7.642 China responds that it was right to rely only on the data considered by Chairman Koplan[1737], since that data alone related to stainless steel wire as such. The analysis provided by Commissioners Bragg and Devaney could not provide any useful basis for the assessment of imports trends for stainless steel wire, since they focused on another product, i.e. "stainless steel wire products, including stainless steel wire and rope".[1738]

(j) Stainless steel rod

7.643 China claims that the USITC failed to determine whether the increase in imports was recent enough, sudden enough, sharp enough and significant enough. According to China, indeed, the USITC did not address the right question when it stated that imports showed a dramatic and rapid increase in 2000, since "rapid and dramatic" was not the vocabulary chosen by the Appellate Body. In any event, there is a lack of explanation.[1739]

7.644 China also argues that the USITC failed to consider the rate and amount of increased imports in absolute and relative terms and the trends.[1740] China and the European Communities further argue that the USITC failed to consider trends in imports over the period of investigation. According to China and the European Communities, these trends show that imports of stainless steel rod increased twice during the period of investigation (by 29.4% in 1997 and by 25% in 2000), and that each surge was followed by a decline in the following year. Being immediately compensated the following year, these imports could not be considered as significant.[1741] The European Communities adds that the decline in actual import levels was already noticeable during the first half of 2001 and acknowledged by the USITC as a decline by 31.3% between interim 2000 and interim 2001 and that there is no reasoned and adequate explanation of how this just another one-year high justifies a safeguard measure and there is also no explanation with regard to the relative import increase, given that the USITC Report only shows asterisks.[1742]

7.645 The United States maintains 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 rod. China's and the European Communities' contentions rest on the use of full-year 2001 data, which were not, and should not be, considered. When viewed within the USITC's period of investigation, imports show a clear rising trend over the last two full years, with the largest increase – of over 25% on an absolute basis – occurring in 2000. Moreover, even if imports followed a pattern of successive surging and receding, this could cause serious injury to the domestic industry, such as to warrant a safeguard measure.[1743]

7.646 China points out that since a decline in imports in interim 2001 occurred, it was a clear signal for the United States to look at the full data for 2001, in order to determine whether or not this new trend was representative. In view of the fact that increased quantities in 1997 and 2000 had vanished by the following year, it was all the more necessary to look at data for the full year 2001.[1744]

[1737] United States' first written submission, para.314.
[1738] China's second written submission, para. 128.
[1739] China's first written submission, para. 278.
[1740] China's first written submission, para. 275.
[1741] China's first written submission, para. 281; European Communities' first written submission, para. 353.
[1742] European Communities' first written submission, paras. 355-357; European Communities' second written submission, paras. 219-221.
[1743] United States' first written submission, paras. 295-296, 300.
[1744] China's first written submission, paras. 119, 121.

7.647 In response to China's argument that the USITC failed to evaluate the rate and amount of increased imports, the United States points out that the USITC noted the amount of the increase in imports from the first full year to the last full year of the period of investigation; and it noted the trends during the period of investigation (some fluctuation, with a sharp increase at the end). The Agreement on Safeguards does not require that competent authorities describe the data in certain ways.[1745]

7.648 The United States further argues that China misconstrues what is meant by "recent" when arguing that the USITC failed to consider the most recent period, i.e. interim 2001. As the *US – Line Pipe* Panel recognized, it is not necessary that imports be increasing up to the very end of the period of investigation. The Agreement on Safeguards also does not require a determination that the increase in imports was "recent enough, sudden enough, sharp enough and significant enough".

7.649 China finally affirms that imports decreased from 45,647 short tons in the first half of 2000, to 36,697 short tons in the second half of 2000, and finally to 31,365 short tons in the first half of 2001. China submits that this strong and lasting recent decline was not given any consideration.[1746]

7.650 As regards China's argument about 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. Also, the Agreement on Safeguards does not specify how the period of investigation should be broken down. In the absence of any evidence of manipulation or bias, the investigating authorities' methodology should be left undisturbed.[1747]

G. SERIOUS INJURY OR THREAT OF SERIOUS INJURY

1. Competent authorities' obligations under the Agreement on Safeguards in making injury determinations

7.651 Relying upon the Appellate Body decision in *US – Lamb*, China asserts that, in determining whether the domestic industry has suffered serious injury, that is "significant overall impairment" of its position in the industry, competent authorities must evaluate all relevant factors and conduct a substantive evaluation of the "bearing", "influence", "effect" or "impact" that the relevant factors have on the situation of [the] domestic industry.[1748] China and the European Communities also rely upon that decision to argue that the competent authorities' explanation must fully address the nature, and, especially, the complexities of the data, and respond to other plausible interpretations of that data.[1749]

7.652 The European Communities argues that it follows from Articles 2.1 and 4.2 of the Agreement on Safeguards, that a competent authority is under an obligation to justify its decision to impose safeguard measures. That is, in the words of the Appellate Body, it must provide a "reasoned and adequate explanation" of its determination that the necessary pre-conditions for the application of safeguard measures have been fulfilled.[1750]

7.653 The European Communities argues that, in addition, flowing from Articles 3.1 and 4.1(c) of the Agreement on Safeguards, a competent authority must publish a report setting out its factual

[1745] United States' first written submission, para. 297.
[1746] China's first written submission, para. 283.
[1747] United States' first written submission, para. 301.
[1748] China's first written submission, paras. 305-307.
[1749] China's first written submission, paras. 305-307; European Communities' first written submission, para. 381.
[1750] European Communities' first written submission, para. 380.

findings and providing justification for the conclusions which led to the imposition of safeguard measures. The European Communities argues that this is also a logical consequence of the domestic investigation process set out in Article 3, which is intended to give interested parties the opportunity to make any concerns known to the competent authority. The European Communities argues that a competent authority must also justify its decision in the light of the comments made before it during its investigation.[1751] In the view of the European Communities, the competent authority's report must set out the pertinent facts on the basis of which a Member imposes a safeguard measure. Moreover, the published report cannot leave the reader guessing about how the competent authority dealt with complexities arising from the data- examination process.[1752]

2. "Significant overall impairment"

(a) CCFRS

7.654 With regard to the USITC's determination of whether there had been a "significant overall impairment in the position of the domestic industry" producing CCFRS, New Zealand argues that although the USITC referred to some factors to support its findings, it did not balance these factors in any objective way. New Zealand questions how, when the domestic industry's share of total domestic consumption had remained stable (and increased significantly in the interim 2001 figures to 93.1% from 91% in 1996), when the domestic share of total commercial shipments had been stable (and increased from 76% in 1996 to 81.5% in interim 2001), when domestic sales had been shown to have increased by 10.9%, when domestic production had increased 8.4% and when productivity had "increased sharply" rising 13.2% there could still be a finding of "serious injury".[1753] New Zealand asserts that the USITC chose to disregard these factors, focussing instead on the fact that capacity utilization had decreased from 91.0% to 85.1%, the fact that operating income had fallen from 4.3% of sales to –1.4% of sales and the fact that the number of workers had declined by 4.4% and the number of hours worked had declined by 3.5%. New Zealand argues that the USITC did not explain why these three negative factors should have outweighed the five positive factors.[1754]

7.655 Further, New Zealand argues that the USITC failed to accord appropriate weight to the significant number of factors indicating gains rather than declines in the position of the domestic industry, and it accorded disproportionate weight to the factors that indicated declines. New Zealand asserts that the USITC frequently rejected factors that did not support a predetermined conclusion of "serious injury" and that nowhere did the USITC show how the factors it had relied upon adequately demonstrate the "very high" standard of "significant overall impairment" in the position of the industry.[1755] Similarly, China notes that the USITC made reference to the industry's financial problems in its report. However, China argues that at no point did the USITC explain how the importance of this factor outweighed the other positive factors and leads to the conclusion that there is an overall impairment of the situation of the industry.[1756]

7.656 In response, the United States asserts that the USITC acknowledged that not every single factor it examined pertinent to the industry's condition was in decline. The United States argues that there need not be a decline in each Article 4.2(a) factor for there to be a finding of serious injury. The United States notes that the USITC specifically found, however, that improvements in certain factors

[1751] European Communities' first written submission, para. 382.
[1752] European Communities' first written submission, para. 383.
[1753] New Zealand's first written submission, para. 4.101.
[1754] New Zealand's first written submission, para. 4.102.
[1755] New Zealand's first written submission, para. 4.103.
[1756] China's first written submission, para. 315.

"do not offset the significant declines exhibited by other indicia of the industry's condition with respect to the issue of whether the industry is suffering serious injury". In this regard, the United States makes reference to declines, which it claims have not been disputed by any party, including significant idling of productive capacity, sharp deterioration in financial performance, and significant unemployment.[1757]

7.657 The United States also asserts that the USITC specifically discussed and acknowledged increases in capacity, production and productivity[1758] and examined the implications of the increases. The USITC fulfilled its obligation under Articles 2.1 and 4.2(a) by concluding that these isolated increases did not detract from its finding of serious injury in light of all pertinent factors having a bearing on the state of the industry.[1759]

7.658 In particular, the United States argues that the USITC Report provided several reasons why increases in production and capacity were consistent with a finding of serious injury. First, according to the United States, the USITC explained that increases from 1996 to 2000 occurred at a time when apparent domestic consumption of CCFRS was increasing. The United States asserts that one would normally expect production and capacity to increase in a growing market. However, according to the United States, the increase in production from 1996 to 2000 was only incrementally greater than the increase in United States apparent consumption of CCFRS during the same period.[1760] Second, the USITC emphasized that the increased capacity was not being utilized. Instead, capacity utilization for the domestic industry had declined steadily from 1996 to 2000 and fell sharply between interim 2000 and interim 2001. The United States asserts that the USITC emphasized that declines in capacity utilization were apparent in each of the particular product categories within the industry, as well as in the industry as a whole.[1761] In any event, the United States argues that Article 4.2(a) does not expressly mention changes in capacity as a factor that an investigating authority must consider in evaluating whether there is serious injury. Instead, it references changes in "capacity utilization".[1762] Third, according to the United States, the overall picture in the industry was not one of steady expansion. The United States asserts that, as had been found by the USITC, ten United States producers of CCFRS declared bankruptcy during the period of its investigation and several shut down and ceased production altogether.[1763] The United States argues that, in light of the foregoing, the USITC thoroughly explained why the positive trends with respect to capacity and production did not outweigh other negative trends concerning idling productive resources in the industry.[1764]

7.659 According to the United States, the USITC also acknowledged that productivity in the CCFRS industry increased from 1996 to 2000. The United States asserts that the USITC considered the effect of this increase on employment levels in the industry and concluded that the increase in productivity "may have offset to some degree the declines in employment".[1765] The United States argues that, therefore, it is clear that the USITC considered the increase in productivity but concluded that it did not outweigh or entirely explain the declines in employment. According to the United States, the annual trends in productivity do not correlate with the trends in employment. Productivity for the CCFRS industry increased during every full year during the period of investigation. This

[1757] United States' first written submission, para. 338.
[1758] United States' first written submission, paras. 339 and 349.
[1759] United States' first written submission, para. 349.
[1760] United States' first written submission, paras. 340-341.
[1761] United States' first written submission, para. 342.
[1762] United States' first written submission, para. 344.
[1763] United States' first written submission, para. 343.
[1764] United States' first written submission, para. 344.
[1765] United States' first written submission, para. 345.

included years in which employment was relatively stable as well as those in which it declined.[1766] The United States argues that, moreover, increased productivity could only explain declining employment at a particular facility where production continued on an ongoing basis. It could not explain declines in employment attributable to the shutting down of operations at production facilities. According to the United States, the decline in employment for the CCFRS industry occurred at a time when several productive facilities closed entirely. Thus, there were losses of employment at facilities where productivity essentially declined to zero.[1767] The United States also argues that increases in productivity, which would generally be expected to lead to improved financial results, did not track productivity given that the financial results of the CCFRS industry declined sharply after 1997, and the industry recorded overall operating losses in 1999, 2000, and interim 2001.[1768]

7.660 In counter-response, New Zealand asserts that a simple unreasoned assertion that improvements in the range of performance factors described in detail by the USITC itself "do not offset the significant declines exhibited by other indicia"[1769], can never hope to meet these requirements.[1770]

7.661 New Zealand further argues that the United States provides no substantiation for the key propositions it asserts. New Zealand questions why it is necessarily "consistent with a finding of serious injury" that production increases from 1996 to 2000 of 8.4% "occurred at a time when apparent consumption of certain flat steel was increasing"? According to New Zealand, an increase in production is a positive indicator in its own right, to be weighed and balanced with other factors, positive and negative, when coming to an overall determination on serious injury. So, for that matter, is an increase in consumption, which offers strong evidence of a healthy market. New Zealand asserts that, what is more, there is no logical or legal basis in Article 4.2(a) – and the United States offers none – for ignoring a positive industry condition indicator just because it correlates (or does not correlate) with movements in another of the listed factors.[1771]

7.662 With regard to the reasons advanced by the United States as to why the industry's increase in capacity is irrelevant and not to be taken into account as a positive factor[1772], New Zealand submits that none is credible. According to New Zealand, the mere fact that this factor is not included in the Article 4.2(a) list is neither here nor there, given that the text requires an evaluation of all relevant factors, "in particular" (i.e. not limited to) those factors then listed. Capacity increases could well be evidence of an industry in good health and therefore need to be assessed and weighed against other factors in the course of reaching an overall evaluation of serious injury. In this connection, the United States argument that certain producers declared bankruptcy so there is no overall industry picture of expansion is belied by the USITC's own figures, which showed an increase in capacity of 15.9%.[1773] Nor should capacity increases be discounted just because they correlate, or do not correlate, with movements in other factors such as capacity utilization.[1774] Accordingly, it should be regarded as a potential positive factor in its own right.[1775]

[1766] United States' first written submission, para. 346.
[1767] United States' first written submission, para. 347.
[1768] United States' first written submission, para. 348.
[1769] USITC Report, Vol. I, p. 55, quoted in United States' first written submission, para 338.
[1770] New Zealand's second written submission, para. 3.74.
[1771] New Zealand's second written submission, para. 3.78.
[1772] United States first written submission, paras. 342-344.
[1773] USITC Report, Vol. I, p. 54.
[1774] As claimed by the United States; United States first written submission, para 342.
[1775] New Zealand's second written submission, para. 3.79.

7.663 In relation to the sharp productivity increase of 13.2%, New Zealand submits that the United States considers this can apparently be discounted because "annual trends in productivity do not correlate with the trends in employment"[1776] and the increase "cannot explain the financial results of the certain flat steel industry". According to New Zealand, nothing in Article 4.2(a) suggests that a productivity increase has to correlate with employment trends[1777] or a certain type of financial result before it qualifies to be weighed and balanced with the whole range of negative and positive factors in making an overall assessment of serious injury.[1778]

7.664 In the context of its arguments regarding causation, the United States argues that the Agreement on Safeguards "requires not a focus on one or two selected criteria but on all of the relevant criteria bearing on the condition of the industry".[1779] New Zealand argues in response that the United States then fails to draw the obvious conclusions: that the USITC's serious injury analysis does not meet the relevant requirements of the Agreement on Safeguards as interpreted by the Appellate Body. According to New Zealand, to a large extent the United States submissions comprise mere repetition of the USITC's findings and "reasoning" and fail to provide any credible defence of why what the USITC did could in fact comply with the Agreement on Safeguards provisions and the relevant Appellate Body decisions in this area.[1780]

7.665 With respect to the USITC's conclusion that there had been a "significant idling" in the domestic industry's productive facilities, New Zealand asserts that the USITC placed great weight on the decline between 1996 and 2000 but argues that the 6% overall decline in capacity utilization was dwarfed by the much more significant capacity, production, and productivity increases that occurred during the same period. In particular, New Zealand argues that during that period, capacity increased 15.9%, production 8.2%, and productivity "sharply increased" by 13.2%.[1781] New Zealand argues that the USITC simply brushed these factors aside without any adequate or reasoned explanation, observing simply that "despite increases in capacity and production, there was significant idling of the domestic industry's productive facilities during the period, given the numerous bankruptcies and the shut down of some facilities, as well as decreased capacity utilization". In making this statement, New Zealand argues that the USITC also failed to explain that the bankruptcies referred to did not necessarily equate with an idling of productive facilities; the USITC itself conceded that only "some" bankrupt companies "ceased operations altogether".[1782] With regard to the issue of capacity utilization, see arguments made by the United States in paragraph 7.658.

7.666 New Zealand also argues that the USITC's finding that there was "significant unemployment or underemployment in the domestic industry" was based on a reduction over the period of investigation in the number of workers and the number of hours worked. According to New Zealand, the USITC did not consider the role of increased productivity in reducing labour requirements; nor did it consider the role of newer, less labour intensive, technology upon this indicator. New Zealand asserts that this failure is particularly noteworthy given the USITC's recognition that the period of investigation witnessed the "first large-scale production of cold-rolled and coated steel by minimills". New Zealand argues that the fact that the number of workers and hours worked had reduced should

[1776] New Zealand's second written submission, paras. 346-348.
[1777] In fact, the 1996-2000 figures throws doubt on the United States factual assertion also – a productivity increase of 13.2% corresponds over this period with a decline of 4.4% in the number of workers and of 3.5% of hours worked.
[1778] New Zealand's second written submission, para. 3.80.
[1779] United States' first written submission, para. 450.
[1780] New Zealand's second written submission, para. 3.76.
[1781] New Zealand's first written submission, para. 4.104.
[1782] New Zealand's first written submission, para. 4.105.

not be presumed to indicate injury given the labour advantages enjoyed by minimills.[1783] With regard to the issue of productivity, see arguments made by the United States in paragraph 7.659.

