the United States misconstrues its claim as attacking the end-point-to-end-point analysis as opposed to the USITC's failure to systematically consider import trends. The United States has not indicated where the USITC has systematically calculated and compared the rate and amount of annual developments in accordance with the Articles 2.1 and 4.2 of the Agreement on Safeguards as interpreted by the Appellate Body. Such analysis is the basis for adequately considering intervening trends at the sensitive end points of the period of investigation and whether import volumes are abnormal.[1555]

(d) Consideration of decline in imports

7.548 Norway adds that the investigation period in *Argentina – Footwear (EC)* was 1991-1995, and the Appellate Body rejected the analysis presented by Argentina, as it did not adequately consider the steady and significant decline in imports beginning in 1994.[1556] Norway submits that this is the same situation as that in the present case, with increases for most product groupings from 1996-1998, and steady and significant declines in 1999, 2000 and interim 2001.[1557] Korea adds that the Appellate Body in *Argentina – Footwear (EC)* clarified that an increase in imports at one point in the investigation period cannot justify a safeguard measure if there has been a steady and significant decline ever since.[1558] [1559]

(e) Aggregation of products

7.549 The European Communities and Norway criticize the USITC's findings on increased imports because the safeguard measures applied by the United States are based on data relating to broader categories of products than those to which safeguard measures apply.[1560]

5. Measure-specific argumentation

(a) CCFRS

7.550 The European Communities considers that the United States violated its obligations under Articles 2.1, and 3.1 of the Agreement on Safeguards by imposing safeguard measures on plate, hot-rolled steel, cold-rolled steel, coated steel and slabs despite a recent, sharp and significant decrease in imports both as a single bundle, or "Certain Flat Steel, other than Slabs", or with respect to each separate product.[1561]

7.551 The United States argues in response that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were imports of CCFRS in such increased quantities, and under such conditions, as to cause serious injury to the domestic industry.[1562]

(i) Aggregation

[1555] European Communities' first written submission, paras. 272-274 and 289; European Communities' second written submission, paras. 190-192.

[1556] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

[1557] Norway's second written submission, para. 93.

[1558] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 128-129.

[1559] Korea's first written submission, para. 101.

[1560] European Communities' first written submission, para. 290; Norway's first written submission, para. 260.

[1561] European Communities' first written submission, para. 293.

[1562] United States' first written submission, para. 221.

7.552 The European Communities submits that the United States has not explained why the evidence underlying the increased import determination has been provided on the basis of the "imported product" entitled "Carbon & Alloy Flat Products" as identified by President Bush[1563], although data was collected for seven different sub-groupings. Equally contradictory is the fact that the analysis and findings concerning increased imports in the USITC Report were based on one CCFRS product, while the increased imports determination by contrast, was based on five different product groupings.[1564] [1565] Brazil, China, the European Communities and New Zealand argue that no matter how the USITC aggregates the five different flat products, under no circumstances has it demonstrated a recent, sudden, sharp and significant increase in imports for the five products plate, hot-rolled steel, cold-rolled steel, coated steel and slabs neither as a single bundle, nor for "Certain Flat Steel, other than Slabs", nor for each separate product.[1566]

7.553 Similarly, Korea argues that the USITC's analysis of increased imports is flawed because it is not based on the proper like product for the five flat-rolled products. The USITC should have analysed imports of (1) slabs, (2) hot-rolled steel, (3) cold-rolled steel, (4) coated steel, and (5) plate as individual like products. However, even if "flat-rolled" products are analysed as a single like product, imports of flat-rolled steel have not increased suddenly, sharply, or recently.[1567] According to Korea, the USITC's erroneous like product analysis obscured the fact that cold-rolled, coated, and plate – even an end-point-to-end-point analysis – showed no absolute or relative increase in imports within the meaning of the Agreement on Safeguards. The entire increase in the end-to-end point comparison for certain flat-rolled was due to a moderate increase, over five years, of hot-rolled and slab, but both had declined significantly in the period preceding the USITC's decision.[1568] New Zealand argues that products falling within the certain carbon flat-rolled category were not, either separately or in aggregate, being imported in the increased quantities contemplated by the Agreement on Safeguards as a condition for the application of a safeguard measure. The USITC's determination in this matter is manifestly flawed.[1569] China adheres to the arguments made by other complainants with regard to the product included in the category of certain flat steel, taken separately.[1570]

7.554 In addition, the European Communities points out that it is not for the complainants or the Panel to analyse increased imports separately in respect of the individual product groups for which the two safeguard measures applying to "Certain Flat Steel" are imposed. Nevertheless, according to the European Communities, Brazil and New Zealand, it can be demonstrated that even when considered separately, there is no basis for concluding that imports of these product groups have increased recently, suddenly, sharply and significantly. Instead, both in absolute and in relative terms, they showed a sharp decrease.[1571]

7.555 New Zealand points out that total import volumes for plate decreased 52% between 1996 and 2001 and the ratio of imports to domestic production dropped 20% during the same period. Imports of cold-rolled steel increased slightly in absolute terms during the period of investigation, but there has been a significant and sustained downward trend since 1998. The quantities of imports relative to

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[1563] USITC Report, Vol. II, Table Flat 3.

[1564] USITC Report, Vol. I, p. 1

[1565] European Communities' first written submission, para. 196.

[1566] China's first written submission, paras. 245-246.; European Communities' first written submission, para. 293; Brazil's first written submission, para. 133; New Zealand's first written submission, para. 3.69.

[1567] Korea's first written submission, para. 74.

[1568] Korea's first written submission, paras. 88-89.

[1569] New Zealand's first written submission, para. 4.77.

[1570] China's first written submission, para. 250.

[1571] European Communities' first written submission, paras. 305-308; Brazil's first written submission, paras. 134-135; New Zealand's first written submission, para. 4.87.

domestic production remained almost constant between 1996 and 2000, but decreased by approximately 30% between 1998 and 2000. Imports of coated steel have declined steadily and significantly since 1999, and the 2001 data reveals an overall decrease in imports in both absolute and relative terms since 1996. Import trends for slab show that although there was an increase in imports in 1999 and 2000, in 2001 imports decreased by 25% as compared with those two previous years and by 10% if compared to 1996.[1572]

7.556 Brazil adds that on the basis of full-year 2001 data, each of the individual flat-rolled products also continued to decline.[1573] Cold-rolled products were the only exception, due to an anti-dumping investigation in 2000 which artificially drove imports down.[1574]

7.557 The United States responds that the complainants raise arguments about the import data for items for which a separate injury determination was not made.[1575] Given the USITC's like product determinations, the USITC was not required to make separate increased import determinations for slab or corrosion-resistant steel, and the trends for those products are not relevant to whether the USITC's analysis of the increase in imports for certain carbon flat-rolled steel was consistent with Article 2.1.[1576]

7.558 Korea also claims that the USITC's investigation of increased imports for flat-rolled products falls far short of the reasoned and adequate explanation of how the underlying facts support its determination as required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards. The USITC had an obligation to explain its conclusion that imports increased in light of the data which directly conflicts with that conclusion.[1577]

(ii) "Increased imports" within the meaning of the Agreement on Safeguards?