7.667 New Zealand also argues that the USITC failed to investigate the extent to which the negative effects they perceived to be affecting the domestic industry differed as between integrated producers and more modern efficient minimills, which was necessary in order to arrive at an accurate assessment of significant "overall" impairment. According to New Zealand, while the former were utilizing increasingly obsolete production technology, the latter were taking advantage of modern technologies and increasing their market share during the period of the investigation. The analysis thus failed to reckon with the fact that during the period of investigation the United States steel industry was an industry in transition – undergoing structural change – with modern minimill producers displacing or taking market share away from obsolete integrated plants.[1784] New Zealand argues that the USITC failed to investigate properly the extent to which performance differed as between integrated mills and minimills.[1785]

7.668 In response, the United States argues that under both Articles 2.1 and Article 4.2(a) of the Agreement on Safeguards, an investigating authority must determine whether "a domestic industry" is experiencing serious injury or is threatened with serious injury. According to the United States, nothing in these provisions require an authority further to determine that each discrete segment that may exist within a particular industry is seriously injured. Having determined that the pertinent domestic industry was the one producing CCFRS, the United States asserts that the USITC's obligation was to assess serious injury on an industry-wide basis. This is precisely what it did.[1786] The United States submits that an examination of the CCFRS industry could not have encompassed only minimills, when the industry contained both minimill producers and the much larger integrated producers. It adds that the obligation to evaluate the industry as a whole, however, does not require an investigating authority to obtain information concerning every producer, or on 100% of industry production. The Panel in *US – Lamb* observed that the "as a whole" and "major proportion" clauses in Article 4.1(c) were grammatically linked and relate "to the representativeness of the data pertaining to the condition of the industry". The United States submits that the USITC collected and used the most comprehensive data possible concerning each of the ten domestic industries on which it made an affirmative finding of serious injury or threat of serious injury. The USITC collected questionnaire data from United States producers representing a clear majority of production in each of these industries.[1787] In this regard, the United States notes that based on the data concerning CCFRS minimill production[1788] and the data concerning total CCFRS production[1789], minimills account for less than 15% of total United States CCFRS production in 2000.[1790]

7.669 The United States argues in this regard that minimills were part of the domestic CCFRS industry, and the USITC found both that the CCFRS industry as a whole was seriously injured and that minimills, as well as integrated producers, had been adversely affected by the increased imports. The USITC acknowledged that minimills had cost advantages over integrated producers, and had some effect on price levels. It concluded, however, that the imports, not the minimills, led to the price pressure that typically drove prices downwards.[1791] The United States argues that numerous

[1783] New Zealand's first written submission, para. 4.106.
[1784] New Zealand's first written submission, para. 4.107.
[1785] New Zealand's written reply to Panel question No. 70 at the first substantive meeting.
[1786] United States' first written submission, para. 351.
[1787] United States' written reply to Panel question No. 70 at the first substantive meeting.
[1788] United States' first written submission, footnote 668.
[1789] US Exhibit-33.
[1790] United States' written reply to Panel question No. 76(a) at the first substantive meeting.
[1791] United States' written reply to Panel question No. 76(c) at the first substantive meeting.

manifestations of serious injury to the CCFRS industry were applicable to minimill producers. Minimill producers' prices went down and their profitability declined during the period of investigation.[1792]

7.670 The United States adds that even if a sectoral analysis of the CCFRS was required, the USITC engaged in such an analysis as well. In particular, the United States argues that the USITC's analysis was conducted on the basis of the pertinent product categories (i.e, slab, plate, hot-rolled, cold-rolled, and galvanized) on which the producers and importers were requested to provide data. According to the United States, the USITC found that its conclusions concerning declines in capacity utilization and financial performance were applicable for each product category as well as for the industry as a whole.[1793] The United States also submits that, in any event, the impact of minimills was pertinent, if at all, to the issue of causation rather than to the issue of whether the entire CCFRS industry in which minimills were responsible for a much smaller share of production than were integrated producers was incurring serious injury.[1794]

7.671 In counter-response, New Zealand observes that the USITC focuses in an unbalanced and unobjective way on the poorly performing sectors of the industry while seemingly unaware that the industry was already making the transition to efficiency and long-term viability, as evidenced by the increasingly strong performance of minimill producers.[1795] This fact receives no mention in the USITC serious injury analysis. According to New Zealand, the United States mischaracterizes this observation as a claim by New Zealand that the USITC was required to undertake separate sectoral injury evaluations, whereas the Agreement on Safeguards requires an analysis of the whole industry. In fact, New Zealand is saying the opposite – that the USITC needed to consider adequately the condition of *all* sectors, not just the sector that was failing, in order to carry out the industry-wide analysis which the United States accepts was required.[1796]

7.672 In conclusion, New Zealand submits that the United States has failed to rebut New Zealand's case that the USITC selectively and disproportionately accorded weight to some factors and not others. Nor has the United States been able to demonstrate that adequate consideration was given to the condition of all sectors of the domestic industry or that the high threshold of "serious injury" has been met. Accordingly, the United States has failed to demonstrate the existence of "serious injury" being suffered by the domestic industry as required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards. It also follows that the United States has failed to provide a reasoned and adequate explanation for its determination of "serious injury" as required by Article 3.1 of the Agreement on Safeguards.[1797]

7.673 The United States submits that because a serious injury finding must focus on an entire industry, an authority is not obliged to conduct an analysis that focuses only on one segment of an industry in isolation. For this reason, the United States submits that the Panel must reject New Zealand's claim that the USITC gave insufficient attention to minimill producers in determining that the CCFRS industry was seriously injured.[1798] The United States reiterates that minimill producers

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[1792] United States' written reply to Panel question No. 76(b) at the first substantive meeting.

[1793] United States' first written submission, para. 352.

[1794] United States' first written submission, para. 353.

[1795] New Zealand first written submission, paras. 2.27-2.32. The United States notes that minimills accounted for fully one-third of total CCFRS production in the United States; United States' first written submission, para. 353, footnote 381.

[1796] New Zealand's second written submission, para. 3.81.

[1797] New Zealand's second written submission, para. 3.82.

[1798] New Zealand's written reply to Panel question No. 70 at the first substantive meeting.

accounted for less than 15% of overall United States CCFRS production in 2000.[1799] The USITC acted appropriately, and consistently with United States obligations under the Agreement, by basing its serious injury finding for CCFRS on data relating to the entire industry, rather than to only the 15% of the industry which was represented by minimill production.[1800]

(b) Rebar

7.674 China argues that given that most of the injury factors were positive in the case of rebar, the USITC had the obligation to explain how the negative factors outweighed the positive factors and why the overall situation of the industry was nevertheless severely impaired. China asserts that it was not enough to merely state that positive factors reflected strong increases in United States apparent consumption.[1801]

7.675 In response, the United States argues that the USITC did exactly what China suggests it should have done. In particular, the United States contends that the USITC explained how the negative factors outweighed the positive factors and why the overall situation of the industry was nevertheless considered to have been severely impaired. The USITC acknowledged that "several indicators pertaining to the rebar industry, such as capacity, production, and employment, increased during the period examined". It found, however, that these increases reflected strong increases in United States apparent consumption.[1802] The United States asserts, however, that United States producers' shipments did not increase commensurately with apparent consumption notwithstanding increases in the domestic industry's productive capacity. The United States argues that, consequently, as the USITC emphasized, the domestic industry lost substantial market share during the period of investigation. In the United States' view, relying on this consideration was clearly consistent with Article 4.2(a), which specifically references "the rate and amount of the increase in imports of the products concerned in absolute and relative terms" as a pertinent factor in evaluating serious injury.[1803]

7.676 China disagrees that the USITC has provided sufficient explanation as how the negative factors outweighed the positive factors. China reiterates that it was not admissible to disregard all the positive factors by simply stating that they reflected strong increases in United States apparent consumption. According to China, the United States' reply does not provide any further justification, but rather only restates what already was to be found in the USITC Report.[1804]

(c) Welded pipe

7.677 Switzerland argues that the trends of several indicators referred to by the USITC do not testify to a threat of injury that was serious enough to fulfil the criteria of the Agreement on Safeguards. Switzerland notes in this regard that the USITC mentions that "the years 1996 to 1998 were a period of generally good health for the domestic industry producing welded tubular products". Switzerland argues that, moreover, some of the indicators examined by the USITC were positive: the number of employees as well as the hourly wages were higher in 2000 than in 1996; the same remarks can be made in relation to United States shipments quantities, operative income and capital expenditures.[1805] Switzerland also notes that the USITC mentioned that two United States firms closed down during the

[1799] United States', response to Panel question No. 76 at the first substantive meeting.
[1800] United States' second written submission, para. 114.
[1801] China's first written submission, para. 335.
[1802] United States' first written submission, para. 370.
[1803] United States' first written submission, para. 371.
[1804] China's second written submission, para. 150.
[1805] Switzerland's first written submission, para. 272.

examined period. Switzerland argues, however, that the USITC failed to show why this fact was relevant, since the importance of these bankruptcies was not clearly explained in the USITC Report. Moreover, according to Switzerland, bankruptcies of non-competitive firms were, in principle, considered to be normal phenomena in a market-based economy and must not necessarily be the consequence of serious injury that has been suffered by a certain industry.[1806] With regard to the relevance of bankruptcies, see arguments made by the United States in paragraph 7.681.

7.678 In response to Switzerland's criticism of the USITC's determination on the basis that certain factors, such as employment and United States shipment quantity, were higher in 2000 than in 1996, and that the operating income of the industry producing welded pipe products remained positive, the United States contends that this overlooks the fact that the USITC's determination was based on threat of serious injury rather than serious injury. The USITC acknowledged that the industry's condition was not at the level of serious injury.[1807] However, in the United States' view, the USITC found that the industry's condition would imminently deteriorate to the level of serious injury. In so doing, the USITC put particular emphasis on declines since 1998 in many factors, particularly production, shipments, capacity utilization, financial performance, and employment. The United States submits that this is fully consistent with the statement of the Appellate Body that, for purposes of the Agreement on Safeguards, "data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury".[1808] The United States notes that the Appellate Body has also instructed that "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". The United States contends that, consistent with this instruction, the USITC did not rely solely on the fact that important indicators of industry performance had declined during the latter portion of the period of investigation. Instead, it emphasized that, in 2000, several of these indicators were at their lowest full-year level during the period of investigation (i.e., capacity utilization, market share, operating income), or were only marginally higher than the period lows (i.e., production, employment). The USITC thus fully explained why the declines it observed during the latter portions of the period of investigation demonstrated an imminent threat of serious injury.[1809]

3. Obligation to evaluate all relevant factors

7.679 New Zealand argues that in view of the disproportionate weight that the USITC accorded to some factors in making its serious injury determination and its failure to accord appropriate weight to others, the USITC failed to evaluate all relevant factors.[1810]

7.680 The United States asserts that the USITC evaluated each of the factors specified in Article 4.2(a).[1811] The United States argues that while the factors expressly articulated in Article 4.2(a) are "of an objective and quantifiable nature", the factors are not all quantifiable in the same manner. For example, imports, sales, and production will be measured in units of output, employment will be measured in numbers of workers, profits and losses will be measured in units of currency, and capacity utilization and productivity are ratios.[1812] The United States argues that, consequently, when conducting its analysis under Article 4.2(a), an investigating authority cannot

[1806] Switzerland's first written submission, para. 273.
[1807] United States' first written submission, para. 383.
[1808] United States' first written submission, para. 384.
[1809] United States' first written submission, para. 385.
[1810] New Zealand's first written submission, para. 4.108.
[1811] United States' first written submission, para. 322.
[1812] United States' first written submission, para. 323.

derive a single injury "measure" and that there is no requirement that it do so. According to the United States, the evaluation must be based on the factors as a whole. Moreover, the authority may find serious injury even if not every single factor it examines concerning the industry's condition is declining. The United States contends that, instead, "it is the totality of the trends, and their interaction, which must be taken into account in a serious injury determination" and the "overall picture" of industry factors must demonstrate significant overall impairment.[1813]

7.681 The United States argues that in conducting its analysis of serious injury an authority may examine factors not expressly referenced in Article 4.2(a). More particularly, the United States argues that an authority can and should examine additional "factors of an objective and quantifiable nature having a bearing on the industry" that it has concluded are relevant. For several industries, the USITC evaluated additional factors it deemed to be relevant, including bankruptcies that had been declared by producers. The United States argues that while several complainants have questioned the relevance of this factor, its significance is clear. According to the United States, firms that declare bankruptcy but remain in operation frequently restructure their operations as part of the bankruptcy process. Consequently, bankruptcies can indicate declines in productive facilities and employment levels. Additionally, the United States argues that when a corporation lacks sufficient liquid assets to pay its creditors, and consequently must seek protection, restructuring, or even liquidation from the United States bankruptcy courts, this situation has obvious implications for the competitive viability of that producer. According to the United States, a corporation will generally not make a bankruptcy filing unless its operations have been significantly impaired. Similarly, an entire industry's viability may be in question when several producers within that industry declare bankruptcy.[1814] The United States also questions the contention by China that the USITC's finding that hot-rolled bar producers had gone bankrupt "is not supported by all the relevant and sufficient data". It points in this regard to the fact that bankruptcies of United States firms are a matter of public record. It also notes that the public USITC Report identified four hot-rolled bar producers that declared bankruptcy and indicated that three of the four had shut down all or a portion of their production operations in 2001. The United States asserts that the accuracy of this data cannot be challenged.[1815]

7.682 China refers to the Appellate Body decision in *US – Lamb*. China states that, in that case, the Appellate Body stated that:

> "[…] Under Article 4.2(a), competent authorities must, as a formal matter, evaluate 'all relevant factors'. However, that evaluation is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere 'check-list'. Under Article 4.2(a), competent authorities must conduct a substantive evaluation of 'the 'bearing', or the 'influence' or 'effect'" or "impact" that the relevant factors have on the "situation of [the] domestic industry". (Emphasis added)".[1816]

7.683 China asserts that what the United States seems to be saying is that a competent authority has no obligation to make a separate evaluation of injury for all the relevant factors. According to China, this is not true. Moreover, China does not agree with the United States that this evaluation "must be based on the factors as a whole". It is true that the Appellate Body stated that competent authorities must reach a determination in light of the evidence as a whole.[1817] However, according to China, this requirement relates only to the final determination of injury and does not prevent the competent

[1813] United States' first written submission, para. 323.
[1814] United States' first written submission, para. 325.
[1815] United States' first written submission, para. 359.
[1816] China's second written submission, para. 133.
[1817] Appellate Body report, *US – Lamb*, para.144.

authority from conducting, prior to this final determination, an evaluation of injury from all relevant factors.[1818]

7.684 In support, the European Communities notes that in *Argentina – Footwear (EC)* the Appellate Body stated that:

> "Article 4.2(a) of the Agreement on Safeguards requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned."[1819]

7.685 The European Communities submits that this makes it clear that there must be an evaluation of each factor listed in Article 4.2(a). The European Communities submits that the competent authority is then under an obligation to determine whether, on the basis of an evaluation of these and any other relevant factors, the domestic industry has suffered a "significant overall impairment" in the sense of Article 4.1(a). The European Communities refers to the following excerpt from the Appellate Body's report in *Argentina – Footwear (EC)*:

> "In our view it is only when the overall position of the domestic industry is evaluated, in light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is 'a significant overall impairment' in the position of that industry. Although Article 4.2(a) technically requires that certain listed factors must be evaluated, and that all other relevant factors must be evaluated, that provision does not specify what such an evaluation must demonstrate. [….] [I]n addition to a technical examination of whether the competent authorities in a particular case have evaluated all the listed factors and any other relevant factors, we believe that it is essential for a panel to take the definition of 'serious injury' in Article 4.1(a) of the Agreement on Safeguards into account in its review of any determination of 'serious injury'."[1820] [1821]

7.686 New Zealand also refers to the Appellate Body decision in *US – Lamb* where, New Zealand says, the Appellate Body repeatedly emphasized that a competent authority must evaluate, in assessing serious injury, "*all relevant factors*" of an "objective and quantifiable nature" and their "bearing" on the domestic industry. This requires a separate evaluation of each factor.[1822]

7.687 New Zealand also argues that the Panel's duty is to review whether the competent authority has, "as a formal matter", evaluated all relevant factors, and second whether it has, "as a substantive matter, provided a reasoned and adequate explanation of how the facts support their determinations". The Appellate Body in *US – Lamb* found that the USITC failed this second requirement, though emphasized it was not making a factual determination as to whether or not there was a threat of serious injury. New Zealand submits that the present case is very similar. The USITC had as a formal matter identified a series of positive and negative factors but had as a substantive matter failed to provide a reasoned and adequate explanation of how the facts supported its serious injury determinations. For example it did not examine and weigh these factors together. Hence, whether or

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[1818] China's second written submission, para. 134.
[1819] Appellate Body report, *Argentina – Footwear (EC)*, para. 136.
[1820] Appellate Body report, *Argentina – Footwear (EC)*, para. 139.
[1821] European Communities' written reply to Panel question No. 23 at the second substantive meeting.
[1822] New Zealand's written reply to Panel question No. 23 at the second substantive meeting.

not serious injury actually existed, the USITC – to paraphrase the finding in *US – Lamb* – "acted inconsistently with Article 4.2(a) and Article 2.1 of the Agreement on Safeguards".[1823]