7.559 Japan and New Zealand argue that the USITC acknowledged, but ignored, the fact that import volume declined 40% between the first half of 2000 and the first half of 2001.[1578] [1579] China, the European Communities and Korea[1580] point out that, at the time the President of the United States took his decision, the full year 2001 data were available and confirmed that imports had even fallen to levels below 1996.[1581] Since the most important increase occurred in 1998, three years before the imposition of the safeguard measures, and was immediately followed by an important decline, China and Korea believe that increased imports were certainly not recent enough. They also were not sharp and significant enough.[1582]

7.560 Korea submits that imports of flat-rolled declined by roughly 18% between 1998 and 1999. Imports then remained at 1999 levels in 2000, showing a statistically insignificant increase (0.3%). Imports then proceeded to decline to their lowest point in the period in the first six months of 2001. Korea submits that it is the complainants' position that a statistically insignificant increase in imports

[1572] New Zealand's first written submission, paras. 4.88–4.92
[1573] Brazil's first written submission, paras. 139-143.
[1574] Brazil's first written submission, para. 144.
[1575] Brazil's written reply to Panel question No. 41 at the first substantive meeting.
[1576] United States' second written submission, para. 107.
[1577] Korea's first written submission, para. 87.
[1578] Korea's first written submission, paras. 49-50.
[1579] Japan's first written submission, para. 190; New Zealand's first written submission, para. 4.83.
[1580] Korea's first written submission, para. 82.
[1581] China's first written submission, para. 241; European Communities' first written submission, para. 298.
[1582] China's first written submission, para. 247; Korea's first written submission, paras. 77-78.

in 2000 is not an "increase" for purposes of the Agreement on Safeguards when analysed both quantitatively and qualitatively. Those imports were preceded by a deep decline and followed by a deeper decline.[1583]

7.561 The United States affirms that the USITC found that imports of CCFRS increased both on an absolute and a relative basis. The USITC focused its analysis on the surge in imports of CCFRS in 1998, the effects of that surge (which continued to reverberate throughout the remainder of the period of investigation) and on the continuation of imports at elevated levels in 1999 and 2000. In absolute terms, imports increased from 18.4 million short tons in 1996 to 20.9 million short tons in 2000. In 1998 there was a rapid and dramatic increase, with imports rising to 25.3 million short tons, an increase of 37.5% over 1996 levels. While the volume of imports declined in 1999 and 2000, it remained significantly higher in those years than at the beginning of the period of investigation.[1584] On a relative basis, imports rose from the equivalent of 10.0% of domestic production in 1996 to 10.5% in 2000.[1585] [1586]

7.562 The European Communities also argues that the relative import finding is as flawed as the determination for actual imports.[1587] The European Communities, China and Korea submit that in addition to ignoring the steady and significant decline since 1998, a 0.5% increase in the ratio in five years is, also in Korea's and China's view[1588], simply not sharp and significant enough to cause or threaten to cause serious injury.[1589] According to Brazil, this increase is nominal at best.[1590] China asserts that the relative increase during 1998 was quickly compensated the following year when imports were back to normal. Ever since, imports in relative terms remained at levels which were very close to those of 1996 and 1997.[1591]

7.563 As regards the degree of the relative increase in imports, the United States points out that an increase in either absolute or relative import levels alone may satisfy Article 2.1 of the Agreement on Safeguards.[1592]

7.564 In counter-response, Korea submits that if the language in *Argentina – Footwear (EC)* is to mean something (*e.g.*, how much is "enough?")[1593], then absolute and relative increases must be put into context. The USITC, however, has not done so.[1594] In fact imports as a percentage of production have declined for the last two and a half years of the period of investigation and imports relative to production at the end of the period is the lowest of the entire period.[1595]

(iii) The USITC's method of analysis

[1583] Korea's written reply to Panel question No. 14 at the second substantive meeting.
[1584] USITC Report, pp. 49-50.
[1585] USITC Report, p. 50.
[1586] United States' first written submission, paras. 208-210.
[1587] European Communities' first written submission, paras. 300-302.
[1588] Korea's first written submission, paras. 84-85; China's second written submission, para. 107.
[1589] China's second written submission, para. 107; European Communities' first written submission, paras. 300-302; Korea's first written submission, paras. 84-85.
[1590] Brazil's first written submission, para. 132.
[1591] China's first written submission, paras. 242, 248.
[1592] United States' first written submission, para. 217.
[1593] United States' first written submission, para. 216.
[1594] Korea's first written submission, para. 118.
[1595] Korea's first written submission, para. 119.

Trends

7.565 The European Communities recalls the USITC finding that imports increased "from 18.4 million short tons in 1996 to 20.9 million short tons in 2000, an increase of 13.7 percent".[1596] The USITC also acknowledged that the "volume of imports declined in 1999 and 2000" from the peak in 1998[1597], and that this decrease continued, given that imports "declined from 11.5 million short tons in interim 2000 to 6.9 million short tons in interim 2001".[1598] The European Communities, Korea and Japan contend that the USITC ignored the general methodology of evaluating trends, suggested by the Appellate Body in *Argentina – Footwear (EC)*, and that the situation for flat steel products closely resembles the one already ruled out in that case as a sudden and recent increase in imports.[1599] China adds that if the USITC believed that the decreasing trend of imports did not prevent it from finding that there were increased imports pursuant to Article 2.1 of the Agreement on Safeguards, it had to give a reasoned and adequate explanation to support this finding and it did not do so by simply stating that imports were still "significantly" higher in 1999 and 2000 than in 1996.[1600]

7.566 The United States also rejects the assertion that the import trends in *Argentina – Footwear (EC)* were the same as those for CCFRS in this case. In *Argentina – Footwear (EC)*, there was a steady decline in imports for two years, following an increase earlier in the period of investigation.[1601] Thus, it was possible to discern a declining trend. In this case, by contrast, there was a three-year increase in imports, with a dramatic surge in 1998, followed by a decline in imports from 1998 to 1999, but then there was levelling off and even a slight increase in 2000, which is no clear declining trend.[1602] The United States submits that import levels in 1999 and 2000 remained well above pre-surge levels and in fact rose slightly between 1999 and 2000. According to the United States, this hardly constitutes a steady decline; rather, this pattern meets the definition of "is being imported in such increased quantities" as that phrase was interpreted by the panel in *US – Line Pipe*.[1603] [1604]

7.567 The European Communities, Japan, Korea and Brazil respond that there is no basis to conclude that imports had only temporarily and recently declined and remained at sharply increased levels, the basis for the finding of increased imports endorsed by the Panel in *US – Line Pipe*. The data show a sustained 30-month period of decline, ending with imports at the lowest level during the entire five and a half year period investigated by the USITC.[1605] While one can argue the nuances of *Argentina – Footwear (EC)*, *US – Line Pipe* and *US – Lamb*, in fact there are no nuances in the import

[1596] USITC Report, Vol. I, p. 49.
[1597] USITC Report, Vol. I, p. 50.
[1598] USITC Report, Vol. I, p. 49.
[1599] European Communities' first written submission, paras. 294-297; Korea's first written submission, para. 80; Japan's first written submission, paras. 195-196.
[1600] China's first written submission, para. 244.
[1601] The data in *Argentina – Footwear (EC)* were as follows:

	1991	1992	1993	1994	1995
Total imports (million pair)	8.86	16.63	21.78	19.84	15.07
Relative Imports	12%	22%	33%	28%	25%

Source: Panel Report, *Argentina – Footwear (EC)*, paras. 8.151 and 8.273.