7.688 China submits that the United States seems to consider that the competent authority conducting an investigation should have discretion in determining what other factors are relevant for its injury determination and that its evaluation should be limited to these other factors alone.[1824] China believes that such an interpretation does not meet the requirements of the Agreement on Safeguards, as clarified by the Appellate Body. The United States refers to the Appellate Body report in *US – Wheat Gluten* to assert that: "An authority can and should examine additional 'factors of an objective and quantifiable nature having a bearing on the industry' that it has concluded are relevant". According to China, such an interpretation would restrict the obligations of the competent authority far beyond the requirements of the Agreement on Safeguards as clarified by the Appellate Body.[1825] In China's view, rather, it is clear that the first obligation of the competent authority is to evaluate all the relevant factors and that, therefore, the competent authorities "must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors".[1826]

7.689 In this regard, and as far as the bankruptcy factor is concerned, China asserts that the United States may not provide in its written submission an explanation regarding the relevance of this factor. Rather, the USITC should have provided, in its report, an adequate and reasoned explanation as why it was relevant to analyse this factor in its injury determination and to what extent it was allowed to demonstrate the existence of serious injury. According to China, the fact that the United States needs to provide such additional information in its written submission is clear evidence that the USITC failed to do so.[1827]

4. Obligation to provide reasoned and adequate explanations

7.690 China argues that, with respect to the USITC's interpretation of the investigation data on injury for all ten products that are covered by the safeguard measures, the USITC failed to provide reasoned and adequate explanations.[1828] Similarly, the European Communities argues that the United States is in breach of its obligations under Articles 2.1 and 4.2 of the Agreement on Safeguards because it failed to provide reasoned and adequate explanations of its determination that serious injury, or threat thereof existed. The European Communities also asserts that it is also in violation of Articles 3.1 and 4.2(c).[1829]

7.691 In response, the United States contends that the USITC explained in some detail why there was a significant overall impairment of the state of each industry that it concluded was seriously injured. According to the United States, these industries uniformly reported poor financial performance. Numerous firms, and often the entire industry, showed unprofitable operations. In several industries, producers had gone bankrupt. For most of the pertinent industries, there were also

[1823] New Zealand's written reply to Panel question No. 23 at the second substantive meeting, citing Appellate Body Report, *US – Lamb*, para. 161.
[1824] United States' first written submission, para. 325, referred to in China's second written submission, para. 135.
[1825] United States' first written submission, para. 325, referred to in China's second written submission, para. 136.
[1826] Appellate Body report, *US – Wheat Gluten*, para. 55, cited in China's second written submission, para. 137.
[1827] China's second written submission, para. 138.
[1828] China's first written submission, para. 308.
[1829] European Communities' first written submission, para. 429.

declines in capacity and production, with closures in productive facilities. Many also had declines in capacity utilization and employment.[1830] The United States also argues that for both welded pipe and stainless steel wire (the two industries on which it found threat of serious injury) the USITC provided a detailed, fact-based explanation why a significant overall impairment in the state of the industry was clearly imminent.[1831]

7.692 China disagrees that the USITC has sufficiently explained, in a reasoned and adequate manner, "why there was a significant overall impairment of the state of each industry that it concluded was seriously injured".[1832]

(a) Alternative explanations of data

7.693 On the basis of the Appellate Body decision in *US – Lamb*, China argues that the Panel should determine whether the explanations given in the USITC Report fully addressed the nature and, especially, the complexities of the data, and responded to the interpretations of that data by China. In other words, if the explanations given by the USITC do not rebut China's interpretation, or if contradictions between the facts and the USITC's conclusions are not fully addressed, China asserts that the Panel must find that the explanations are not reasoned and adequate.[1833]

7.694 In response, the United States observes that China did not provide any interpretations of data to the USITC in its investigation and that Article 3.1 merely directs authorities to provide "findings and reasoned conclusions reached on all pertinent issues of fact and law"; it does not further require authorities to respond directly to all arguments raised by parties to the investigation. The United States indicates that the USITC report nevertheless contains sufficient reasoning to respond to the criticisms of China.[1834]

(i) CCFRS

7.695 China argues that the determination that the domestic industry of CCFRS products was suffering serious injury did not fulfil the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[1835]

7.696 China refers[1836] to the statement contained in the USITC Report that "In view of the significant idling of productive facilities, the sharp deterioration in the financial performance of the domestic industry, and significant unemployment or underemployment within the domestic industry, we find that the domestic industry producing CCFRS is seriously injured". With regard to employment, China argues that, contrary to the conclusion reached by the USITC, although employment had decreased, this did not necessarily indicate the industry had been injured. Indeed, productivity had increased by 13.2% between 1996 and 2000 and consumption had only increased by 7.8%. China further argues that since the industry is capital-intensive rather than labour-intensive, it may be that unemployment was mainly due to higher productivity.[1837]

[1830] United States' first written submission, para. 335.
[1831] United States' first written submission, para. 337.
[1832] China's second written submission, para. 139.
[1833] China's first written submission, para. 309.
[1834] United States' first written submission, para. 363.
[1835] China's first written submission, para. 317.
[1836] China's first written submission, para. 312.
[1837] China's first written submission, para. 313.

7.697 China notes that the USITC also mentioned a decline in capacity utilization with respect to CCFRS in its report. China argues that the fact that the increase in productivity was well in excess of domestic demand must also have had some impact on capacity utilization. China argues that, therefore, although capacity utilization declined, this does not mean that the industry was in a difficult position, especially given the fact that the domestic industry gained a larger market share of the United States market.[1838]

7.698 China also notes that the USITC made reference to the industry's financial problems in its report. However, China argues that at no point did the USITC explain how the importance of this factor outweighed the other positive factors leading to the conclusion that there is an overall impairment of the state of the industry.[1839]

7.699 China argues that the USITC did not provide a reasoned and adequate explanation for its determination given that the USITC Report did not address the issues referred to by China nor did it explain why the industry had been seriously injured, despite the existence of the positive factors that had been raised by China.[1840]

7.700 In response, the United States asserts that the USITC acknowledged that not every single factor it examined, pertinent to the industry's condition, was in decline. The United States argues that there need not be a decline in each Article 4.2(a) factor in order for there to be a finding of serious injury. The United States notes that the USITC specifically found, however, that improvements in certain factors "do not offset the significant declines exhibited by other indicia of the industry's condition with respect to the issue of whether the industry is suffering serious injury". In this regard, the United States makes reference to declines, which it claims have not been disputed by any party, including significant idling of productive capacity, sharp deterioration in financial performance and significant unemployment.[1841]

7.701 The United States also asserts that the USITC specifically discussed and acknowledged increases in capacity, production and productivity[1842] and examined the implications of the increases. The USITC, it asserts, fulfilled its obligation under Articles 2.1 and 4.2(a) by concluding that these isolated increases did not detract from its finding of serious injury in light of all the pertinent factors having a bearing on the state of the industry.[1843]

7.702 In particular, the United States argues that the USITC Report provided several reasons why increases in production and capacity were consistent with a finding of serious injury. First, according to the United States, the USITC explained that increases from 1996 to 2000 occurred at a time when apparent domestic consumption of CCFRS was increasing. The United States asserts that one would normally expect production and capacity to increase in a growing market. However, according to the United States, the increase in production from 1996 to 2000 was only incrementally greater than the increase in United States apparent consumption of CCFRS during the same period.[1844] Second, the USITC emphasized that the increased capacity was not being utilized. Instead, capacity utilization for the domestic industry had declined steadily from 1996 to 2000 and fell sharply between interim 2000 and interim 2001. The United States asserts that the USITC emphasized that declines in capacity

[1838] China's first written submission, para. 314.
[1839] China's first written submission, para. 315.
[1840] China's first written submission, para. 316.
[1841] United States' first written submission, para. 338.
[1842] United States' first written submission, paras. 339 and 349.
[1843] United States' first written submission, para. 349.
[1844] United States' first written submission, paras. 340-341.

utilization were apparent in each of the particular product categories within the industry, as well as in the industry as a whole.[1845] In any event, the United States argues that Article 4.2(a) does not expressly mention changes in capacity as a factor that an investigating authority must consider in evaluating whether there is serious injury. Instead, it references changes in "capacity utilization".[1846] Third, according to the United States, the overall picture in the industry was not one of steady expansion. The United States asserts that, as had been found by the USITC, ten United States producers of CCFRS declared bankruptcy during the period of its investigation and several shut down and ceased production altogether.[1847] The United States argues that, in light of the foregoing, the USITC thoroughly explained why the positive trends with respect to capacity and production did not outweigh other negative trends concerning idling productive resources in the industry.[1848]

7.703 According to the United States, the USITC also acknowledged that productivity in the CCFRS industry increased from 1996 to 2000. The United States asserts that the USITC considered the effect of this increase on employment levels in the industry and concluded that the increase in productivity "may have offset to some degree the declines in employment".[1849] The United States argues that, therefore, it is clear that the USITC considered the increase in productivity but concluded that it did not outweigh or entirely explain the declines in employment. According to the United States, the annual trends in productivity did not correlate with the trends in employment. Productivity for the CCFRS industry increased every full year during the period of investigation. This included years in which employment was relatively stable as well as those in which it declined.[1850] The United States argues that, moreover, increased productivity could only explain declining employment at a particular facility where production continued on an ongoing basis. It could not explain declines in employment attributable to the shutting down of operations at production facilities. According to the United States, the decline in employment for the CCFRS industry occurred at a time when several productive facilities closed down entirely. Thus, there were losses of employment at facilities where productivity essentially declined to zero.[1851] The United States also argues that increases in productivity, which would generally be expected to lead to improved financial results, did not track productivity given that the financial results of the CCFRS industry declined sharply after 1997, and the industry recorded overall operating losses in 1999, 2000, and interim 2001.[1852]

7.704 Despite explanations proffered by the United States, China submits that it still considers that the USITC did not provide an adequate and reasoned explanation for its determination. Indeed, China does not consider that the USITC has furnished sufficient explanation as to how the negative factors outweighed the other positive factors. In China's view, a mere statement that "the improvements in these indicia do not offset the significant declines exhibited by other indicia" is an insufficient explanation.[1853] Furthermore, China notes that the explanations given by the United States, which are to a large extent a re-statement of the USITC Report as far as capacity, production and productivity are concerned, are largely based on end-points comparison between 1996 and 2000. According to China, reliance on such end-points comparison is insufficient to rebut the claim by China that the USITC did not properly examine these three factors.[1854]

[1845] United States' first written submission, para. 342.
[1846] United States' first written submission, para. 344.
[1847] United States' first written submission, para. 343.
[1848] United States' first written submission, para. 344.
[1849] United States' first written submission, para. 345.
[1850] United States' first written submission, para. 346.
[1851] United States' first written submission, para. 347.
[1852] United States' first written submission, para. 348.
[1853] China's second written submission, para. 141.
[1854] China's second written submission, para. 142.

7.705 China argues that the USITC did not provide a reasoned and adequate explanation for its determination given that the USITC Report did not address the issues referred to by China nor did it explain why the industry had been seriously injured, despite the existence of positive factors that had been raised by China.[1855]

(ii) Hot-rolled bar

7.706 China argues that the determination that the domestic industry of hot-rolled bar was suffering serious injury did not fulfil the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[1856] China believes that the USITC did not fully address the nature and the complexity of the data. China argues, that, moreover, the USITC Report does not contain a response to the interpretations of the data that have been put forward by China. On this basis, China argues that the USITC failed to provide a reasoned and adequate explanation for its determination.[1857]

7.707 In response, the United States argues that there is no basis for China's assertion that the USITC did not fully address the nature and complexity of the data. The United States submits that, on the contrary, the USITC's report fully explained both the nature of the data the USITC used in analysing serious injury to the hot-rolled bar industry and why that data supported its conclusion of serious injury. That conclusion satisfies the obligations of Articles 2.1 and 4.2(a) of the Agreement on Safeguards.[1858]

7.708 More particularly, the United States argues that in determining that the hot-rolled bar industry was seriously injured, the USITC cited a wide variety of data indicating that the industry was in a significantly impaired condition. It pointed to declining production, shipments, and capacity that had occurred in the industry since 1998; three United States producers declaring bankruptcy and shutting down production in early 2001; idling productive facilities; the sharply declining financial performance of the industry since 1998 and the overall operating losses in 2000 and interim 2001; declining employment during the latter portion of the period of investigation and capital expenditures and research and development expenditures declining throughout the period of investigation.[1859] The United States asserts that China, ignoring these pervasive declines and the reasoning the USITC used to support its serious injury conclusion, instead chooses to direct a number of scattered criticisms concerning the USITC's analysis. The United States argues that China's criticisms, in addition to being factually incorrect, do not demonstrate that the United States failed to comply with its obligations under Articles 2.1 and 4.2(a).[1860]

7.709 China refers to the statement contained in the USITC Report that: "In light of the poor financial performance of the hot-rolled bar industry, the declines in output and shipments, and the numerous bankruptcies and plant closures that occurred during the latter portion of the period examined, with the consequent unemployment due to these closures, we conclude that the industry is seriously injured".[1861] China argues that the USITC's statement as far as it concerns "declines in output and shipments" is not supported by the facts of the investigation. Rather, in China's view, production and shipments increased between 1996 and 2000. China acknowledges that both factors declined towards the end of the period of investigation. However, China argues that the USITC failed

[1855] China's first written submission, para. 316.
[1856] China's first written submission, para. 326.
[1857] China's first written submission, para. 325.
[1858] United States' first written submission, para. 363.
[1859] United States' first written submission, para. 354.
[1860] United States' first written submission, para. 355.
[1861] China's first written submission, para. 318.

to explain why these declines indicated serious injury and were not just a normal reaction to the sharp increase in these factors which had occurred at the beginning of the period of investigation. China argues that, in any case, the USITC failed to justify why only the last years of the period of investigation were considered relevant in examining these factors. In addition, China asserts that the USITC failed in its argument that these factors declined between interims 2000 and 2001 because the industry was injured rather than as a result of a decline in consumption.[1862]

7.710 In response, the United States argues that the fact that production and shipments for the hot-rolled bar industry were each higher in 2000 than they were in 1996 cannot be dispositive. According to the United States, Article 4.2 does not permit an investigating authority to rely exclusively on an endpoint-to-endpoint analysis in assessing serious injury.[1863] The United States asserts that the USITC did not stop with an endpoint-to-endpoint analysis. It also examined trends within the period of investigation. The United States contends that this examination demonstrated that production, shipments, sales quantities and revenues pervasively declined over the latter portion of the period of investigation. Moreover, shipments and sales quantities declined, and production increased only minimally from 1999 to 2000, when United States apparent consumption of hot-rolled bar increased. Consequently, in the United States' view, this was not a situation where the rate of increase merely slowed during the period of investigation, as China appears to posit. According to the United States, the USITC's thorough examination and explanation of trends within its period of investigation further indicates that the declines in output-related indicators were not merely functions of changes in United States apparent consumption.[1864] The United States also states that declines in production, shipments, and sales during the latter portion of the period of investigation were significant because, first, they were based on the most recent data available and clearly probative of current impairment in the position of the domestic industry and. secondly, they were coincident with other negative trends upon which the USITC relied – namely, the industry's deteriorating operating performance.[1865]

7.711 China disagrees with the statement by the United States that China tried to rely on an end-points comparison, as far as the analysis of production and shipments is concerned. In its submission, China stated that: "Production and shipments rather increased between 1996 and 2000". Rather than relying on a comparison between end-points, China emphasized that the general trend over the whole investigation period was somewhat upward, even if slight decreases could be noticed.[1866]

7.712 China also states that special attention needs to be drawn to the "numerous bankruptcies and plant closures". Contrary to the USITC's view, China does not believe that this criterion should be used as grounds for a determination of serious injury since it was not supported by all the relevant and sufficient data.[1867] In this respect, China asserts that all that was known about the hot-rolled bar industry was that there were 32 domestic firms that responded to the questionnaire and which represented 70 to 78% of domestic production. No information had been provided on the total number of firms or the size of the different firms.[1868] China also notes that the USITC stated that the 3 firms that declared bankruptcy in 2001 did not respond to the questionnaire.[1869] China asserts that the only information available was that these three firms accounted for approximately 1.5 million tons of capacity. However, according to China, there was no information concerning the time during which

[1862] China's first written submission, para. 319.
[1863] United States' first written submission, para. 356.
[1864] United States' first written submission, para. 357.
[1865] United States' first written submission, para. 358.
[1866] China's second written submission, para. 143.
[1867] China's first written submission, para. 320.
[1868] China's first written submission, para. 321.
[1869] China's first written submission, para. 320.

such capacity was achieved, nor concerning productivity or any other criteria. Furthermore, there was no information concerning the health of these firms during and before the period of investigation. China argues, in addition, that there was no information as to why this factor should be considered.[1870]

7.713 With respect to the reference to bankruptcies by the USITC in making its serious injury determination, the United States argues that in conducting its analysis of serious injury an authority may examine factors not expressly referenced in Article 4.2(a). More particularly, the United States argues that an authority can and should examine additional "factors of an objective and quantifiable nature having a bearing on the industry" that it has concluded are relevant. For several industries, the USITC evaluated additional factors it deemed to be relevant, including bankruptcies that had been declared by producers. The United States argues that while several complainants have questioned the relevance of this factor, its significance is clear. According to the United States, firms that declare bankruptcy but remain in operation frequently restructure their operations as part of the bankruptcy process. Consequently, bankruptcies can indicate declines in productive facilities and employment levels. Additionally, the United States argues that lacking sufficient liquid assets to pay its creditors, and consequently having to seek protection, restructuring, or even liquidation from the United States bankruptcy courts, has obvious implications for the competitive viability of a producer. According to the United States, a corporation will generally not make a bankruptcy filing unless its operations have been significantly impaired. Similarly, an entire industry's viability may be in question when several producers within that industry declare bankruptcy.[1871] The United States also questions the contention by China that the USITC's finding that hot-rolled bar producers had gone bankrupt "is not supported by all the relevant and sufficient data". It points, in this regard, to the fact that bankruptcies of United States firms are a matter of public record. It also notes that the public USITC Report identified four hot-rolled bar producers that declared bankruptcy and indicated that three of the four had shut down a portion or all of their production operations in 2001. The United States asserts that the accuracy of this data cannot be challenged.[1872]

7.714 As far as bankruptcies are concerned, China does not challenge the accuracy of the data, but rather would like to underline that, due to the lack of response to the questionnaire, there is insufficient explanation as to how this criterion could be used in the assessment of whether the industry has suffered a serious injury and whether this injury can be attributed to increased imports.[1873] China reiterates that if some producers did not respond to the questionnaires, the information provided to the competent authority may not reflect completely, and may not be truly representative of the industry's situation. The authority must therefore be particularly cautious when using this information. In this case, the need for a reasoned and adequate explanation is of particular importance.[1874]

7.715 China notes that, according to the USITC, the data from the questionnaires showed a decline in employment. However, China is of the opinion that no such decline took place and that, rather, changes in employment were a function of cycles during the period of investigation.[1875] China notes, in this regard, that while the USITC stated that "the lack of questionnaire responses from some producers that have shut down facilities means that the questionnaire data do not fully reflect declines in employment that occurred at the conclusion of the period examined" it went on to state that following the closing down of the three firms, which have not answered the questionnaire, 1,000

[1870] China's first written submission, para. 321.
[1871] United States' first written submission, para. 325.
[1872] United States' first written submission, para. 359.
[1873] China's second written submission, para. 144.
[1874] China's second written submission, para. 145.
[1875] China's first written submission, para. 322.

employees have lost their jobs.[1876] China argues that if the answers to the questionnaires did not fully reflect the situation of the industry as regards unemployment, such information was not representative of the industry and the USITC's conclusion in respect of this criterion could not have been reasoned and adequate.[1877]

7.716 China also argues that the treatment of the employment factor by the USITC was not objective. In this regard, China points out that the USITC considered unemployment in all three firms that declared bankruptcy, although these firms did not respond to the questionnaire. However, the USITC did not consider employment in the remaining firms which were not bankrupt and which did not answer the questionnaire either. China argues that the examination of the employment factor was not objective, reasoned or adequate preventing the USITC from making an objective determination of the overall situation of the industry.[1878]

7.717 In response, the United States notes that, as stated in its report, because not all the bankrupt hot-rolled bar producers responded to its questionnaire, the USITC referred to public data concerning these firms in its analysis of capacity and employment trends for the hot-rolled bar industry.[1879] The United States also asserts that China cites no provision of the Agreement on Safeguards to justify its apparent belief that the USITC could only use information it obtained from the questionnaire responses it received in its analysis of serious injury. The United States submits that, to the contrary, Article 3.1 of the Agreement on Safeguards requires investigating authorities to provide "public hearings or other appropriate means in which importers, exporters, and other interested parties could present evidence and their views" but that, presumably, it would not require investigating authorities to permit interested parties to submit evidence pertinent to the investigation if the investigating authorities could not consider such evidence once it were submitted.[1880] The United States notes that interested parties that supported the imposition of safeguards remedies for hot-rolled bar presented information concerning certain hot-rolled bar producers that did not respond to the USITC's questionnaire, including information on capacity of certain firms that had ceased operations and the number of employees affected by each shutdown. The United States argues that parties that opposed the imposition of remedies had the opportunity to challenge the accuracy or reliability of this data. According to the United States, none did so before the USITC and China does not do so before the Panel. In the United States' view, the USITC found the data to be reliable and probative. Consequently, it acted in a manner fully consistent with the Agreement on Safeguards when relying on the entirety of data in its record concerning the hot-rolled bar industry.[1881]

7.718 As far as employment is concerned, China considers that, since the USITC acknowledged that the questionnaire data did not fully reflect falls in employment, this data was not sufficiently reliable for the USITC to draw conclusions from it. Since the data gathered by the USITC through the questionnaires was clearly incomplete, it should have considered this data very carefully and there was an increased need for an adequate and reasoned explanation as to how it was supporting the USITC's conclusion that the industry was being seriously injured.[1882] China also submits that the USITC should have addressed the issue of unemployment for the remaining firm that were not

[1876] China's first written submission, para. 323.
[1877] China's first written submission, para. 324.
[1878] China's first written submission, para. 324.
[1879] United States' first written submission, para. 360.
[1880] United States' first written submission, para. 361.
[1881] United States' first written submission, para. 362.
[1882] China's second written submission, para. 146.

bankrupt. According to China, there is no evidence indicating that the United States did so. On this basis, China considers that the USITC did not fully address the nature and complexity of the data.[1883]

(iii) Cold-finished bar

7.719 China argues that the USITC determination that the domestic industry of cold-finished bar was suffering serious injury did not fulfil the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[1884] China believes that the USITC did not fully address the nature and the complexity of the data. China argues, moreover, that the USITC Report does not contain a response to the interpretations of the data that have been put forward by China. On this basis, China argues that the USITC failed to provide a reasoned and adequate explanation for its determination.[1885]

7.720 In response, the United States notes that in finding that the cold-finished bar industry was seriously injured, the USITC identified the industry's poor financial performance (such as drops in operating income, the existence of operating losses and declines in sales revenue) and loss of market share as particularly pertinent. The United States contends that the USITC also cited declines in the industry's capacity, shipments, and production during the last three full years of its period of investigation, and its low levels of capacity utilization.[1886] The United States argues that the USITC objectively examined all pertinent factors and provided a reasoned explanation for its conclusion that the cold-finished bar industry was seriously injured. The United States, therefore, satisfied its obligations under Articles 2.1 and 4.2(a) of the Agreement on Safeguards.[1887]

7.721 China notes that the concluding section on injury in respect of cold-finished bar in the USITC Report stated that: "The most pertinent indicator of the industry's condition is the poor financial performance. The industry's financial condition improved in 1997 and 1998 from the level in 1996, but its operating performance declined sharply in 1999 and continued to be poor in 2000. During both 1999 and 2000, the industry was only marginally profitable, with an increasing number of firms posting operating losses. Industry financial performance continued to deteriorate in interim 2001, when the industry sustained an operating loss. Although the cold finished-bar industry's shipments and production were higher in 2000 than in 1996, these indicators declined during the last three years of the period examined and there was significant unused capacity throughout the period. In light of these considerations, we conclude that the cold-finished bar industry is seriously injured".[1888] China argues that this statement does not present an accurate picture of the situation of the industry. With regard to production, United States shipments, capacity and capacity utilization, increases between 1996 to 1998 were significant. China argues that, accordingly, even if production and the other factors subsequently declined in the period of investigation, levels in 2000 were significantly higher than the 1996 levels. China also asserts that United States consumption significantly increased between 1996-2000. China argues that, therefore, a sound interpretation of the data should be that the position of the industry was positive.[1889]

7.722 According to China, the USITC could not ignore the positive factors that it itself acknowledged, by simply stating that the financial performance was the most pertinent indicator of the industry's condition. In any case, it is China's view that this is insufficient to explain how the

[1883] China's second written submission, para. 147.
[1884] China's first written submission, para. 331.
[1885] China's first written submission, para. 330.
[1886] United States' first written submission, para. 364.
[1887] United States' first written submission, para. 368.
[1888] USITC Pub. 3479, Vol. I at 104 cited in China's first written submission, para. 327.
[1889] China's first written submission, para. 328.

negative factors outweighed the positive factors. Indeed, there is nothing in the Agreement on Safeguards that would allow the USITC to consider one indicator more important than the others. Furthermore, the USITC has given no explanation as to why the deterioration of the industry's financial performance was to be considered as the "most pertinent indicator of the industry's condition".[1890]

7.723 In response, the United States notes that the USITC expressly acknowledged that certain output-related factors increased from 1996 to 2000 for cold-finished bar. The United States further contends that the analysis of serious injury is not merely a question of endpoint-to-endpoint comparisons.[1891]

7.724 China also does not agree with the USITC's interpretation that emphasis should be placed on the most recent period, given the sharp increase in most factors at the beginning of the period of investigation. More particularly, China argues that the recent decline in factors had to be evaluated in the light of the unusual increase that had taken place just before that period. In China's view, the recent decline in some factors only demonstrates that factors were stabilizing and that, therefore, the industry was not seriously injured.[1892]

7.725 In response, the United States argues that China has not explained what was "unusual" about the increases in shipments and production that the USITC acknowledged occurred between 1996 and 1998. In the United States' view, these increases merely followed increases in domestic consumption. Apparent consumption also increased from 1999 to 2000, yet the domestic industry's shipments and production declined during this period. The United States argues that the USITC appropriately concluded that, although the United States cold-finished bar industry was able to increase its output to reflect changes in apparent consumption at the beginning of the period of investigation, it was not able to do so at the conclusion of the period.[1893] The United States also argues that, contrary to a submission made by China, the cold-finished bar industry's financial condition was not "stabilizing" at the conclusion of the period of investigation. Instead, financial indicators declined sharply after 1998. The United States asserts that the deterioration of the industry's financial performance, which the USITC explained was "[t]he most pertinent indicator of the industry's condition" was simply ignored by China.[1894]

7.726 As far as the word "unusual" is concerned, China states that it was used by China to underline the clear contradiction between the USITC's conclusion that the industry has been seriously injured and the clear positive trends shown by certain factors. However, the point of the sentence quoted by the United States was to make clear that China disagrees with the USITC's interpretation that considerable importance should be given to the most recent period. The state of the domestic industry should have been assessed with a view of the trends over the whole investigation period, which are clearly positive for a certain number of indicators.[1895]

(iv) Rebar

7.727 China argues that the USITC failed to make a determination of injury with respect to rebar that was consistent with the requirements of Articles 2.1 and 4.2(a) of the Agreement on

[1890] USITC Pub. 3479, Vol. I, p. 104, cited in China's second written submission, para. 148.
[1891] United States' first written submission, para. 365.
[1892] China's first written submission, para. 329.
[1893] United States' first written submission, para. 366.
[1894] United States' first written submission, para. 367.
[1895] China's second written submission, para. 149.

Safeguards.[1896] China believes that the USITC did not fully address the nature and the complexity of the data and that, as a result, the USITC failed to provide a reasoned and adequate explanation for its determination.[1897]

7.728 In response, the United States argues that the USITC objectively considered all the pertinent data and provided a reasoned basis in finding that the rebar industry was seriously injured. According to the United States, that finding is consistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards.[1898] More particularly, the United States notes that in finding that the rebar industry was seriously injured, the USITC emphasized the industry's poor financial performance during the latter portion of the period of investigation. Reference is made by the United States in particular to the deterioration of the industry's financial condition between 1999 and 2000: the fact that the domestic industry's capital expenditures declined during each year of the period of investigation, and the 2000 expenditures were less than half the 1996 level; and that the domestic industry's market share was considerably lower in 2000 than it was in 1996.[1899]

7.729 China notes that the USITC stated in its report that: "Although several indicators pertaining to the rebar industry, such as capacity, production, and employment, increased during the period examined, these increases reflect strong increases in United States apparent consumption. Notwithstanding these increases, however, the rebar industry showed poor financial performance during the latter portion of the period examined. The industry's financial condition deteriorated sharply between 1999, when it had a positive operating margin of 5.0%, and 2000, when it had a negative operating margin of 1.6%. Additionally, the domestic industry's market share declined during the period examined and its capital expenses declined considerably. We consequently conclude that the rebar industry is seriously injured".[1900] China believes that this statement does not present an accurate picture of the situation of the industry.[1901] In particular, China argues that while the imports' share of the domestic market was greater in 2000 as compared to the level in 1996, it remained low. Furthermore, domestic industry sales and capacity utilization increased. China further argues that losses suffered by the industry were incurred towards the end of the period of investigation. China points out that such losses were also suffered at the beginning of the period of investigation, which did not prevent the industry from realizing important profits three years in a row. Thus, China posits that the losses incurred by the industry towards the end of the period of investigation were just part of a cycle. China argues that the USITC did not make any demonstration to the contrary.[1902]

7.730 In response, the United States argues that the record did not show an industry with cyclical patterns. Rather, it showed one that had continued and sustained increases in demand for its product throughout the period of investigation. According to the United States, rebar producers' inability to operate profitably during a time of record demand was a clear indication of serious injury.[1903] The United States notes that apparent United States consumption of rebar rose by 48.1% during 1996 to 2000 and was also 2.0% higher in interim 2001 than in interim 2000. In light of these conditions of competition, the fact that the United States rebar industry expanded capacity and employment and was able to increase its output during the period of investigation was not surprising. The United States submits that, as the USITC observed the rebar industry was not able to benefit from increasing

[1896] China's first written submission, para. 337.
[1897] China's first written submission, para. 336.
[1898] United States' first written submission, para. 373.
[1899] United States' first written submission, para. 369.
[1900] USITC Pub. 3479, Vol. I at 111 cited in China's first written submission, para. 332.
[1901] China's first written submission, para. 333.
[1902] China's first written submission, para. 334.
[1903] United States' first written submission, para. 372.

demand. Its share of the United States market fell significantly (10 percentage points) from 1996 to 2000. Moreover, notwithstanding increases in factors such as production and employment, its financial condition deteriorated sharply. The industry had an operating loss in 2000, and was only marginally profitable during interim 2001. The USITC also noted that the industry's capital expenses declined over the period of investigation. The USITC properly evaluated both the industry's improvements and declines with respect to each of the Article 4.2(a) factors, and fully explained why the factors as a whole supported its conclusion of serious injury.[1904]

7.731 China submits that its claim that the losses incurred by the industry towards the end of the period of investigation are just part of a cycle was an illustration of the lack of adequate explanation provided by the USITC regarding the losses incurred by the industry with regard to only one specific part of the investigation period.[1905]

7.732 The United States submits in response that the USITC explained that it was highly pertinent that the domestic rebar industry had sharply deteriorating financial performance during the latter portion of the period of investigation, notwithstanding its increases in output. There was no evidence in the record for finding that the domestic industry's financial performance was a reflection of a business cycle. The record did not show an industry with cyclical patterns – it showed one that had continued and sustained increases in demand for its product throughout the period of investigation. Rebar producers' inability to operate profitably during a time of record demand was a clear indication of serious injury.[1906]

7.733 China notes that, in its reply, the United States responds that "the USITC further explained that it was highly pertinent that the domestic rebar industry had sharply deteriorating financial performances during the latter portion of the period of investigation, notwithstanding its increases in output". However, there is no explanation as why this would be "highly pertinent".[1907]

(v) Welded pipe

7.734 Switzerland argues that the USITC failed to demonstrate for welded pipe products (other than OCTG), that there was a threat of "serious injury" in the sense of a "significant overall impairment in the position" of the industry, as is required by Article 4.1(a) of the Agreement on Safeguards.[1908] In particular, Switzerland argues that if the categorisation of welded pipe products had been done correctly, the USITC would have found that for precision tubes, there was until recently only one firm among the tubes producers in the United States that claimed to be able to produce similar products, albeit not of the same quality. Accordingly, Switzerland argues that it fails to understand how the United States industry in the sector could face serious injury.[1909]

7.735 By way of a general response, the United States argues that, in requesting establishment of a Panel, Switzerland did not include a claim that the United States findings of serious injury or threat of serious injury were inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards. The United States submits, therefore, that this claim is outside the Panel's terms of reference, and there is

[1904] United States' written reply to Panel question No. 79 at the first substantive meeting.
[1905] China's second written submission, para. 334.
[1906] United States' first written submission, para. 372.
[1907] China's second written submission, para. 152.
[1908] Switzerland's first written submission, para. 259.
[1909] Switzerland's first written submission, para. 268.

no basis for the Panel to address it. It goes on to state, however, that if the Panel decides to address this issue, it should find that Switzerland has failed to meet their burden of proof.[1910]

7.736 In counter-response, Switzerland submits that it did not specifically mention the requirement of serious injury or the threat thereof in its request for establishment of a Panel. However, in its request for the establishment of a Panel, it invoked Articles 2.1 and 4.2(a) of the Agreement on Safeguards, which explicitly refer to increased imports, serious injury or threat thereof and causal link. Switzerland, furthermore, specifically referred to increased imports and causal link. The argument of causal link (between increased imports and serious injury or threat thereof) inherently covers the element of serious injury or threat thereof as no argument can be made regarding the causal link if the argument of injury or threat thereof is excluded.[1911]

7.737 China argues that the USITC failed to make a determination of threat of serious injury in relation to certain pipe products that was consistent with the requirements of Articles 2.1 and 4.2(a) of the Agreement on Safeguards.[1912]

7.738 In response, the United States notes that the USITC's determination on welded pipe was based on threat of serious injury. While the USITC found that the industry producing welded pipe was not seriously injured, it characterized its overall condition as "weak". It concluded that serious injury appeared imminent on the basis of the fact that production had declined since 1998 despite generally stable United States apparent consumption; capacity utilization had fallen sharply in 1999 and 2000; United States producers' market share had fallen sharply in 2000 and declined further in interim 2001; domestic producers' operating income was at its lowest full-year level in 2000; and employment in the industry had fallen in 1999 and 2000, and was close to the lowest level of the period of investigation in 2000. Wages showed similar trends. Interim 2001 employment levels were above those of 2000, but wages and the number of hours worked were not.[1913]