[1602] United States' first written submission, para. 215.
[1603] Panel Report, *US – Line Pipe*, para. 7.207.
[1604] United States' second written submission, para. 105.
[1605] Japan's second written submission, para. 97; Korea's first written submission, para. 114; Brazil's first written submission, paras. 54-55; European Communities' second written submission, para. 200.

data. The only increase in imports was a distant memory by the time the USITC initiated its investigation.[1606] Brazil adds that the United States has determined that CCFRS is being imported into the United States in increased quantities despite the fact that imports are not only at the lowest level during the entire period of investigation, but also substantially below the peak of 1998, and have declined sharply over the last three semi-annual periods. Put simply, there is no factual support for a determination of increased imports of CCFRS.[1607]

7.568 Japan adds further that 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. Japan argues that when one removes excluded developing countries from the import trend analysis, it becomes even more clear how unjustifiable the USITC'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 USITC'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%, for combined flat-rolled products, and declined as a share of US 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. 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. [1608]

End-point analysis

7.569 Brazil[1609], China[1610], the European Communities, Japan[1611], Korea[1612] and New Zealand[1613] assert that the USITC compared the end points of 1996 and 2000 and made its increased imports finding although it had to recognize that the trends in the most recent period from 1998 to the first half of 2001 evidenced a steady and continuous fall in imports. The European Communities, Japan, Korea and New Zealand consider that even an end-point-to-end-point analysis for 1996-2000 only yields a very modest increase of 13.7% over a five-year period, which is a not a "sharp", "sudden" or "significant" increase.[1614] Moreover, the absolute increase of 2.66 million tons between 1996-2000

[1606] Brazil's first written submission, para. 58.
[1607] Brazil's written reply to Panel question No. 14 at the second substantive meeting.
[1608] Japan's first written submission, paras. 205-206.
[1609] Brazil's first written submission, paras. 129, 132.
[1610] China's first written submission, paras. 243-244.
[1611] Japan's first written submission, paras. 190, 195.
[1612] Korea's first written submission, paras. 76, 78.
[1613] New Zealand's first written submission, paras. 4.81, 4.84.
[1614] European Communities' second written submission, para. 199; Japan's first written submission, para. 195; Korea's first written submission, para. 76; New Zealand's first written submission, para. 4.85-4.86.

was entirely accounted for by the increase in imports of hot-rolled coil – 2.84 million tons – that were subject to anti-dumping and countervailing duty investigations in 1998 and 2000.[1615] [1616] Korea adds that the USITC failed to properly note that hot-rolled accounted for the vast majority of the volume increase in 1998 and the minor "increase" end-point to end-point was a function solely of hot-rolled and slab imports. In fact, if imports of hot-rolled coil and slab are separated out of total imports of flat-rolled, total imports were 6.8 million short tons in 1996, 6.9 million short tons in 1999, and 6.1 million short tons in 2000.[1617] Japan adds that the increase could not have been "significant" when it represented a mere 0.5% increase in imports as a share of production, especially when 38% of the increase consisted of slab imported by the domestic industry itself.[1618]

7.570 In response to Japan's argument that the increase in CCFRS imports was not significant because 38% of it consisted of slab, much of which was imported by the domestic industry, the United States stresses that this argument is based on a simple end-points comparison. Japan's argument also is premised on the erroneous assumption that imports by the domestic industry should not be "counted".[1619] The United States also argues that it is patently untrue that the USITC relied only on an end-points analysis, comparing import levels in 1996 with those in 2000. It did not rely exclusively on such observations to evaluate the increased imports. The USITC quite clearly considered intervening years, focusing on the surge in imports in 1998, and the continuation of imports at elevated levels in 1999 and 2000.[1620]

(iv) Consideration of 2001 data

7.571 The European Communities, Brazil, China[1621] and New Zealand argue that the USITC ignored the most recent 6-month period in its investigation, the first half of 2001. If the first half of 2001 is used as the end point, imports of flat-rolled products, both absolute and relative, are significantly below 1996 levels.[1622] Brazil and China[1623] affirm that the data from the full year 2001 confirm that the sharp decline in flat-rolled imports continued in the second half of 2001. As a percentage of domestic production, imports in 2001 were lower than at any point during the 1996-2001 period, more than 2 percentage points below 2000 and almost two percentage points below 1996. Remarkably, imports in 2001 were 10.5 million tons below peak 1998 levels and 3.5 million tons below 1996 levels.[1624] New Zealand points out that the United States has itself recognized the importance of interim 2001 data, explaining that the USITC gathers data for the interim period "so that it will have information available to it on the most current period possible".[1625] The problem is that, having gathered the most recent available data, the USITC ignores its significance. Among other things, this data showed that imports of CCFRS had declined by 40% and demand by 14.9%. Proper attention to this data should have indicated to the USITC that an increased imports finding could not

[1615] *Respondents' Joint Prehearing Brief on Hot-Rolled Steel*, Inv. No. TA-201-73 (11 September 2001) ("*Respondents' Joint Prehearing Brief on Hot-Rolled*"), Exhibit 4 (Exhibit CC-52) ("subject" hot-rolled imports increased from 1.75 million tons in 1996 to 4.59 million tons in 2000).
[1616] Korea's first written submission, para. 76.
[1617] Korea's first written submission, para. 117.
[1618] Japan's first written submission, para. 195.
[1619] United States' first written submission, para. 219.
[1620] United States' first written submission, para. 214.
[1621] China's first written submission, paras. 240-241, 246.
[1622] Brazil's first written submission, para. 132; New Zealand's first written submission, para. 4.84.
[1623] China's first written submission, paras. 238-239.
[1624] Brazil's first written submission, paras. 137-138.
[1625] United States' first written submission, para 197; United States' written reply to Panel question No. 50 at the first substantive meeting, para 95.

be made, and that increased imports could not have been the cause of alleged serious injury to the domestic industry.[1626]

(v) Consideration of decline in imports

7.572 Korea asserts that the USITC's analysis ignored the reason why imports declined – prevailing anti-dumping and countervailing duty orders. In this case, the USITC was well aware of the reason that imports declined and why that trend would continue for the foreseeable future.[1627]

7.573 The United States rejects Korea's contention that the USITC ignored the reason for the decline in imports of CCFRS after 1998, namely anti-dumping and countervailing duty cases, and affirms that the USITC addressed this in its analysis of causation.[1628]

(b) Tin mill products

(i) "Increased imports" within the meaning of the Agreement on Safeguards?