7.739 Switzerland does not dispute that the United States industry has suffered difficulties. However, it argues that the USITC has not demonstrated, for the welded pipe products (other than OCTG), the threat of "serious injury" in the sense of a threat of a "significant overall impairment in the position" of the industry, as is required by Article 4.1(a) of the Agreement on Safeguards.[1914] In this regard, Switzerland points out that the USITC found that the domestic industry of welded pipe was facing a threat of serious injury. The USITC came to this conclusion after having given particular emphasis to the following declining factors since 1998: production, shipments, capacity utilization, financial performance and employment. However, the USITC itself recognized that "during the period of investigation the domestic welded pipe capacity increased and was at its highest level in 2000. According to Switzerland, United States capacity growth largely tracked the increase in apparent consumption of welded pipe. The recent decline in domestic production coupled with the increase in domestic capacity resulted in a significant decline in capacity utilization beginning in 1999 and continuing through 2000, and interim 2001". [1915]

7.740 China argues that the USITC failed to explain, in a reasoned and adequate manner, why there was a threat of serious injury to the certain pipe products industry, given that the market for large

[1910] United States' first written submission, para. 382.
[1911] Switzerland's second written submission, para. 78.
[1912] China's first written submission, para. 343.
[1913] United States' first written submission, para. 374.
[1914] Switzerland's second written submission, para. 80.
[1915] USITC Report, Vol. I, p.160, cited in China's second written submission, para. 81.

diameter line pipe had begun to surge and would continue to expand in the immediate future.[1916] China asserts in this regard that the USITC agreed with the projections of continued growth due to rising demand for pipeline projects. According to China, the USITC also stated that domestic production increased between 1996 and 1998 in conjunction with rising levels of aggregate apparent United States consumption. China argues that, according to the USITC, since rising levels of consumption resulted in an increase in production, one could expect the increase in demand for line pipe to result in an increase in production, which would improve the situation of the industry.[1917]

7.741 In response, the United States argues that the USITC acknowledged in its report that there had been a recent increase in demand for large diameter line pipe and that continued growth in this market segment was likely.[1918] The United States notes that the USITC provided two reasons why this fact did not detract from its conclusion of threat of serious injury. It first observed that large diameter line pipe accounted for only 20 to 30% of the entire industry producing welded pipe.[1919] Contrary to China's contention, the USITC was justified in concluding that it should not have been dispositive. In support, the United States asserts that the USITC was analysing serious injury on the basis of the industry as a whole. In making an analysis for 100% of the industry, the USITC was not compelled to conclude that increased demand in 20% of the industry outweighed the remaining 80% facing different conditions of competition.[1920] Secondly, the USITC did not find the increase in demand for large diameter line pipe to be dispositive. As the USITC noted, demand for this product had already begun to increase. Consequently, whether the increase in demand for large diameter line pipe would affect demand in the entire industry would be apparent in the data collected in the USITC investigation.[1921] However, overall demand for welded pipe had not increased appreciably during the latter portion of the period of investigation. Instead, as the USITC observed, it had remained generally stable since 1998.[1922] The United States argues that, although the increases in demand for large diameter line pipe observed at the conclusion of the period of investigation had been sufficient to stabilize overall United States demand for welded pipe, it had not been sufficient to prevent the declines in shipments, production and capacity utilization observed during these periods. Although the USITC concluded that demand conditions for the imminent future would be the same as those observed during the latter portion of the period of investigation, it was nevertheless justified in finding that the unfavourable trends in output-related factors for the entire industry producing welded pipe, which it had observed during these periods would continue.[1923]

7.742 China notes that, despite the foregoing, the USITC explained that large diameter line pipe only represented a portion of the industry and that overall demand for welded pipe products remained "relatively" constant despite the recent rise in demand. On that basis, the USITC believed that the threat of serious injury remains.[1924] In China's opinion, this explanation was far from sufficient. First, China argues that it was normal that overall demand increased only slightly in interim 2001 given that demand was only starting to rise at that point. Moreover, China argues that in order to come to the conclusion that serious injury was still imminent, the USITC had to determine the impact in the near future of this increase in demand and then determine whether it could prevent serious injury or not.[1925] China argues that the fact that 20-30% of the whole category of the product in question would be

[1916] China's first written submission, para. 338.
[1917] China's first written submission, para. 339.
[1918] United States' first written submission, para. 376.
[1919] United States' first written submission, para. 377.
[1920] United States' first written submission, para. 378.
[1921] United States' first written submission, para. 379.
[1922] United States' first written submission, para. 380.
[1923] United States' first written submission, para. 381.
[1924] China's first written submission, para. 340.
[1925] China's first written submission, para. 341.

affected by the increasing demand was a very important factor to be considered. China argues that the USITC did not examine it closely enough and did not give reasoned and adequate explanations as to why injury was still imminent.[1926]

7.743 Despite arguments of the United States, China notes that the USITC did not assess to what extent the demand for line pipe, that the USITC acknowledged should still be increasing in the future, could have an impact in the on the demand for the overall welded product category. Indeed, this might have confirmed the trend, underlined in the United States' reply, that consumption of welded pipe has been increasing since 1999.[1927] Accordingly, China maintains that the USITC failed to provide a reasoned and adequate explanation as to why injury was still imminent.[1928]

7.744 Switzerland notes that the USITC, in its report, stated that: "In view of the declining trends in most of the industry's performance factors beginning in 1999 and continuing through 2000 and into 2001, particularly the decline in industry production, capacity utilization, shipments, number of workers, and profitability in 2000, we find that the domestic industry is approaching a state of serious injury".[1929] Switzerland argues that rather than there being a threat of serious injury, the relevant United States domestic industry actually failed to adapt to the adjustment process of the steel industry world-wide.[1930]

7.745 In response, the United States argues that Switzerland does not explain why a more generalized discussion of the adjustment process of the steel industry world-wide is required under Article 4.2(a). According to the United States, this topic clearly does not pertain to any factor expressly listed under Article 4.2(a) nor is the topic analogous to any factor listed under Article 4.2(a). The United States contends that the focus in that provision is on objective, empirical factors "having a bearing on the situation" of the pertinent domestic industry. These factors describe or indicate the state of the industry, as opposed to considerations not subject to quantification that may have an effect on the domestic industry. The United States submits that, in contrast, an analysis of the effects of world-wide conditions of competition would appear more properly to relate to the evaluation of the causal link between increased imports and serious injury required under Article 4.2(b). The United States argues that the USITC's consideration of all the factors expressly listed in Article 4.2(a), together with several other empirical factors relevant to evaluation of the condition of the domestic industry producing welded pipe, fully satisfies the requirements of that provision.[1931]

7.746 Concerning the question of the adaptation of the United States domestic industry to the adjustment process world-wide, Switzerland, on the basis of the injury factors considered by the USITC, is of the view that the United States industry of welded tubes increased its capacity to the extent that, already in 1996, the capacity exceeded the United States apparent consumption by 855,809 tons.[1932] Recognizing that Article 4.2(a) of the Agreement on Safeguards does not require an analysis of the adjustment process of the steel industry world-wide, Switzerland does not claim that the United States should have done so. Switzerland submits that it deduced from the figures cited in the USITC Report and the developments in the steel industry worldwide that the United States

[1926] China's first written submission, para. 342.
[1927] China's second written submission, para. 153.
[1928] China's second written submission, para. 154.
[1929] USITC Report, Vol. I, p. 162 cited in Switzerland's first written submission, para. 267.
[1930] Switzerland's first written submission, para. 269.
[1931] United States first written submission, para. 388.
[1932] Switzerland's second written submission, para. 85.

industry must not have adapted to the situation of the steel industry world-wide, suffering from chronic overcapacity of production, the way for instance Swiss steel industry did.[1933]

7.747 As regards the indicator of capacity, Switzerland notes that United States domestic capacity increased strongly (+22%) and constantly between 1996 and 2000, whereas United States domestic demand increased to a lesser extent (+19%). In comparison, foreign capacity increased only slightly (+3%) during the same period. Switzerland states that during the period of investigation the share of the United States industry in global capacity rose from about 25% to nearly 29%. With an increase in their capacity larger than the increase in United States demand, United States firms had either to gain market share in the United States, to produce for the stocks or not to use their capacity.[1934] Switzerland further argues that because the United States industry increased, between 1996 and 2000 its production capacity (+22%) more than the United States demand increased (+19%), United States firms had either to gain market share in the United States, to produce for the stocks or not to use their capacity. Switzerland submits that the decline in the factors examined by the USITC should not be a surprise, because the United States capacity of the welded pipe industry was too great and still increased while the situation of the United States industry started to deteriorate. The argument made by the United States that the decline of capacity utilization is an indication that the industry was facing a threat of serious injury is not valid despite Article 4.2(a) of the Agreement on Safeguards because firms cannot simply assume that they can increase the capacity as they like and transform it into increased production opportunities.[1935]

7.748 Switzerland also notes that the import unit value continuously decreased (-9%) between 1996 and 2000. Switzerland suggests that this could be explained by the fact that, abroad, investments were largely made with the objective of reducing production costs. However, according to Switzerland, in the United States, the average sales value increased by 3% between 1996 (USD606) and 1998 (USD622), before it started decreasing. Switzerland suggests that this could have been due to either enterprises' inadequate pricing policies or to a wrong investment policy, or to other reasons.[1936]

7.749 Switzerland also notes that the USITC Report indicates that the United States producers' shipments increased through 1999, but then fell by 9.1% in 2000 and remained stable (at slightly lower levels) in the first half of 2001. According to the figures in the USITC Report, the United States producers' shipments increased slightly in interim 2001 compared with interim 2000.[1937] Thus, according to Switzerland, if the situation stabilized or even seemed to have improved recently, the threat of serious injury is not really demonstrated.[1938]

7.750 Finally, Switzerland submits that using the basis of only a one-year decline to conclude that the United States industry is in a situation of threat of serious injury is using too short a period of time. The threat could be demonstrated almost at will. In the present case, it is more important to take into account a longer period, because certain indicators were increasing also in the short run. Taking, for instance, employment, the United States claims that serious injury appeared imminent because the employment in the industry fell in 1999 and 2000 and was close to the lowest level of the period of investigation in 2000.[1939] In reality, the number of workers was relatively stable and fluctuated just

[1933] Switzerland's second written submission, para. 86.
[1934] Switzerland's first written submission, para. 270.
[1935] Switzerland's second written submission, para. 82.
[1936] Switzerland's first written submission, para. 271.
[1937] USITC Report, Vol. II, TUBULAR 15.
[1938] Switzerland's second written submission, para. 83.
[1939] United States first written submission, para. 374.

slightly during the period of investigation except in 1999 where it increased by 7%.[1940] It even increased in interim 2001 (1.2%) compared to interim 2000. Industries that consider they are facing a threat of serious injury would not hire additional workforce. In addition, the number of production workers was higher at the end (6,736 in 2000) of the period of investigation than at the beginning (6,539 in 1996).[1941]

(vi) Stainless steel wire

7.751 China argues that the determination that the domestic industry of stainless steel wire was suffering serious injury or threat of serious injury did not fulfil the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[1942] China believes that the USITC did not fully address the nature and complexity of the data. China argues, moreover, that the USITC Report does not contain a response to the interpretations of the data that have been put forward by China. On this basis, China argues that the USITC failed to provide a reasoned and adequate explanation for its determination.[1943]

7.752 In response, the United States argues that each of the affirmative-voting Commissioners provided a lengthy analysis of the Article 4.2(a) factors, and explained how these factors supported their affirmative conclusions.[1944]

7.753 China argues that consideration of the relevant injury factors for stainless steel wire demonstrate that there was no overall impairment of the situation of the industry.[1945]

7.754 In response, the United States notes that Chairman Koplan made an affirmative determination of threat of serious injury based on a domestic industry producing stainless steel wire. He emphasized pervasive declines in many industry indicators between interim 2000 and interim 2001, including shipments, production, market share, productivity, employment, wages and financial performance. The United States submits that several of the other factors were already at low levels or well below period peaks before they declined in interim 2001, such as operating income, which declined rapidly between interim 2000 and interim 2001, employment indicia and capital expenditures. The United States notes that Commissioner Bragg based her determination on a domestic industry producing both stainless steel wire and stainless steel wire rope. She likewise cited pervasive declines in industry performance from interim 2000 to interim 2001. Commissioner Devaney also found that the pertinent domestic industry produced both stainless steel wire and stainless steel wire rope. He found this industry to be seriously injured, citing inadequate profitability and declines in market share, employment, and capital expenditures.[1946]

7.755 China argues that there was no threat of serious injury to the market for stainless steel wire. In support, China argues that slight declines in employment, R&D and capital expenditure were not significant enough to offset the overall positive situation of the industry. Moreover, according to China, there were no signs that competitive conditions would change in the immediate future so as to warrant the conclusion that the industry would be impaired especially given that imports' market share declined during the first five full years of the period of investigation. China also argues that although imports consistently undersold domestic products, price movements did not clearly correlate with the underselling of imports. Since imports had failed to injure the industry in the past, and since the

[1940] USITC Report, Vol. II, TUBULAR-15.
[1941] Switzerland's second written submission, para. 84.
[1942] China's first written submission, para. 349.
[1943] China's first written submission, para. 347.
[1944] United States first written submission, para. 391.
[1945] China's first written submission, para. 344.
[1946] United States' first written submission, para. 390.

condition of the industry had improved over the period of investigation, China submits that the only sound conclusion that could be reached was that that there was no threat of serious injury.[1947]

7.756 Similarly, the European Communities argues that the USITC's finding of threat of serious injury for stainless steel wire was premised on the notion that imports would continue to increase and the threat of serious injury would materialise into serious injury. However, according to the European Communities, while the data before the USITC for interim 2001 showed a small increase in imports when compared to interim 2000, the data available before the President decided to impose safeguard measures showed that imports for full year 2001 had decreased slightly from full year 2000. The European Communities asserts that this suggested that the trend of increase in interim 2001, on which the USITC based its determination, did not continue in the second half of 2001. According to the European Communities, given this change in trend, the competent authority, who should have been aware of this data, was under a duty to reason its decision to impose safeguard measures based on the threat of serious injury. The European Communities asserts that the President did no such thing and that, therefore, the measures imposed on stainless steel wire were inadequately explained and inconsistent with Article 2.1 and 4.2.[1948]

7.757 In response, the United States asserts that China's argument that affirmative threat determinations were not warranted in light of "slight" declines in indicators during the latter part of the period of investigation and the "overall positive" condition of the industry, mischaracterizes and fails to address or acknowledge the findings that Commissioners Koplan and Bragg made. Neither Commissioner found the current condition of the industry to be positive overall. According to the United States, Chairman Koplan emphasized the low operating margins of the industry. Commissioner Bragg characterized industry performance as "not strong". Both Commissioners noted significant declines between the interim periods in production, capacity utilization, market share and employment.[1949] Consequently, both Commissioners Koplan and Bragg evaluated the declines in industry indicators during interim 2001 in the context of the industry's lacklustre performance overall during the period of investigation as a whole. The United States argues that, as a consequence, both their analyses and explanations of threat of serious injury with respect to domestic industries producing stainless steel wire satisfy the requirements of Articles 2.1 and 4.2(a).[1950]

7.758 China also argues that three USITC Commissioners expressed in the USITC Report that there was no serious injury or threat of serious injury in relation to stainless steel wire. In China's view, their conclusions were also supported by explanations concerning the facts of the investigation. China argues that, as a result, the remaining Commissioners had a duty to support their affirmative determinations with explanations that rebutted the interpretations and conclusions of the three Commissioners who voted in the negative. China submits that the absence of such a rebuttal resulted in contradictions. Furthermore, in China's view, there was no clear indication as to why serious injury or threat thereof was still present. Accordingly, China argues that there is a clear lack of reasoned and adequate explanation by the USITC.[1951]

7.759 In response to a question from the Panel as to whether, in the event of a split vote within a competent national authority such as the USITC, there is a legal requirement to rebut the arguments of the negative determinations, the European Communities and Norway answered in the affirmative arguing that the negative or dissenting determinations constitute, or at least contain, plausible

[1947] China's first written submission, para. 345.
[1948] European Communities' first written submission, para. 420.
[1949] United States' first written submission, para. 392.
[1950] United States' first written submission, para. 393.
[1951] China's first written submission, para. 346.

alternative explanations and the prevailing determination must therefore consider them and explain why they are not adopted or followed in the prevailing determination.[1952] Korea argues that since the concept of a split vote does not exist in the context of the Agreement on Safeguards, the question is whether the conditions for safeguard relief have been met. A finding that they have been met and a finding that they have not been met in the same determination cannot be reconciled and, consequently, the conditions for imposing safeguard relief have not been met.[1953] Japan, on the other hand, argues that as long as there is a legitimate affirmative determination (in other words, a majority of Commissioners voting affirmative or negative on the basis of the same like product), there is no legal requirement to rebut the arguments of Commissioners dissenting from the majority vote; nor does it matter whether a dissenting Commissioner publishes a separate dissenting opinion.[1954]

7.760 The United States answers in the negative. It submits that there is no requirement in the Agreement on Safeguards for members of the USITC voting in the affirmative to rebut the arguments raised by other members of the USITC who voted in the negative. As long as the official determination of the USITC includes the findings, reasoned conclusions, detailed analysis of the case and demonstration of the relevance of the factors examined as required by Articles 3 and 4 of the Agreement on Safeguards, then the determination is sufficient. The United States argues that this conclusion does not change depending on whether or not a Member publishes separate or dissenting votes. A determination stands on its own, regardless of whether certain decision-makers disagree with that determination. A contrary conclusion would lead to absurd results. It would mean, in effect, that a determination might be consistent with the Agreement on Safeguards when the views of dissenting or concurring decision-makers are not published, but an identical determination would be inconsistent when such views are published. Such a rule would lead Members to avoid publishing separate or dissenting votes, which would stifle a full discussion of the issues.[1955]