7.574 Brazil and, based on the import data relevant to the four commissioners who considered tin mill products separately, China, Japan and Norway assert that the requisite sharp, recent, sudden, and significant increase was not present, and the affirmative injury finding for tin mill products was unjustified.[1629]

7.575 The United States insists that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the determinations of three USITC Commissioners that there were increased imports of tin mill, or in the case of Commissioners Bragg and Devaney, of tin mill as part of a like product encompassing certain carbon and alloy flat products.[1630]

7.576 Norway responds that, with regard to Commissioners Bragg and Devaney, according to the figures presented by the United States, there is an increase from 1996 to a peak in 1998, but thereafter a sharp decrease in 1999 which continues in 2000 – and with a new sharp decrease in interim 2001. Norway submits that this is clearly a "steady and significant decline" in the "recent past", with full year 2001 ending even lower than 1996.[1631]

7.577 The European Communities and Norway recall that the USITC made an increased imports finding for tin mill products although it explicitly acknowledged that after a "peak level of 698,543 short tons" in 1999, imports "declined to 580,196 short tons in 2000" and were another "11.1 percent lower" in interim 2001 than in interim 2000.[1632] The USITC also recognized that the ratio of imports to domestic production had decreased from "20.1 percent during the import volume peak in 1999" to

[1626] New Zealand's written reply to Panel question No. 15 at the second substantive meeting.
[1627] Korea's first written submission, para. 81.
[1628] United States' first written submission, paras. 209-220.
[1629] Brazil's first written submission, para. 257; China's first written submission, para. 289; Japan's first written submission, paras. 209-210; Norway's first written submission, paras. 263, 272, 273.
[1630] United States' first written submission, para. 232.
[1631] Norway's second written submission, para. 94.
[1632] USITC Report, Vol., I, p. 71.

"17.4 percent in 2000".[1633] The USITC finally disclosed that the official import data used in its discussion "overstate the imports subject to this investigation" due to prior product exclusions.[1634] [1635]

7.578 China and the European Communities argue that the only increase of imports during the review period was a surge in 1999, which is not recent enough to justify a safeguard measure.[1636] In addition, China and Norway point out that, subsequently, anti-dumping measures have led to a substantial reduction of tin mill imports[1637], which the USITC completely ignored.[1638] Under no circumstances can the United States claim that tin mill products continue being imported at increased quantities until the very recent past. On the contrary, since 1999, actual imports of tin mill products have declined sharply – by over 20%.[1639]

7.579 According to the European Communities, at the time the President of the United States took his decision to impose safeguard measures, full 2001 year data was available and confirmed that imports of tin mill products had even receded back almost to pre-1998 levels.[1640] The European Communities submits that, similarly, the ratio of imports to domestic production has seen a steady and continuous decline since 1999 through the year 2000 and into the interim 2001.[1641] Brazil and Japan confirm this observation for the imports from sources covered by the measure, particularly non-NAFTA countries, which are the imports that matter given the requirement of parallelism between injury and remedy.[1642] China, the European Communities and Norway assert that such a situation, that is a significant and steady decrease in imports since a midterm high both in actual numbers as well as in relation to domestic production, has already been ruled out in *Argentina – Footwear (EC)*.[1643]

7.580 The European Communities and Korea also argues that there was also no relative increase in tin mill imports. The ratio of imports to domestic production peaked at a record 20.1% in 1999 reflecting Weirton's business decision.[1644] This, however, can only be regarded as a temporary occurrence, mostly instigated by the US domestic industry's own business decisions. Imports relative to production sharply decreased to the 17% range in the year 2000 and in interim 2001.[1645] Again, this does not satisfy the "qualitative" increase requirement.[1646]

7.581 In response to the allegation that the USITC failed to show that the increase in imports that did occur was sharp, recent, sudden and significant, the United States reiterates that the complainants are applying an incorrect standard because Article 2.1 of the Agreement on Safeguards speaks of

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[1633] USITC Report, Vol.; I, p. 72.
[1634] USITC Report, Vol.; I, p. 71, footnote 370.
[1635] European Communities' first written submission, para. 359; Norway's first written submission, para. 265.
[1636] China's first written submission, para. 293.
[1637] China's first written submission, para. 288; Norway's first written submission, para. 267.
[1638] Norway's first written submission, para. 97.
[1639] European Communities' first written submission, para. 360.
[1640] European Communities' first written submission, para. 361.
[1641] European Communities' first written submission, para. 363.
[1642] Brazil's first written submission, para. 257; Japan's first written submission, para. 209.
[1643] European Communities' first written submission, para. 363; China's first written submission, para. 287; Norway's first written submission, para. 268.
[1644] USITC Report, Vol. I, p. 72 (Exhibit CC-6).
[1645] *Steel*, Inv. No. TA-201-73, USITC Publication 3479 (December 2001), *Volume II: Information Obtained in the Investigation (Carbon and Alloy Steel Flat, Long and Tubular Products*) (USITC Report, Vol. II), Table FLAT-10, p. FLAT-14 (Exhibit CC-6).
[1646] Korea's first written submission, para. 129.

whether there were imports "in such increased quantities … and under such conditions as to cause or threaten to cause serious injury," and not whether imports were sharp, recent, sudden and significant in the abstract.[1647]

(ii) The USITC's method of analysis

7.582 China, Korea and Norway assert that the USITC's end points comparison and a comparison between the first year of the period of investigation with the 1999 peak demonstrate an increase in imports, but that such an analysis does not consider the trends in imports.[1648]

7.583 The United States asserts that there is no merit to the argument that the USITC relied only on an end-points analysis, comparing import levels in 1996 with those in 2000. Commissioners Bragg and Miller discussed import levels during the period of investigation, and in the interim periods, and quite clearly focused on the increases in imports that occurred within the period of investigation.[1649] [1650]

7.584 Korea and China argue that the United States should not be able to rely on the analysis of Commissioners Bragg and Devaney, since their analysis of increased imports was not based on tin mill products, but on "certain carbon and alloy flat products including tin mill". Grouping tin mill products with other products in a wide group of products ("certain carbon and alloy flat products") prevented those Commissioners from making any useful analysis as far as tin mill products alone are concerned.[1651] However, China also notes that the analysis of the import trends for tin mill "as part of a like product encompassing certain carbon and alloy flat products" also shows a clear declining trend from 1999 to 2001.[1652] [1653]

(iii) Requirement of reasoned and adequate explanation

7.585 China, the European Communities, Korea and Norway also argue that the temporary 1999 surge in imports was stimulated by a temporary business decision of the United States domestic industry, more particularly, Weirton's decision to shut down a blast furnace and rely on imported slabs.[1654] The European Communities argues that if a one-time high in import levels was caused by an exceptional business decision, the competent authorities would need to explain how they can rely on it although this condition is no longer given.[1655] Brazil and Korea add that it is relevant that the very industry seeking import relief brought about, and benefitted from significant parts of the increase.[1656] It would be ironic if a producer decided to increase imports and then turned around to use that very increase as the basis for pursuing a safeguard action.[1657]

[1647] United States' first written submission, para. 228.