7.761 For China, it remains clear that the fact that the decision, by the President, that the determinations of those Commissioners who voted in the affirmative should be the determination of the USITC, is not sufficient to resolve the contradictions between the views of the various Commissioners. In particular, China finds it surprising that the United States seems to consider the three Commissioners, members of the USITC, even if they made negative findings related to the existence of serious injury, as "persons or entities who may participate in the investigation, but are not part of the authority that has made the serious injury determination".[1956]

7.762 Furthermore, according to China, even for the Commissioners who voted in the affirmative, it is clear that, in view of the numerous positive trends in certain factors, their determination is revealing a lack of adequate and reasoned explanation. For instance, the fact that Chairman Koplan mainly relied on interim data clearly provides insufficient justification for the findings.[1957] In any case, China considers that, as for the analysis on increased imports, the analysis provided by Commissioners Bragg and Devaney is of no relevance since it was based on an industry producing not stainless steel wire, but "stainless steel wire products", i.e. stainless steel wire and stainless steel wire rope. Therefore, these analyses cannot provide any useful indications as far as the state of the industry producing stainless steel wire only is concerned, and cannot be compared with the results of the

[1952] European Communities' written reply to Panel question No. 131 at the first substantive meeting; Norway's written reply to Panel question No. 131 at the first substantive meeting.
[1953] Korea's written reply to Panel question No. 131 at the first substantive meeting.
[1954] Japan's written reply to Panel question No. 131 at the first substantive meeting.
[1955] United States' written reply to Panel question No. 131 at the first substantive meeting.
[1956] United States' first written submission, para. 391, footnote 431, cited in China's second written submission, para. 155.
[1957] China's second written submission, para. 156.

analysis provided by Chairman Koplan either. There is a clear lack of adequate and reasoned explanation as to how the analyses of these two Commissioners can support final determinations regarding the state of the industry producing stainless steel wire.[1958] According to China, this is even more evident in view of the fact that there was not even agreement between the three Commissioners voting affirmatively about the state of these different domestic industries. Indeed, Chairman Koplan found a domestic industry producing stainless steel wire to be threatened with serious injury.[1959] While Commissioner Bragg found a domestic industry producing both stainless steel wire and stainless steel wire rope to be threatened with serious injury.[1960,] At the same time, Commissioner Devaney found the same industry producing stainless steel wire and stainless steel wire rope to have been seriously injured.[1961]

7.763 China argues that, consequently, the decision by the President itself does not provide sufficient explanation as to the final determination by the USITC. Indeed, it is not clear whether the final determination of the USITC was that the industry was suffering serious injury (opinion of Commissioner Devaney), or that serious injury was only threatened (opinion of Commissioners Koplan and Bragg). This reveals obvious contradictions in the assessment both of the domestic industry and of the injury indicators that, in itself, sufficiently demonstrates the lack of adequate and reasoned explanation underlying the US measure on stainless steel wire.[1962] China states that it does not intend to contest the right of WTO Members to establish their own decision-making processes for reaching determinations in applying safeguard measures. China merely argues that this does not excuse the United States from satisfying the requirement of providing an "adequate and reasoned explanation", in particular, from giving proper or adequate consideration to views, even minority ones, that have been expressed in the USITC Report.[1963]

(vii) Other products

7.764 The United States notes that none of the complainants have made any challenge to the USITC's determinations of serious injury to the industries producing tin mill, carbon and alloy fittings and flanges, stainless steel bar, or stainless steel rod. The United States argues that, consequently, the complainants have not satisfied their burden of presenting a prima facie case of a violation of section 4.2(a) with respect to the findings concerning these industries.[1964]

7.765 In response, China disagrees with the statement by the United States that "no complainant has made any challenge to the USITC's determinations of serious injury to the industries producing tin mill, FFTJ, stainless steel bar, or stainless steel rod". In its second written submission, China states that it did challenge the determinations of the USITC regarding serious injury for all ten products in the following terms: "China believes that for all ten products covered by the measures of safeguard, the USITC failed to provide reasoned and adequate explanations".[1965] In addition, for six out of ten products, China presented some possible alternative interpretations of the facts.[1966]

7.766 The European Communities asserts that the suggestion by the United States that for four product bundles the complainants had not challenged the USITC's serious injury determination is

[1958] China's second written submission, para. 157.
[1959] USITC Pub. 3479, Vol. I, p. 255.
[1960] USITC Pub. 3479, Vol. I, p. 288.
[1961] USITC Pub. 3479, Vol. I, p. 344, cited in China's second written submission, para. 158.
[1962] China's second written submission, para. 159.
[1963] China's second written submission, para. 160.
[1964] United States' first written submission, para. 336.
[1965] China's first written submission, para. 308.
[1966] China's second written submission, para. 130.

inaccurate. While the European Communities has not entered into a discussion of the specifics of any product bundle determination, it has challenged the methodology applied in each of those determinations. Not only has the USITC employed a methodology which fails to meet the standards of the Agreement on Safeguards, it has also failed to provide a reasoned and adequate explanation of certain findings where it has provided insufficient or no data at all.[1967]

7.767 Norway also submits that Norway did challenge the USITC's determination of serious injury to the industry producing tin mill products, in the following manner:

> "For the Tin Mill Products, the USITC claims that the domestic industry is experiencing serious injury. While Norway will not dispute before this Panel that the United States steel industry in general has suffered difficulties, the United States has not demonstrated, for the producers of *inter alia* Tin Mill Products, the existence of 'serious injury' in the sense of a 'significant overall impairment in the position' of the industry, that can be attributed to imports."[1968]

7.768 Norway states that it did not expand further on this issue while it was so blatantly clear that no causal link whatsoever existed between any injury that might be suffered by the United States' industry and imports.[1969]

(b) Representativeness of data

(i) Production destined for internal consumption

7.769 The European Communities argues that in analysing financial performance only on the basis of commercial shipments, i.e. production which was not destined for further internal consumption, the USITC failed to examine the industry as a whole and thus failed to arrive at an objective and reasoned determination of the existence of serious injury.[1970] The European Communities argues that this vitiates both the USITC's injury finding and also the causation finding given that causation is established by relating and comparing the trends between the injury indicators and increased imports.[1971] The European Communities further argues that such a selective examination does not permit a competent authority to establish the existence of serious injury. By limiting its examination in such a manner, the competent authority does not determine the existence of "serious injury" as is required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards and as a consequence does not provide a reasoned and adequate explanation of its findings.[1972]

7.770 In response, the United States argues that the data collected by the USITC purported to provide, and did in fact provide, information pertaining to the entire industry.[1973] Consequently, the USITC satisfied the obligation under Articles 4.1 and 4.2(a) of the Agreement on Safeguards to render its analysis of serious injury or threat of serious injury based on information pertaining to each

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[1967] European Communities' second written submission, para. 290.

[1968] Norway's second written submission, para. 100, referring to para. 278 of Norway's first written submission.

[1969] Norway's second written submission, para. 101.

[1970] European Communities' first written submission, para. 378.

[1971] European Communities' first written submission, paras. 378 and 379.

[1972] European Communities' written reply to Panel question No. 71 at the first substantive meeting.

[1973] United States' first written submission, para. 334; United States' second written submission, para. 109.

domestic industry at issue.[1974] The United States submits that the USITC did not reduce the scope of its injury examination.[1975]

7.771 The United States notes in this regard that there is an important distinction between transfers for internal consumption, on the one hand, and transactions in the commercial or merchant market, on the other. In the commercial market, a producer sells product to a purchaser in an arm's-length transaction. By contrast, the internal transfers of an individual producer are not the result of such transactions and, thus, should not be considered "sales". The United States submits that because product that is internally transferred is not sold, the USITC could not generate objective and consistently-derived data concerning the valuation of such transfers that could be used in financial analysis. Consequently, the USITC's financial analysis was based on the one type of objective industry-wide data available in the record, namely that pertaining to commercial sales. The United States further notes that the unreliability of transfer value data was a particular problem for the domestic industry producing CCFRS. Including data on internal transfers would have resulted in double or triple counting of the same unit of production. This is because all internal transfers of hot-rolled steel are ultimately reported as cold-rolled or corrosion-resistant steel when sold in their final processed form. Thus, to have included in the CCFRS financial analysis data concerning both internal transfers of hot-rolled steel and commercial sales of cold-rolled or coated steel would have counted the same ton of steel twice. The United States submits that by using commercial sales value, the USITC was able to avoid problems relating to double-counting of product. The United States submits that, by contrast, the USITC could and did generate objective quantity-based information on internal transfers. It used and relied on such data in its report in calculating the quantity of production, total United States shipments, and United States apparent consumption.[1976]

7.772 The European Communities submits that the claim that the USITC could not "generate objective and consistently-derived data" is not a sufficient defence. First, there is no examination of the industry as a whole – as is clearly required by the Agreement on Safeguards. There can be little doubt that the USITC is capable of obtaining such data at least for all productive activities of the industry – that is exactly what it did in the determination which led to the *US – Hot-Rolled Steel* dispute.[1977] The European Communities questions why this exercise is possible for an industry where 60% of production is internally consumed but not possible for industries in which considerably less production is internally consumed. Second, even if the USITC was not in a position to gather the data which it considered necessary, the Appellate Body clearly required that an explanation be given why production for internal consumption was not examined.[1978] The USITC never provided such an

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[1974] United States' first written submission, para. 334.
[1975] United States' second written submission, para. 1090.
[1976] United States' written reply to Panel question No. 73 at the first substantive meeting.
[1977] The Panel in *US – Hot-Rolled Steel* quoted the USITC Report which stated:

> "From 1997 to 1998, as apparent consumption increased significantly, operating income declined by more than half. On merchant market sales, the ratio of operating income to net sales declined from 5.9 per cent in 1997 to 0.6 per cent in 1998 and overall, the ratio declined from 5.5 per cent in 1997 to 2.6 per cent in 1998."
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> USITC Report, quoted Panel Report, *US – Hot-Rolled Steel*, para. 7.209.

[1978] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204, where the Appellate Body stated:

> In our view, [an objective examination] means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all other the other parts that make up the industry, as well as examine the industry as

explanation.[1979] The European Communities submits that, as a result, the United States has, by failing to examine performance on production for internal consumption failed both to ensure an examination of the performance of the industry as a whole and to examine, where it has examined only one part of the industry, other parts in an equivalent manner. Therefore, all the USITC's injury determinations should be found to be inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards.[1980]

7.773 The European Communities further argues that Article 4(1)(c) of the Agreement on Safeguards refers to "producers as a whole" and producers of a major proportion of "total domestic production" as the object of the serious injury examination. The European Communities argues that in making the serious injury examination, a competent authority cannot distinguish *per se* between producers on the basis of the destination of their output. That is, a competent authority cannot define the "domestic industry" as only those producers who sell their produce on the "free" or "merchant" market as opposed to those who produce for internal consumption of an integrated downstream processor, or captively consumed products. In this regard, the European Communities points to the Appellate Body decision of *US – Cotton Yarn*. The European Communities asserts that, when faced with a United States decision to exclude from the definition of "domestic industry" producers of cotton yarn who produced for integrated upstream processors, the Appellant Body found in that case that the term "producing" in Article 6.2 of the Agreement on Textiles and Clothing "cannot be given a different or a qualified meaning on the basis of what a domestic producer chooses to do with a product".[1981] The European Communities argues that while it is not alleged that the USITC has defined the domestic industry so as to exclude producers who produce only for internal consumption, the USITC has, nevertheless, in its examination of profits and losses, neglected to examine the potential relevance of an industry's production for internal consumption, and in so doing has reduced the scope of its injury examination.[1982]

7.774 The European Communities also makes reference to the Appellate Body decision made in the context of an injury determination for an anti-dumping investigation. According to the European Communities, in *US – Hot-Rolled Steel*, the Appellate Body found that the definition of "domestic industry", and the use of the term in Article 3 of the Anti-Dumping Agreement, indicated that an investigating authority was not entitled to look only at "one part, sector or segment of the domestic industry".[1983] The European Communities also asserts that the Appellate Body found in that case that investigating authorities are not entitled to conduct their investigations in such a way that it becomes more likely that, as a result of the fact finding or evaluation process, they will determine that the domestic industry is injured.[1984] The European Communities asserts that in *US – Hot-Rolled Steel*, the Appellate Body found that where free market sales are subject to a specific examination, it is not enough that captive sales be included in the overall assessment, they must be disaggregated and a separate analysis must be carried out.[1985] The European Communities asserts that the same reasoning applies to a safeguards investigation.[1986]

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a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it was not necessary to examine directly or specifically the other parts of the domestic industry.

[1979] European Communities' second written submission, para. 299.
[1980] European Communities' second written submission, para. 300.
[1981] European Communities' first written submission, para. 391.
[1982] European Communities' written reply to Panel question No. 71 at the first substantive meeting.
[1983] European Communities' first written submission, para. 397.
[1984] European Communities' first written submission, para. 398.
[1985] European Communities' first written submission, para. 401.
[1986] European Communities' first written submission, para. 399.

7.775 In response, the United States asserts that it does not dispute the general proposition that Articles 4.1(a), 4.1(c), and 4.2(a) of the Agreement on Safeguards require that an authority's finding of serious injury pertain to the entire domestic industry. It also acknowledges jurisprudence that an investigating authority cannot consider the factors referred to in Article 4.2(a) for only one segment of the industry without explaining how the factor is significant for the industry as a whole.[1987] The United States argues that the USITC's analysis focused on each industry as a whole consistent with United States law and the mentioned jurisprudence. With one exception, the USITC did not engage in a segmented analysis for any of the domestic industries it examined. In the case of the exception, the United States contends that the USITC used its analysis of the various segments to support its conclusions concerning serious injury to the industry as a whole.[1988]

7.776 With respect to the reference by the European Communities to the Appellate Body decision in *US – Hot-Rolled Steel*, the United States argues that, in that case, the Appellate Body addressed the consistency with the AD Agreement of a provision of US anti-dumping and countervailing duty law directing the USITC to focus primarily on merchant market sales in certain circumstances.[1989] The United States argues that that particular provision of US law is not applicable to safeguards investigations and was never invoked by the USITC in the present case. The United States asserts that the portions of the USITC Report that discussed serious injury did not refer to "merchant market" or "captive consumption" segments but, rather, were computed on the basis of the entire industry.[1990]

7.777 The European Communities asserts that the United States contents itself with claiming that, because it was not possible to generate consistent data for internal production, it satisfied its obligations under the Agreement on Safeguards. The United States defends itself legally by arguing that the report of the Appellate Body in *US – Hot-Rolled Steel*, which concerned the identical situation in the anti-dumping context, did not concern both a US statutory provision regulating captive production and its application, but only concerned the statutory provision.[1991] However, the European Communities asserts that the briefest examination of the Appellate Body's report in *US – Hot-Rolled Steel* shows that the Appellate Body considered that the lack of analysis of financial performance on internal consumption when an analysis had been made of commercial sales vitiated the USITC's determination irrespective of the statutory provision at issue. This shows both that the United States' legal defence fails to deal satisfactorily with the basic thrust of the Appellate Body's decision, and that the United States' explanation that it could not derive consistent data for internal consumption is wholly inadequate.[1992]

7.778 The European Communities states that in order to better understand the import of the Appellate Body's findings, it is useful to examine the nature of the investigation which the Appellate Body was asked to consider. The Appellate Body set out the situation as follows:

> "[W]e observe that the USITC Report contains data for, firstly, the merchant market and, secondly, for the overall market. […] In particular, in its examination of market share and of each of the financial performance indicators, the USITC mentioned data pertaining to the merchant market and the overall market. However, while the USITC Report includes frequent reference to data for the merchant market, it does not contain, describe, or otherwise refer to, data for the captive market. […] According to

[1987] United States' first written submission, para. 327.
[1988] United States' first written submission, para. 328.
[1989] United States' first written submission, para. 329.
[1990] United States' first written submission, para. 330.
[1991] European Communities' second written submission, para. 294.
[1992] European Communities' second written submission, para. 295.