[1648] China first written submission, paras. 288, 290; Korea's first written submission, paras. 95, 98; Norway's first written submission, para. 268.

[1649] USITC Report, pp. 71-72 (Commissioner Miller); and p. 279 (Commissioner Bragg).

[1650] United States' first written submission, para. 229.

[1651] Korea's second written submission, paras. 122-123; China's second written submission, para. 126.

[1652] United States' first written submission, para.223.

[1653] China's second written submission, para. 127.

[1654] European Communities' first written submission, para. 364; China's first written submission, para. 292; Korea's first written submission, para. 96; Norway's first written submission, paras. 269 and 271.

[1655] European Communities' written reply to Panel question No. 43 at the first substantive meeting.

[1656] Korea's written reply to Panel question No. 43 at the first substantive meeting.

[1657] Brazil's written reply to Panel question No. 43 at the first substantive meeting.

7.586 With regard to the complainants' argument that the surge in tin mill imports in 1999 occurred in part because of Weirton's shutting down a blast furnace, the United States rejects the notion that imports by the domestic industry should not be "counted" as increased imports.[1658] The Agreement on Safeguards does not treat imports that are attributable to domestic producers any differently than other imports. Moreover, safeguards proceedings involve decisions about entire industries, not about individual producers; and industries do not make such business decisions.[1659]

7.587 In response, Norway insists that if imports enter to replace a shortfall in domestic production, this is a qualitative factor which is directly relevant to the issue of causation as well. Disregarding these important elements in respect of the increase in imports, makes the whole increased import analysis by the United States in breach of Article 2.1.[1660] Korea adds that given the import changes and the facts underlying such changes at issue, the competent authorities were under a particularly strong obligation to make an assessment, both quantitatively and qualitatively, as to the nature of the increase in imports. The USITC did not conduct such an assessment.[1661] China submits that the increase in imports ceased in 2000, i.e. 18 months before the measure was taken. An increase in imports that occurred 18 months ago and was followed by a decline in those imports cannot be considered as being "recent enough" and "sudden enough".[1662]

7.588 The United States responds that the complainants do not divulge the reason for their certainty that an increase which occurred 18 months ago is "insignificant". In fact, no such basis exists. Neither Article XIX nor the Agreement on Safeguards specifies a period beyond which an increase in imports is "insignificant". Certainly the Appellate Body in *Argentina – Footwear (EC)* did not attempt to draw a line beyond which an increase in imports would be *per se* insignificant.[1663]

7.589 In the light of the intervening trends and other alternative explanations, the European Communities and Norway assert that the USITC did not provide an adequate and reasoned explanation why it could consider that imports continued being imported at sharply and recently increased levels in the most recent past.[1664]

7.590 According to the United States, the assertion that the USITC failed to give adequate weight to the decline in imports since 1999 is irrelevant to the extent that it is based on the views of USITC Commissioners making negative determinations. Among the affirmative determinations, only Commissioner Miller relied on the import data which the complainants cite, that is import data for tin mill alone. She recognized that, after surging in 1999, import volumes declined between 1999 and 2000, and between the interim periods, and she explained why these declines were not decisive in her causation analysis.[1665] [1666]

[1658] United States' first written submission, para. 230.
[1659] United States' written reply to Panel question No. 43 at the first substantive meeting, para. 89.
[1660] Norway's second written submission, para. 97.
[1661] Korea's first written submission, para. 128.
[1662] China's second written submission, para. 125.
[1663] United States' second written submission, para. 99.
[1664] European Communities' first written submission, para. 365; Norway's first written submission, para. 273.
[1665] The European Communities claims that the ratio of imports to domestic production declined in interim 2001. European Communities' first written submission, para. 362. In fact, relative import levels were higher in interim 2001 (at 17.7%) than in interim 2000 (when they were 17.1%). USITC Report, p. 72 footnote 373.
[1666] United States' first written submission, para. 231.

7.591 Norway responds that the figures of Commissioner Miller (which are also a misrepresentation as her figures include increases in excluded products[1667]) show an increase from 1996 to a peak in 1999, with a sharp decrease in 2000 and further declines in interim 2001. Norway submits that there is also here clearly a "steady and significant decline" in the "recent past".[1668]

(iv) Relevance of the like product definition

7.592 Korea and Norway argue that the United States cannot lump together findings of increased imports with respect to distinct like product groupings – flat-rolled and tin mill – to support a finding of increased imports of the more narrow like product – tin mill. The requirement of like product is fundamental to a finding of increased imports. A mix and match approach as adopted by the United States suggests that any combination of legal findings, even if they are inconsistent, is insufficient and presents a clear violation of the Agreement on Safeguards.[1669] The Appellate Body made clear in *US – Line Pipe* that legally consistent decisions with respect to the requirements of the Agreement on Safeguards (serious injury and threat of serious injury) are permitted.[1670] However, legally inconsistent decisions based on different definitions of imported products are not.[1671]

(c) Hot-rolled bar

(i) "Increased imports" within the meaning of the Agreement on Safeguards?

7.593 China and the European Communities contend that the USITC failed to determine and justify that the increase in imports was recent enough, sudden enough, sharp enough and significant enough.[1672] In China's view, the USITC also addressed the wrong question when it stated that imports showed a dramatic and rapid increase in 2000, since "rapid and dramatic" is much less explicit than "recent, sudden, sharp and significant enough"[1673] and was not the vocabulary chosen by the Appellate Body[1674], who has the mandate of clarifying the provisions of the WTO Agreement.

7.594 The United States insists that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were increased imports. The USITC noted that imports were higher, both in absolute terms and relative to United States production, in 2000 than in any prior year of the period examined and showed a rapid and dramatic increase from 1999. While imports declined in the interim period comparison, the ratio of imports to United States production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level.[1675] [1676]

7.595 In response to China's and the European Communities' contention that there are neither facts nor explanations justifying a determination that hot-rolled bar is being imported at recently, sharply and significantly increased quantities, the United States points out that first, the import data which the

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[1667] See USITC Report, Vol. 1, at footnote 370 (Exhibit CC-6).
[1668] Norway's second written submission, para. 94.
[1669] Korea's first written submission, para. 123; Norway's second written submission, para. 94.
[1670] Appellate Body Report, *US – Line Pipe*, paras. 168-170.
[1671] Korea's first written submission, para. 124.
[1672] European Communities' first written submission, paras. 315-316; China's first written submission, para. 255.
[1673] China's written reply to Panel question No. 45 at the first substantive meeting.
[1674] China's first written submission, para. 255.
[1675] China's first written submission, para. 255.
[1676] United States' first written submission, paras. 235 and 246.