> the United States, the examination of the data for the captive market is subsumed within the examination of the domestic market as a whole, even though the merchant market is the subject of separate and express examination.
>
> It is true [...] that the *aggregate* data for the industry as a whole includes data for every part of the industry. However, without further analysis to *disaggregate* this data, the data relating to the captive market remains unknown. Moreover, the mere fact that the *aggregate* data for the industry as a whole include data for every part of the industry does not overcome the fact that the USITC Report discloses no *analysis* of the significance of the data for the captive market. Thus, there is no explanation by the USITC of the state of the part of the domestic industry that is shielded from direct competition with imports, nor any explanation of the significance of that shielding for the domestic industry as a whole. […] Yet, in the examination provided of the merchant market, there *is* an explanation of the poor state of that part of the domestic industry which is *not* shielded from the effects of imports.
>
> As we have already explained, in the absence of a satisfactory explanation, Article 3.1 of the *Anti-Dumping Agreement* does not entitle investigating authorities to conduct an selective examination of one part of a domestic industry. Rather, where one part of an industry is the subject of separate examination, the other parts should also be examined in like manner. Here, we find that the USITC examined the merchant market, without also examining the captive market in like or comparable manner, and the USITC provided no explanation for its failure to do so."[1993] (footnotes omitted, emphasis in original)[1994]

7.779 The European Communities submits that, in other words, the Appellate Body found an examination of financial performance which was divided into an examination of performance on the merchant market (i.e. on commercial sales) and for all production, was inconsistent with the AD Agreement because there was no comparable focus on performance on captive consumption or no reasonable explanation why this was not necessary. In the present case, as is undisputed, the USITC analysed the industry's financial performance only on commercial sales, and not for all productive activities nor specifically for internal consumption.[1995] According to the European Communities, the United States seeks to deny that *US – Hot-Rolled Steel* is relevant. The European Communities submits that, evidently it is relevant – it sets out a principle that the United States has failed to respect. Indeed, the United States has acted inconsistently with its obligations in two senses – it has failed to examine all activities of the industry, and by examining only one part it has failed to examine all parts equally or explain why this was not necessary.[1996]

7.780 The European Communities argues that where captive activities are excluded from the analysis, a competent authority will not have made an objective assessment nor provided a reasoned and adequate explanation of its conclusions. Moreover, such an incomplete analysis will bring into question the objectivity and representativeness of the competent authority's investigation under Article 4.2.[1997] The European Communities argues that this, in turn, takes away the basis for concluding that there is serious injury suffered by the domestic industry.[1998] It states that this is

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[1993] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 212-214.
[1994] European Communities' second written submission, para. 296.
[1995] European Communities' second written submission, para. 297.
[1996] European Communities' second written submission, para. 298.
[1997] European Communities' first written submission, para. 402.
[1998] European Communities' first written submission, para. 392.

confirmed by Article 4.2(a) of the Agreement on Safeguards, which contains a non-exhaustive list of injury indicators which an investigating authority must examine.[1999] It argues that the scope of the provision is not qualified by reference to the use made of the products in question. Consequently, according to the European Communities, a competent authority must examine the state of all the productive activities of the domestic industry. A competent authority cannot simply examine "profit and losses" made on non-internally consumed production and conclude that there is sufficient evidence of significant overall impairment in the position of a domestic industry.[2000] In this regard, the European Communities points out that an integrated producer may forego profits on upstream input products in order to maximise profit-taking on sales of more valuable downstream finished and highly specialised products and may simply sell surplus production of the input product. Therefore, an analysis of whether losses are made on sales of the upstream input product will only provide an incomplete picture of the state of such an industry.[2001]

7.781 The European Communities further argues that the USITC's examination is not objective, because it does not examine all areas of activities, including those in which the domestic industry may be performing well. "Serious injury" is defined in Article 4.1(a) as a "significant overall impairment in the position of a domestic industry". Article 4.2(a) requires an evaluation of "all relevant factors" "having a bearing on the situation" of the industry. The performance of an industry with respect to production for internal consumption must be a factor which may have a bearing on that industry and which therefore must be evaluated and cannot be ignored. The European Communities argues that consequently, the United States has not evaluated all relevant factors, and has not, therefore, undertaken a proper serious injury examination. The total absence of any information on its treatment of production for internal consumption also raises serious questions as to how costs were allocated between production for commercial sale and that for internal consumption. If costs were disproportionately allocated to commercial sales, this would evidently decrease the profitability of such sales. Since the United States admits that it did not ensure consistent treatment of internal transfers (and therefore that profits and losses were not artificially shifted between products), it has failed to conduct a proper investigation.[2002] The European Communities argues that this methodological flaw applies to all of the products concerned. For each product, at least some of the production is internally consumed and financial performance on these products was, therefore, not analysed. Consequently, all findings are not based on an assessment of the situation of the domestic industry as a whole.[2003]

7.782 In response, the United States contends that the information concerning operating performance and profit margins included in the USITC's report was intended to represent the performance of each industry as a whole, not merely a particular segment of that industry.[2004] The United States acknowledges that the data on operating income that appeared in the USITC Report were based on the value of commercial sales. However, the United States explains that there were several reasons why the USITC used this measure. First, the USITC obtained financial performance data principally through the questionnaires it issued. According to the United States, by requesting that producers, for purposes of providing financial information, limited their reporting to revenues actually received for commercial sales, and costs relating to those sales, the USITC assured that the financial data it received would be computed on a basis that was both consistent among different

[1999] European Communities' first written submission, para. 393.
[2000] European Communities' first written submission, para. 394.
[2001] European Communities' first written submission, para. 395.
[2002] European Communities' first written submission, paras. 423-452; European Communities' written reply to Panel question No. 71 at the first substantive meeting.
[2003] European Communities' first written submission, para. 424.
[2004] United States' first written submission, para. 331.

producers for each particular product on which it collected data and consistent for a particular producer across several products it produced. Therefore, according to the United States, the USITC assured that the financial data it received was "objective" and consistent with United States generally accepted accounting principles.[2005] In contrast, presenting financial data based on many different schemes for computing transfer values for internal transfers of product could have seriously compromised the objectivity of the data reported.[2006] The United States argues that, moreover, had the USITC instructed the producers to attempt to determine values for internal transfers of product, this presumably would have required producers to construct transfer values on the basis of commercial sales values. Therefore, there would have been no difference or only minimal difference between those constructed transfer values and the reported concerning merchant sales values, particularly for the numerous domestic industries where internal transfers constituted a very small percentage of overall production.[2007]

7.783 The European Communities submits that, inevitably, if data for commercial sales is all that is analysed, questions arise as to how costs are allocated between production for internal consumption and production for commercial sales. An improper analysis of costs would undermine both the analysis of serious injury and the analysis of causation. This issue has already exercised the panel and Appellate Body in *US – Wheat Gluten*.[2008] In that dispute, similarly to the instant dispute, three products, one of which was wheat gluten, were produced from the same raw material on the same production line. Indeed, in the present dispute, the product is in fact the same (stainless steel rod for internal consumption is identical to stainless steel rod for commercial sale), only the immediate use is different – either commercial sale or internal consumption. In *US – Wheat Gluten* the European Communities raised a concern as to how the allocation of profits between the different products was carried out. The Appellate Body reversed the panel's finding that the USITC had provided a reasoned and adequate explanation of the allocation methodologies applied to allocate profit among the three different products, because the panel relied on statements made by the United States which were not contained in the USITC Report.[2009] [2010]

7.784 The European Communities states that, in the present case, the European Communities asked the United States to identify where in the USITC Report it had explained how it ensured that allocations of costs to commercial sales were consistent and objective. In its response to this question, the United States explained that USITC staff checked data reported by US producers against audited annual financial statements, referring to page 7 of the overview of the USITC Report.[2011] The USITC explained in page 7 of its overview, after describing how it distributed questionnaires:

> "[A] careful review of the data submitted by questionnaire respondents was undertaken by the Commission staff. Certain basic analytical procedures were conducted on data in questionnaires from all sources, including US producers, foreign producers, US purchasers, and US importers. Each firm's unit values for major items such as shipments, prices, sales values, and costs were scrutinized and compared to public source data and to the aggregate unit values for all firms. Comments regarding

[2005] United States' first written submission, para. 332; United States' second written submission, para. 110.
[2006] United States' first written submission, para. 332.
[2007] United States' first written submission, para. 333.
[2008] Panel Report, *US – Wheat Gluten*, paras. 8.57 to 8.66 and, reversing the Panel's conclusions, Appellate Body Report, *US – Wheat Gluten*, paras. 156-163.
[2009] Appellate Body Report, *US – Wheat Gluten*, para. 163.
[2010] European Communities' second written submission, para. 301.
[2011] United States' written reply to European Communities' question No. 5, paras. 11 and 12.

> discrepancies from all parties in the investigation were considered and material problems with data submissions were resolved.
>
> Additional procedures and reviews focused on US producer companies. Their reported data on sales, operating income, and capacity were reconciled with each firm's financial statements to the fullest extent possible, and reported sales values were compared with reported commercial sales values. A limited-scope verification was also conducted on one of the largest US steel producers, Nucor Corp., wherein its questionnaire data were reconciled with its corporate records."[2012]

7.785 According to the European Communities, on its face, the USITC Report does not explain how the USITC ensured the correct allocation of costs. Indeed, the latter paragraph on domestic producers does not refer to costs at all. There is no explanation of how the USITC ensured that the allocation of costs was consistent across different companies. Reconciling data with annual financial accounts for a company as a whole, based on income generated on all the products sold by the company, takes for granted certain allocations of operating income and hence costs, which may be done by different companies on a different basis. Moreover, according to the European Communities, there is no explanation whatsoever as to how the USITC verified the accuracy of any data for interim 2001 since the data for these periods could not logically be checked against annual audited accounts. Nor can it be determined how the USITC verified the accuracy of the data for interim 2000 because no explanation is provided of how the respondents allocated data within the year 2000.[2013]

7.786 The European Communities notes that, in *US – Wheat Gluten*, the USITC had explicitly discussed the issue of allocation of profits. The USITC concluded:

> "Based on a careful review of the allocation methodologies used by domestic wheat gluten producers in responding to the Commission's questionnaire, we find those allocations to be appropriate."[2014]

7.787 According to the European Communities, the Appellate Body concluded that this statement did not provide a reasoned and adequate explanation of the USITC's treatment of the allocation of profits. It found the panel's determination that the above-quoted statement did constitute a reasoned and adequate explanation on the basis of information provided during the panel proceedings to be inconsistent with the standard of review the panel was required to apply, and consequently reversed the Panel's findings.[2015]

7.788 The European Communities asserts that in the present case, the USITC did not even discuss the allocation methodologies applied, did not explain whether it considered the allocation methodologies were consistent between different producers and did not even claim that the allocations were "appropriate". In the light of the Appellate Body's examination of this similar issue in *US – Wheat Gluten*, the European Communities requests that the Panel find that the USITC failed to

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[2012] USITC Report, Vol. III., p. OVERVIEW-7, cited in European Communities' second written submission, para. 302.

[2013] European Communities' second written submission, para. 303.

[2014] USITC Report on imports of Wheat Gluten quoted in Appellate Body Report, *US – Wheat Gluten*, para. 157, cited in European Communities' second written submission, para. 303.

[2015] Appellate Body Report, *US – Wheat Gluten*, paras. 162-163, cited in European Communities' second written submission, para. 305.

provide a reasoned and adequate explanation of how it ensured that costs were properly allocated between production for commercial sale and for internal consumption.[2016]

7.789 In response, the United States submits that to the extent that there are "serious questions as to how costs were allocated between production for commercial sale and that for internal transfer", as the European Communities asserts[2017], it has fully responded to them and allayed any possible concerns about the USITC's cost allocation methodology. The United States reiterates that USITC accounting staff reconciled the financial data United States producers reported in their questionnaire responses with those producers' audited financial statements to ensure that cost data in its report were allocated to commercial sales in a manner consistent with United States generally accepted accounting principles. Indeed, because the audited financial statements contain information about commercial sales only, and do not encompass internal transfers, the USITC could not have performed an analogous reconciliation process had it attempted to use data concerning such transfers for its financial analysis.[2018] The United States submits that the nature of the reconciliation process ensured that the financial data on which the USITC relied were objective. By contrast, a financial analysis based on data relating to internal transfers, as the European Communities advocates, would have raised many difficulties with respect to double counting of product, particularly with respect to the CCFRS like product.[2019]

7.790 The European Communities states that it is not in a position to assess the effect in this particular case of the fact that internal consumption has not been taken into account. It submits that it is not for the European Communities, which does not have access to the same information which the United States authorities had, or should have had, to establish what would have been the difference in this case had captive consumption been properly considered. However, the European Communities considers that it has made a prima facie case that the methodology used by the United States does not permit an evaluation of the existence of serious injury consistent with the Agreement on Safeguards. It is not in a position to apply the correct methodology, and consequently determine the difference a proper examination would have made to the serious injury determination. Needless to say, while the USITC neglected to examine profits and losses on internal consumption for all product bundles, for those product bundles with substantial proportion of internal consumption the effect of this exclusion may well be significant.[2020] In any event, the United States was obliged to explain why it did not examine such production, even where only a small proportion of production was internally consumed, and why only examining the free market sales still allowed, in its view, to have a reliable basis for a WTO consistent serious injury determination. Such a conclusion must be demonstrated by the competent authorities in their report and not *ex post facto* before the Panel.

7.791 The United States submits that the European Communities has failed to establish that there is some objective manner of measuring financial "performance" with respect to what is not an arm's-length commercial transaction, but merely a single producer's internal transfer. The United States further argues that the European Communities has failed to rebut statements made by the United

[2016] European Communities' second written submission, para. 306.
[2017] European Communities' written replies to Panel questions Nos. 71 and 151 at the first substantive meeting.
[2018] United States' second written submission, para. 112.
[2019] United States' second written submission, para. 113.
[2020] European Communities' first written submission, para. 424, Figure 30 and common annex B – tables 1-15.

States about the lack of objective data pertaining to financial performance concerning internal transfers.[2021]

7.792 The European Communities concludes that it is clear that the USITC has, by failing to examine performance on production for internal consumption, failed both to ensure an examination of the performance of the industry as a whole and to examine, where it has examined only a segment, other segments in an equivalent manner. The European Communities submits, therefore, that the USITC's findings are not reasoned and adequate and should not be upheld. In addition, the USITC failed to explain, in a reasoned and adequate manner, how it ensured that the allocation of costs between production for commercial sales and internal consumption was verified and ensured to be consistent across the various producers which responded. As a result of these two failings, the USITC's injury determination is inconsistent with Articles 2.1, 4.2(a), 3.1 and 4.2(c) of the Agreement on Safeguards.[2022]

(ii) Confidential information

7.793 The European Communities argues that, despite the numerous injunctions of the Appellate Body, the USITC failed to provide a reasoned and adequate explanation of the basis for its findings because it did not provide substantial data elements.[2023] More particularly, the European Communities argues that the findings in the USITC Report fail to provide a reasoned and adequate explanation of the determination because it kept confidential, or fails to provide, significant swathes of information which were necessary to properly assess the correctness of the USITC's findings with respect to the existence of serious injury and that this also affected the determination of the existence of a causal link.[2024] The European Communities argues that this failing is particularly relevant with respect to the product groups of CCFRS, stainless steel rod, stainless steel wire and stainless steel bar.[2025] The European Communities argues that this vitiates both the USITC's injury finding and the causation finding given that causation is established by relating and comparing the trends between the injury indicators and increased imports.[2026]

7.794 With regard to CCFRS, the European Communities argues that the overall tables for flat products, that is, the tables in which the USITC had aggregated slab, plate, hot-rolled, cold-rolled, coated, grain oriented electrical steel and tin mill were regarded as confidential by the USITC.[2027] With respect to stainless steel rod, the USITC did not provide any data with respect to "trade and employment" (i.e. capacity, production, shipments, inventories and employment), "financial indicators" (i.e. results of operations) and price comparisons. Similarly, with regard to stainless steel bar and stainless steel wire, no data was provided on the financial performance of the industry. The European Communities argues that none of these determinations are, therefore, consistent with Articles 4.2(a) and 4.2(b) of the Agreement on Safeguards.[2028] The European Communities also argues that no or only partial data was provided with respect to undercutting or underselling for slabs; coated; cold-finished bar; certain pipe products; carbon and alloy fittings and flanges; stainless steel bar; and stainless steel rod.[2029]

[2021] United States' second written submission, para. 111.
[2022] European Communities' second written submission, para. 307.
[2023] European Communities' first written submission, para. 378.
[2024] European Communities' first written submission, paras. 407-408.
[2025] European Communities' first written submission, para. 409.
[2026] European Communities' first written submission, paras. 378-379.
[2027] European Communities' first written submission, para. 413.
[2028] European Communities' first written submission, para. 416.
[2029] European Communities' first written submission, para. 417.