USITC analysed on a year-to-year basis show substantial increases. As the *US – Line Pipe* Panel explained, it is not necessary to find that imports are still increasing up to the very end of the period of investigation.[1677] Second, the appropriate consideration under the Agreement on Safeguards is not whether imports have increased "recently, sharply and significantly" in the abstract. The USITC satisfied the standard set out in Article 2.1 of the Agreement on Safeguards when it first focused on increased imports and subsequently found injury and a causal link.[1678]

7.596 The European Communities responds that the United States cannot rely on the ruling of the Panel in *US – Line Pipe* in its defence. The Panel in that case only upheld the increased imports finding given that there was an explicit finding that import levels *remained* at increased levels which the USITC has not demonstrated.[1679]

7.597 China further argues that the increase in imports of hot-rolled bar was not recent because the sharpest increase, both in absolute and relative terms, occurred in 1998, and the USITC also failed to recognize a decline in imports that started in 2000 and lasted until the end of the period of investigation.[1680]

7.598 As regards China's argument regarding a decline in imports that "started in 2000 and lasted until the end of the period of investigation", the United States rejects this attempt to carve up the investigation period to achieve a desired result. The United States further submits that the Agreement on Safeguards does not specify how the period of investigation should be broken down.[1681] With regard to the argument that increased imports were not recent, China overlooks the fact that imports were at their highest level (both in absolute and relative terms) in 2000; and that there were significant increases in the last year-to-year comparison from 1999 to 2000.[1682]

7.599 China responds that a sharp increase that occurred in 1998 cannot be considered as being "recent" anymore and subsequent imports cannot be characterized as being "sharp".[1683]

(ii) Consideration of 2001 data

7.600 The European Communities asserts that the USITC acknowledged but disregarded a sharp decrease both in absolute terms and relative to domestic production in the first half of 2001, that is the most recent and decisive part of the investigation period.[1684] By the time the President imposed the safeguard measures, the available full 2001 year import data revealed a 32% decrease in imports compared to 2000.[1685] Even if the 2.6 percentage difference between 1999 and 2000 could be seen as a recent increase, it was certainly neither sharp nor significant, but part of a slight and gradual increase at steps between 1.1 and 2.6%, which was then compensated in interim 2001 when the ratio fell back to 24.6%.[1686]

[1677] Panel Report, *US – Line Pipe*, para. 7.204.
[1678] United States' first written submission, paras. 239-241.
[1679] European Communities' second written submission, para. 203.
[1680] China's first written submission, paras. 258-262.
[1681] United States' first written submission, para. 244.
[1682] United States' first written submission, para. 245.
[1683] China's first written submission, para. 114.
[1684] USITC Report, Vol. I., p. 92.
[1685] European Communities' first written submission, paras. 311-312.
[1686] European Communities' first written submission, para. 315.

7.601 The United States rejects the European Communities' argument based on full-year 2001 data, because full-year 2001 data were not, and should not be, considered. [1687]

(iii) The USITC's method of analysis

7.602 China argues that the USITC failed to evaluate the rate and amount of increased imports in absolute and relative terms, and to consider trends, and that it was not enough for the USITC to simply state the import data for each year of the period of investigation.[1688]

7.603 The United States disagrees with China on the question whether it was not enough for the USITC to "simply state the import data for each year without evaluating the rate and amount of increased imports in absolute and relative terms". The USITC noted where the imports increased and where they decreased. The United States submits that the Agreement on Safeguards does not require that competent authorities characterize the data in certain ways. It also does not require competent authorities to intone specific terminology not contained in the Agreement.[1689] Since under Article 3.2 of the DSU, a dispute settlement report cannot add to a Member's obligations under the covered agreement, the Appellate Body's use of a particular phrase cannot obligate competent authorities to use the same phrase.[1690]

(d) Cold-finished bar

(i) "Increased imports" within the meaning of the Agreement on Safeguards?

7.604 The European Communities notes that the alleged recent surge in imports was a one-year micro-development immediately compensated for by a decrease in 2001. By the time the President of the United States took his decision, the full 2001 data was available and demonstrated that the declining trend, that was already signalled by the interim 2001 data, proved to be a steady and significant decrease in imports back to levels even below 1998.[1691]

7.605 The United States rejects the European Communities' characterization of the data on absolute import levels as "a one-year micro-development immediately compensated by a decrease in 2001". First, full-year 2001 data were not, and should not be, considered, for reasons previously articulated by the United States. Second, it is simply not accurate to call a 33.6% increase in imports in one year, that follows on the heels of increases in two out of the preceding three years, "a one-year micro-development".[1692]

7.606 In relation to relative imports the European Communities considers that there is no justification why a mere 6% increase in the ratio between imports and domestic production could be seen as a sudden, sharp and significant surge in imports that is capable of causing injury to a domestic industry, in particular, since actual imports already showed a manifest decrease.[1693]

7.607 As regards relative import levels, the United States insists that the 6.7 percentage point increase in relative import levels from 1999 to 2000 (from 17.0 to 23.7%) was, in fact, very significant. The United States submits that the European Communities' attempt to discount this

[1687] United States' first written submission, paras. 239-241.
[1688] China's first written submission, paras. 253, 254 and 256.
[1689] United States' first written submission, para. 242.
[1690] United States' written reply to Panel question No. 45 at the first substantive meeting, para. 91.
[1691] United States' first written submission, paras. 319-320.
[1692] United States' first written submission, para. 252.
[1693] European Communities' first written submission, para. 321.

increase by pointing to a decline in absolute import levels is unpersuasive, given that an increase in either absolute or relative import levels alone may satisfy Article 2.1 of the Agreement on Safeguards.[1694]

7.608 The European Communities responds that the United States has effectively admitted that the absolute import levels were not sufficient and that it solely relies on the relative import developments. Therefore, the European Communities asks the Panel to find that imports did not increase in actual numbers.[1695] As to relative imports, the United States did not explain why the mere 6% increase in relative imports in 2000 (out of a one-year dip in 1999) combined with the countertrend in actual imports in 2001 could still justify a finding of cold bar being imported in extra-ordinarily increased quantities; and the European Communities asks the Panel to dismiss the relative increased imports finding for this product.[1696]

(ii) Requirement of reasoned and adequate explanation

7.609 The European Communities asserts that the facts and explanations provided by the United States authorities do not justify a determination that cold-finished bar is being imported in recently, sharply and significantly increased quantities.[1697]

7.610 The United States argues that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were increased imports of cold-finished bar.

(e) Rebar

(i) "Increased imports" within the meaning of the Agreement on Safeguards?

7.611 China and the European Communities argue that the facts and explanations provided by the USITC do not justify a determination that rebar is *being* imported at recently, sharply and significantly increased quantities.[1698]

7.612 The United States insists that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record supported the USITC's determination with respect to increased imports. The USITC analysed the surge in imports in 1999 and the continued high levels of imports in 2000 in the context of their ability to cause serious injury. China's argument that the USITC failed to determine whether the increase in imports of rebar was "recent enough, sudden enough, sharp enough and significant enough" is premised on an incorrect standard.

7.613 The United States further stresses that the USITC recognized that imports had declined between 1999 and 2000, and between the interim periods, and it explained why these declines were not decisive to its analysis. Competent authorities are not required to articulate an intricate trends analysis.[1699]

[1694] United States' first written submission, para. 254.
[1695] European Communities' first written submission, para. 207.
[1696] European Communities' second written submission, para. 208.
[1697] European Communities' first written submission, para. 322.
[1698] China's first written submission, para. 268; European Communities' first written submission, para. 328.
[1699] United States' first written submission, para. 265.

7.614 In response, China insists that, under the Agreement on Safeguards, as interpreted by the Appellate Body in *Argentina – Footwear (EC)*, import data must be characterized in a certain way, i.e. as being "sudden enough, sharp enough, recent enough and significant enough".[1700]

7.615 China and the European Communities argue that the USITC failed to take into account the decline in rebar imports in 2000 and 2001.[1701] Taking a safeguard measure despite a significant decrease in imports would be tantamount to claiming self defence when shooting at an aggressor who is already running away, i.e., where the danger is no longer imminent.[1702]

7.616 With regard to the European Communities' contentions, the United States reiterates that full-year 2001 data were not, and should not be, considered. Furthermore, the USITC observed that, despite the declines from 1999 to 2000, and between interim 2000 and interim 2001, imports in 2000 and in interim 2001 were nonetheless at levels that were substantially higher than in earlier years of the period of investigation before 1999.[1703]

7.617 The European Communities counter-responds that the annualised interim 2001 data show that both, actual and relative imports have decreased significantly in the first part of 2001. The United States cannot rely on the ruling in *US – Line Pipe* because there are no facts and an adequate and reasoned explanations that imports "remained" at increased levels.[1704]

(ii) The USITC's method of analysis

7.618 China argues that the USITC did not satisfy the requirement that it consider the rate and amount of the relative and absolute increase in imports and the trends by simply stating the import data for each year of the period of investigations.[1705]

7.619 The European Communities also argues that the observation that imports were higher in 2000 than in 1996 is irrelevant because it is merely based on an end-point-to-end-point comparison. The European Communities submits that recent absolute import levels are irrelevant if the most recent trend shows a decrease in imports.[1706]

7.620 The United States also argues that the USITC's analysis was hardly based on a simple end-points comparison. In this regard, the European Communities overlooks the fact that the USITC also: (i) compared 2000 import levels to those in 1998 (and found that 2000 imports were 35.8% higher); (ii) compared interim 2001 imports levels to 1996 and 1997 (and found that imports in the first six months of 2001 exceeded full-year levels in 1996 and 1997); and (iii) compared the relative import ratio in interim 2001 to 1996, 1997 and 1998 (and found that it was higher than in any of those prior years).[1707]

7.621 Finally, according to the United States, it is not true that recent absolute import levels are irrelevant if the most recent trend shows a decrease in imports, as the European Communities argues.

[1700] China's first written submission, para. 116.
[1701] China's first written submission, para. 271; European Communities' first written submission, paras. 323-328.
[1702] European Communities' first written submission, para. 327.
[1703] United States' first written submission, para. 262.
[1704] European Communities' second written submission, paras. 210-211.
[1705] China's first written submission, paras. 266-267.
[1706] European Communities' first written submission, para. 327.
[1707] United States' first written submission, para. 263.

Article 4.2(a) does not focus on trends to the exclusion of the amount of imports and it is not necessary that imports be increasing up to the very end of the period of investigation.[1708]

(f) Welded pipe

(i) "Increased imports" within the meaning of the Agreement on Safeguards?

7.622 The European Communities argues that, although imports have not decreased in the most recent past, the USITC failed to show that the increases in imports of welded pipe were "sudden, sharp and significant". The USITC's consideration that the "24.2 percent" increase in quantity "was the largest annual percentage increase of the period examined" and that imports "continued at a very high level in interim 2001"[1709] as well as the reference to a large increase in the ratio to domestic production at the end of the period examined[1710] is, submits the European Communities, not sufficient.[1711]

7.623 The European Communities and Switzerland argue that because imports of welded pipe increased steadily throughout the period of investigation, the increase was not "sudden, sharp and significant". A safeguard measure may not be used to protect the industry against a gradual and therefore adjustable increase in imports.[1712]

7.624 According to Switzerland, even if the Panel finds that the 24.2% increase in imports in 2000 was recent and sharp enough, the United States failed to provide an adequate and reasonable explanation of how the facts in the report support its findings and to demonstrate the relevance of the factors examined.[1713] The European Communities adds that absent such explanation, which cannot be cured in the dispute settlement proceedings, the Panel cannot and should not determine whether the existing increase is sufficient to meet the WTO standard.[1714]

7.625 Switzerland admits that imports of welded tubular products have increased during the period of investigation. However, there must be an extraordinary and abnormal surge in imports as stated in the first safeguard measure adjudicated by the GATT in the *US – Fur Felt Hats* case. A gradual increase in imports is the very purpose of trade liberalization between WTO members. A gradual increase can, therefore, not be substantial enough to trigger an emergency action like the imposition of a safeguard measure.[1715] The United States omits to say that in 1999 the imports decreased by 6.4% that the increase of almost 25% in 2000 is based on the comparison with 1999 figures, that is after there had been a decrease, and not on the comparison with 1998 figures where the increase would have been less important, for after a decrease, an increase to the previous level gives automatically a higher percentage of increase. The higher percentage increase in 2000 is due to a statistical effect. Another interesting development is that from 1996 to 1998 imports have increased by almost 44% compared to an increase of only 16 per cent during the period 1998-2000. However, the United States did not take any safeguard measure at the time when imports were more important that is during 1996-1998.

[1708] United States' first written submission, para. 264.
[1709] USITC Report, Vol. I, p. 157.
[1710] USITC Report, Vol. I, p. 158.
[1711] European Communities' first written submission, para. 332.
[1712] European Communities' first written submission, para. 335; Switzerland's first written submission, paras. 253-254.
[1713] Switzerland's first written submission, para. 256.
[1714] European Communities' first written submission, para. 337.
[1715] Switzerland's first written submission, para. 71.

7.626 The United States claims that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were increased imports of welded pipe. The European Communities misstates the standard under Article 2.1 of the Agreement on Safeguards when arguing that the USITC failed to show that the increases in imports of welded pipe were "sudden and sharp". For the same reasons, the United States rejects Switzerland's argument that because imports of welded pipe increased steadily throughout the period of investigation, the increase was not "sudden, sharp and significant". The United States also insists that the import data, and their link to the threat of serious injury to the domestic industry, are described in the USITC Report in a clear and straightforward manner.[1716]

7.627 The European Communities responds that the United States does not indicate where in its Report the USITC has provided a quantitative analysis of import developments showing that there has been an abnormal and unexpected change in import levels as opposed to the continuation of a perfectly foreseen gradual and adjustable rise in imports.[1717]

(ii) The USITC's method of analysis

7.628 The European Communities submits that the USITC has also failed to provide annual percentage increases and to evaluate *all* the trends in actual and relative imports by comparing their increases and decreases over the period of investigation.[1718]

(g) FFTJ

7.629 The European Communities argues that the USITC Report does not contain an adequate and reasoned explanation, based on a complete evaluation of import trends over the entire period of examination for each of the specific products grouped into this broad category, of why the steady development described by the USITC fulfils the very high and exacting standard of import surges that are sharp and significant enough so as to cause serious injury or a threat thereof for each of the specific products it grouped together in its mix of heterogeneous products.[1719]

7.630 The United States contends that, in arguing that the increase in imports was steady, rather than sharp and significant, the European Communities again applies the wrong standard. The Agreement on Safeguards requires an evaluation of whether there were imports "in such increased quantities … and under such conditions as to cause or threaten to cause serious injury", and the USITC satisfied this standard when it first focused on increased imports and subsequently found injury and a causal link.[1720]

7.631 For the counter-responses of the European Communities, see section F.4c(i).

(h) Stainless steel bar

7.632 The European Communities states that it fails to see a reasoned explanation of how the facts can support a finding of a recent, sudden, sharp and significant surge. The European Communities challenges the USITC's finding of increased imports because what might at first glance appear to be an upward trend between 1999 and 2000 was a mere blip, i.e., a one year peak in imports which

[1716] United States' first written submission, paras. 276, 272-273, 274.
[1717] European Communities' first written submission, para. 214.
[1718] European Communities' first written submission, para. 334.
[1719] European Communities' first written submission, para. 344.
[1720] United States' first written submission, para. 282; United States' written reply to Panel question No. 42 at the first substantive meeting, para. 85.

immediately returned to normal levels in 2001. The USITC itself acknowledged that absolute import numbers decreased in the first half of 2001. At the time the US President took his decision, the full year 2001 data confirmed the significant and enduring plunge in imports.[1721]

7.633 The United States insists that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were increased imports of stainless steel bar. The United States submits that the Panel should not be misled by the characterization by the European Communities of the rise in imports in 2000 as "a mere blip". As regards the decline in imports in 2001 to which the European Communities points, the United States reiterates that full-year 2001 data were not, and should not be, considered. According to the United States, it is readily apparent from the data that the increase in imports in 2000 was sharp and substantial. [1722]

7.634 The European Communities responds that even on the basis of interim 2001 data, the sharp decrease in actual imports compensating the earlier increase must have been obvious to the USITC and required a particularly convincing explanation why imports remained at increased volumes.[1723]

(i) Stainless steel wire

(i) "Increased imports" within the meaning of the Agreement on Safeguards?

7.635 China and the European Communities contend that the USITC failed to determine whether the absolute and relative increase in imports was recent enough, sudden enough, sharp enough and significant enough, and failed to correctly evaluate the rate and amount of the increase in imports and to correctly consider the trends in imports.[1724]

7.636 In response to the contention that the USITC failed to determine whether the increase in imports was recent enough, sudden enough, sharp enough and significant enough, the United States reiterates that there are no absolute standards for how recent, sudden, sharp or significant an increase in imports must be.[1725]

7.637 The European Communities also argues that the increase observed in the period 1999-2000 was merely the flip side of a sharp decrease in imports in 1999.[1726] Also in relative terms, the 2000 increase in imports was a "blip development" not resulting in abnormal import levels. There is also no adequate and reasoned explanation for how these facts support a conclusion that the micro-development between 1999 and 2000 was an abnormal, sudden and sharp increase in imports threatening serious injury.[1727]

7.638 According to the United States, the European Communities' characterization of the 2000 increase as a "blip development" is not borne out by the facts and overlooks the fact that two of the USITC Commissioners making affirmative determinations found a threat of serious injury. In doing so, they focused not only on the increase in imports in 2000, but particularly on conditions in interim

[1721] European Communities' first written submission, paras. 348, 349, 351.
[1722] United States' first written submission, paras. 287-288.
[1723] European Communities' second written submission, para. 220.
[1724] China's first written submission, paras. 302-303; European Communities' first written submission, para. 372.
[1725] United States' first written submission, para. 316.
[1726] USITC Report, Vol. I, p. 235.
[1727] European Communities' first written submission, paras. 369-371; European Communities' written reply to Panel question No. 44 at the first substantive meeting.

2001.[1728] Chairman Koplan noted the rapid increase in relative import levels in interim 2001.[1729] Commissioner Bragg noted the increase in absolute import levels in 2000, and the fact that these declined only slightly between interim 2000 and interim 2001.[1730] Commissioner Devaney noted that the quantity of imports increased in 2000, and remained steady between the interim periods.[1731]

7.639 The European Communities responds that the references to extracts from the causation analysis are irrelevant and do not contain the required quantitative analysis of the increase in imports. Nowhere in the analysis of Chairman Koplan (who was the only one looking at stainless steel wire as a separate product) is there any explanation why relative import levels can be seen as abnormal and the Agreement on Safeguards does not permit safeguard measures to be taken against threat of imports, but only after imports have actually or relatively increased.[1732]

(ii) The USITC's method of analysis and the requirement of a reasoned and adequate explanation

7.640 China argues that the USITC failed to consider the rate and amount of increased imports in absolute and relative terms and the trends.[1733] China also asserts that the upward trend in imports was very smooth and, thus, the USITC was wrong in considering the increase from 1999 to 2000 apart from the rest of the period of investigation. In any event, the USITC did not provide any reasoned and adequate explanation concerning the trends in imports.[1734]

7.641 The United States insists that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were increased imports of stainless steel wire.[1735] China's assertion that the USITC's analysis of the import trends was deficient because the upward trend in imports was "smooth", and the USITC failed to explain the trend in imports is without merit. The USITC Commissioners making affirmative determinations described the import data in a detailed and straightforward fashion. They noted the increases in imports, especially over the interim periods.[1736] China's arguments regarding increased imports are based only on the data considered by Chairman Koplan who defined the like product as stainless steel wire, but do not address the analysis of increased imports performed by the other two Commissioners who made affirmative determinations based on broader product categories.

[1728] As the Appellate Body recognized in *US – Lamb*, para. 137, because of the future-oriented analysis involved in a threat determination, it is especially important to focus on more recent data.
[1729] USITC Report, pp. 256-259.
[1730] USITC Report, p. 280.
[1731] USITC Report, p. 343.
[1732] European Communities' second written submission, paras. 230-233.
[1733] China's first written submission, para. 299.
[1734] China's first written submission, para. 301.
[1735] United States' first written submission, para. 317.
[1736] United States' first written submission, para. 315.