7.795 According to the United States, other than to make a general claim that the United States acted inconsistently with its obligations by not publishing the confidential data, the European Communities does not ask for the tables either in their confidential form or in an indexed form. Nor does the European Communities assert that any of the redacted information is necessary or appropriate to the Panel's evaluation of its claims, or ask the Panel to invoke Article 13.1 of the DSU.[2030] The United States notes that the European Communities in particular claims that the USITC violated Article 3.1 by failing to publish certain "aggregated data" regarding domestic flat-rolled steel producers.[2031] In this regard, the United States points out that in its report, the USITC published data regarding the "results of operations of US producers", and "U.S. producers' capacity, production, shipments, inventories, and employment" for each flat-rolled product (i.e., slabs, plate, hot-rolled, cold-rolled, coated, and tin) except GOES. The reason data were not published for GOES was that, because there are only two domestic producers, such publication might reveal confidential company-specific information. The USITC could not publish aggregate flat-rolled data because to do so would enable readers to determine GOES information simply by subtracting data for each of the other flat-products.[2032]

7.796 The United States argues that the assertion by the European Communities that the USITC should, at the very least, have published "aggregated data" to maintain confidentiality, while complying with the publication requirements of Article 3.1, was rejected by the *US – Wheat Gluten* panel.[2033] The United States submits that the panel in *US – Wheat Gluten* concluded that in view of:

> "[T]he fundamental importance of maintaining the confidentiality of sensitive business information in order to ensure the effectiveness of domestic safeguards investigations; the discretion implied in Article 3.2 SA for the investigating authorities to determine whether or not "cause" has been shown for information to be treated as "confidential"; and the specific and mandatory prohibition in that provision against disclosure by them of such information without permission of the party submitting it, we cannot find that the United States has violated its obligations under Articles 2.1 and 4 SA, nor specifically under Article 4.2(c), by not disclosing, in the published report of the USITC, information qualifying under the USITC policy as information 'which is by nature confidential or which is provided on a confidential basis,' including aggregate data."[2034]

7.797 The United States continues by stating that most recently, the Panel in *US – Line Pipe* confirmed that the publication requirements of Article 3.1 must be construed so as not to impair the confidentiality requirements of Article 3.2. In particular, the panel stated that:

> "In respect of Korea's claim that a failure to include relevant confidential information in a published determination constitutes a violation of Articles 3.1 and 4.2(c), we note that the panel in *US – Wheat Gluten* found that the requirement in Article 4.2(c) to publish a 'detailed analysis of the case under investigation' and 'demonstration of the relevance of the factors examined' cannot entail the publication of 'information which

[2030] United States' first written submission, para. 1330.
[2031] United States' first written submission, para. 1331.
[2032] United States' first written submission, para. 1332.
[2033] United States' first written submission, para. 1336.
[2034] United States' first written submission, para. 1337.

is by nature confidential or which is provided on a confidential basis' within the meaning of Article 3.2."[2035]

7.798 According to the United States, there is no reason why the Panel should not to be guided by the *US – Wheat Gluten* Panel's finding in respect of the European Communities' Article 4.2(c) claim. Similarly, and given the express reference in Article 4.2(c) to Article 3, the United States notes that it fails to see how the Article 3.1 (last sentence) requirement to "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law" could entail the publication of "information which is by nature confidential or which is provided on a confidential basis" within the meaning of Article 3.2. The United States submits that, accordingly, it encourages the Panel to reject the European Communities' claim that failure to include relevant confidential information in a published determination is per se a violation of Articles 3.1 and 4.2(c). In the view of the United States, there was, therefore, no requirement that the United States publish confidential information, even in an "aggregated" format.[2036]

7.799 The European Communities argues that Article 11 of the DSU directs panels to, *inter alia*, make an objective assessment of the facts. The European Communities also relies upon the Appellate Body decision in *US – Wheat Gluten* where, according to the European Communities, the Appellate Body found that the Panel had failed in its duty under Article 11 when, in evaluating the soundness of the USITC's analysis, it relied upon explanations furnished by the United States during the cause of proceedings which were not present in the USITC's Report. On the basis of that decision, the European Communities argues that a Member applying a safeguard measure must provide all data and explanations sufficient to justify the measure in the report it is required to provide. According to the European Communities, this does not oblige a Member to divulge data which are confidential, release of which would harm individual enterprises. However, according to the European Communities, it does require that the Member provide aggregate data in which the data on individual enterprises are not identifiable, or provide indexed data which illustrates the trends in the data. The European Communities submits that such a requirement is, in some senses, the concomitant obligation to that imposed on individual enterprises to provide a non-confidential summary of the data, set out in Article 3.2.[2037]

7.800 The European Communities argues that data may legitimately be kept confidential where only one company has provided a competent authority with the data which has been used to justify a safeguard measure. In this respect, the European Communities notes that Article 4.1(c) of the Agreement on Safeguards defines the "domestic industry" as "producers as a whole", or "those whose collective output of the like or directly competitive product constitutes a major proportion of total domestic production". The European Communities argues that given that serious injury must be shown, at the very least, to a "major proportion" of production, it must be questioned whether the data can be considered to prove that a "major proportion" of the domestic industry has suffered serious injury if only one producer provides data.[2038]

7.801 The European Communities argues that while it is understood that the USITC was under certain confidentiality obligations under domestic law, this does not excuse the United States from its WTO obligations to provide an adequate and reasoned explanation of its factual findings and the legal conclusions drawn therefrom. In the European Communities' view, where two or more companies had provided data, the aggregated data would have been sufficient to ensure that confidential

[2035] United States' first written submission, para. 1338.
[2036] United States' first written submission, para. 1340.
[2037] European Communities' first written submission, para. 384.
[2038] European Communities' first written submission, para. 387.

company-specific information would not come into the public domain. It argues, further, that even where data had been provided by only one company, such data could have been indexed in a manner which would be sufficient to demonstrate, in a reasoned and adequate manner, that the safeguard action taken was justifiable.[2039]

7.802 The United States notes that the European Communities is the only complainant in this proceeding to raise a claim concerning confidential information. The United States asserts that, therefore, all other complainants found the public USITC Report either to be adequate in this regard, or, at least, not a subject to be addressed by them in this dispute.[2040]

7.803 The United States notes that the European Communities acknowledges that the United States has certain confidentiality obligations under domestic law and does not ask the United States to violate those obligations or for the United States to provide the confidential versions of the relevant data tables. The United States notes that, indeed, the protections afforded to confidential information under United States law are consistent with similar protections accorded by Article 3.2 of the Agreement on Safeguards.[2041] The United States also notes that the European Communities claims that the United States "could have" indexed such information in its report, but it apparently now does not seek indexed information either. The European Communities states that it is too late for the United States "to cure its insufficient report by providing now the information".[2042] In response, the United States argues that whether the United States "could have" developed a non-confidential summary of the confidential data does not translate into a requirement that it must have done so. The Agreement on Safeguards does not require that a Member publish indexed information or other public summaries as parts of its report, and the European Communities cites no provision in the Agreement or panel or Appellate Body findings in support of its inference that it does. Under Article 3.1 of the Agreement, it is sufficient that "competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".[2043]

7.804 The United States notes that the USITC published two versions of its report, a confidential version and a public version. The confidential version was sent to the President and to authorized persons under the USITC's administrative protective order (including attorneys representing most of the major EU steel producers). A redacted version was made available to the general public. Nothing in Articles 3.1 and 4.2(c) of the Agreement on Safeguards requires the competent authorities to publish, in a public report, the confidential information that supports their findings and conclusions. Indeed, paragraph 2 of Article 3, the second paragraph of the very same article that requires the competent authorities to publish a report, acknowledges that the competent authorities are likely to have received confidential information in the course of their investigation, and very unambiguously states that "Such information shall not be disclosed without permission of the party submitting it".[2044]

7.805 The United States also asserts that it is not only domestic law which precludes the Commission from disclosing confidential information. Article 3.2 of the Agreement on Safeguards itself requires that such confidentiality be maintained. The United States refers to the panel in *US – Wheat Gluten* which found that:

[2039] European Communities' first written submission, para. 418.
[2040] United States' first written submission, para. 1323.
[2041] United States' first written submission, para. 1324.
[2042] United States' first written submission, para. 1325.
[2043] United States' first written submission, para. 1326.
[2044] United States' first written submission, para. 1327.

> "Article 3.2 SA places an obligation upon domestic investigating authorities not to disclose – including in their published report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law and demonstrating the relevance of the factors examined – information which is "by nature confidential or which is provided on a confidential basis" without permission of the party submitting it."[2045]

7.806 According to the United States, given that the very terms of Article 4.2(c) expressly incorporate the provisions of Article 3, and given the specific and mandatory language of Article 3.2 dealing with the required treatment of information that is by nature confidential or is submitted on a confidential basis, the requirement in Article 4.2(c) to publish a "detailed analysis of the case under investigation" and "demonstration of the relevance of the factors examined" cannot entail the required publication of "information which is by nature confidential or which is provided on a confidential basis" within the meaning of Article 3.2 of the Agreement on Safeguards.[2046]

7.807 The European Communities argues in counter-response that the USITC, as an investigating authority, was obliged to treat some of the information it received as confidential. This meant that those data could not be disclosed in its public report. The European Communities does not dispute that the United States may refuse to provide specific data when confidential treatment is warranted. However, that the United States may withhold specific data does not excuse it from its obligation to provide a reasoned and adequate explanation. Without such a reasoned and adequate explanation, the Panel cannot make an objective assessment of the matter before it and, with interested WTO Members, cannot ensure that the conditions necessary for the application of safeguard measures have been satisfied.[2047]

7.808 The European Communities further argues that much of the United States' argumentation on this issue has been that it is not required to disclose confidential data.[2048] According to the European Communities, this is besides the point. The European Communities has argued that the USITC was under an obligation to provide a reasoned and adequate explanation, and that this could be done in the form of the provision of, for example, indexed data, or aggregated data. The United States rejected this, arguing that:

> "[W]hether the United States "could have" developed a non-confidential summary of the confidential data does not translate into a requirement that it must have done so."[2049]

7.809 According to the European Communities[2050], in so doing, it appeared to deny the obligation to provide a reasoned and adequate explanation of its findings. However, in response to a question from the Panel as to the relationship between the possibility to protect confidential information and the obligation to provide a reasoned and adequate explanation the United States opined:

> "When an investigation involves substantial amounts of confidential information, there are several means by which the authority can satisfy both its Article 3.1

[2045] Panel Report, *US – Wheat Gluten*, para. 8.19 cited in United States' first written submission, para. 1334.
[2046] United States' first written submission, para. 1335.
[2047] European Communities' second written submission, para. 308.
[2048] United States' first written submission, paras. 1322-1340.
[2049] European Communities' second written submission, para. 309.
[2050] European Communities' second written submission, para. 310.

> obligation to provide findings and reasoned conclusions, and its Article 3.2 obligation not to disclose confidential information."[2051]

7.810 The European Communities states that while it would not formulate the applicable law in quite the same manner, the European Communities does welcome the fact that the United States agrees that the claimed right not to disclose confidential information coexists with the obligation to provide a reasoned and adequate explanation to meet the "serious injury" test in Article 4 of the Agreement on Safeguards. The issue then becomes what is required of an investigating authority in the light of the obligation to provide a reasoned and adequate explanation with respect to data that is entitled to confidential treatment ?[2052]

7.811 The European Communities notes that in an effort to settle this dispute, the European Communities requested the United States to provide information that had been withheld in the public version of the USITC Report. The European Communities states that the United States never responded to that request. It further argues that the United States cannot attempt to cure its insufficient report by now providing the information which, in order to respect Articles 2.1, 4.2, and 3.1 of the Agreement on Safeguards, should have appeared in the report.[2053]

7.812 In response, the United States asserts that after meeting with the European Communities representatives, USTR informally asked the USITC to review the public version of its report to determine whether any of the redacted data in the tables was improperly designated as confidential and should be disclosed. The USITC found that none of the data had been improperly designated as confidential. Accordingly, there was nothing for the United States to report. The United States comments that the Panel should be aware that the USITC Report contained nearly 400 tables, the overwhelming percentage of which were made available in their entirety in the public version of the USITC Report. According to the United States, the European Communities is taking issue with data redacted from only 14 of those tables.[2054]

7.813 In response to a question posed by the Panel, the United States argues that it does not believe that the Article 3.1 requirement to provide a reasoned and adequate explanation and the Article 3.2 requirement to protect confidential information are in conflict. An authority's obligation to protect confidential information under Article 3.2 is not conditioned in any way. The first sentence of Article 3.2 states that confidential information "shall, upon cause being shown, be treated as such by competent authorities". Article 3.2 does not state that the authority may release such information if it is particularly central to its decision, or if its disclosure would aid in understanding the reasons for its findings and conclusions. Instead, the authority's obligation not to disclose confidential information is absolute. The United States argues that, consequently, the findings and reasoned conclusions that an authority provides under Article 3.1 must be findings and conclusions that do not disclose confidential information. Indeed, because maintaining confidentiality is an obligation, a Panel cannot take an adverse inference against a Member because the Member's competent authority did not disclose confidential information. Instead, the Panel must judge the adequacy of the authority's explanation on the basis of the information the authority could properly disclose.[2055]

7.814 The United States also argues that when an investigation involves substantial amounts of confidential information, there are several means by which the authority can satisfy both its

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[2051] United States' written reply to Panel question No. 77 at the first substantive meeting.
[2052] European Communities' second written submission, para. 311.
[2053] European Communities' first written submission, para. 419.
[2054] United States' first written submission, para. 1329.
[2055] United States' written reply to Panel question No. 77 at the first substantive meeting.

Article 3.1 obligation to provide findings and reasoned conclusions and its Article 3.2 obligation not to disclose confidential information. One is to provide a non-confidential narrative discussion of the confidential information. The United States submits that this is an approach the USITC repeatedly took in its report. For example, in the discussion of price declines for cold-finished bar, the USITC had to redact certain numbers quantifying price declines that appear on page 105 of its report. Instead, it characterized the declines as "dramatic". Consequently, the nature of its discussion is clearly discernible. Even for stainless steel rod, where virtually all data concerning the domestic industry was confidential, the USITC still was able to discuss trends in the industry data in general, but descriptive, terms that enable the Panel to discern the reasons for the USITC's conclusions. In this manner the USITC provided findings and conclusions that did not disclose confidential information.[2056]

7.815 In response, the European Communities states that the question is not whether the trend is "discernible" as a result of the use of the word dramatic. The issue is whether, in the words of the Appellate Body, a competent authority has provided a "reasoned and adequate explanation of how the facts support its determination".[2057] The use of the word "dramatic" says nothing about whether the facts support the determination that the price decline was "dramatic". The European Communities states that it is not suggesting that the United States disclose information which is confidential. Indexing pricing developments would be one way of allowing a Panel to determine whether a decline in prices was in fact "dramatic". Indeed, quoting the finding for which the United States considers that the use of the word "dramatic" is sufficient illustrates that the notion of the "non-confidential narrative discussion" of confidential information does not permit a competent authority to provide a reasoned and adequate explanation of its findings:

> "[A]verage unit values of the imports trended downward from 1996 to 1998, and the decline accelerated in 1999. [...] Additional evidence that import prices declined dramatically in 1999 is provided by data for one-inch round C12L14, the cold-finished bar product for which the Commission obtained significant pricing data concerning imports. Between the fourth quarter of 1998 and the first quarter of 1999, import prices for this product declined by *** percent. They fell an addition *** percent between the first and second quarters of 1999, the largest quarterly decline to that point in the period examined."[2058]

7.816 According to the European Communities, there is no indication of how the facts support the USITC's determination that the decline in imports prices was "dramatic". Had the data on import pricing been indexed, the investigating authority, without providing the specific figures, could have shown that the decline in prices was of a sufficient magnitude to be qualified as "dramatic". Thus, providing a "non-confidential narrative discussion" is not sufficient to provide a reasoned and adequate explanation of how the facts support the determination.[2059]

7.817 With reference to the alleged failure to provide any data (other than import data) for stainless steel rod and the failure to provide financial data for stainless steel bar and stainless steel rod, the European Communities notes that for all three products, the European Communities has argued, and the USITC acknowledged, that cost developments (mostly related to nickel), in addition to energy

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[2056] United States' written reply to Panel question No. 77 at the first substantive meeting.

[2057] Appellate Body Report, *US – Lamb*, para. 103.

[2058] USITC Report, Vol. I, p. 105-106, referred to in United States' written reply to Panel question No. 77 at the first substantive meeting, and cited in European Communities' second written submission, para. 313.

[2059] European Communities' second written submission, para. 313.

costs, had a substantial effect on the industry's performance. The European Communities notes that with respect to stainless steel bar, the USITC found that:

> "While the average unit value of the industry's net commercial sales increased in 2000 and 2001, the industry's cost of goods sold rose from *** percent of its net sales revenues to *** percent of its net commercial values in 1999, *** percent of net commercial sales in 2000, and *** percent in interim 2001. As a result of these decreasing margins between the industry's cost of goods sold and its net sales values, the industry's operating income levels declined from a profit of *** percent in 1998 to a loss of *** percent in 1999, recovered only slightly to a minimal profit of *** percent in 2000, and then fell to a loss of *** percent in interim 2001."[2060]

7.818 According to the European Communities, increasing costs may, in certain circumstances be an alternative cause of injury. Thus their analysis may be vital. However, because costs for these products have not been provided on an indexed basis, there is no means to determine whether the facts which the USITC found supported its determination. The same issue was dealt with in the same manner for stainless steel rod [2061] and for stainless steel wire.[2062] The European Communities submits that perhaps the most striking use of redaction is with respect to arguments of interested parties that certain problems affecting one of the very few domestic producers impacted the overall situation of the domestic industry. For stainless steel rod and bar the USITC noted:

> "[I]n addition, we also have considered respondent's argument that the industry's condition during the period was affected significantly by the poor operations of the domestic producer AL Tech/Empire. However, ***."[2063]

7.819 The European Communities asserts that having accepted, therefore, that a Member must provide a reasoned and adequate explanation, even when certain data cannot be disclosed for reasons of confidentiality, there can be no doubt that providing only a "non-confidential narrative discussion" is insufficient to provide a reasoned and adequate explanation of how the facts support a determination of the existence of serious injury and a causal link. According to the European Communities, the United States proved that it was perfectly capable of providing data in another format which protected the confidentiality of the underlying data, and could potentially provide a reasoned and adequate explanation, in its discussion of the proportionality of the measure on Stainless Steel Rod.[2064] The United States, has, therefore, for stainless steel rod, stainless steel bar and stainless steel wire acted inconsistently with Articles 2.1, 4.2(a), 3.1 and 4.2(c) of the Agreement on Safeguards.[2065]

(iii) Recent data

7.820 The European Communities argues that a Member must take account of all information available to it before taking a measure. It asserts that this is an essential element of the provision of an adequate and reasoned explanation, especially in relation to determinations of threat of serious injury, which depend on extrapolations of trends. The European Communities argues that if recent

[2060] USITC Report, Vol. I, pp. 211-212 (footnotes omitted), cited in European Communities' second written submission, para. 315.
[2061] USITC Report, Vol. I, pp. 220-221.
[2062] USITC Report, Vol. I, p. 259.
[2063] USITC Report, Vol. I, p. 221, and for Stainless Steel Bar p. 212 where the USITC states, "We note, however, that ***", cited in European Communities' second written submission, para. 316.
[2064] United States' first written submission, paras. 1160-1161.
[2065] European Communities' second written submission, para. 317.

data that is available before the competent authority decides to impose safeguard measures would bring a determination of threat of serious injury into doubt, the competent authority must justify its determination of threat of serious injury in light of those recent developments. According to the European Communities, failing to do so means that the determination is not reasoned and adequate and, further, a conclusion by the competent authority that a measure is justified would be inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards.[2066]

(iv) Analysis of trends

7.821 The European Communities asserts that the USITC based a number of its determinations (on, for example, capacity utilization, average unit values, cost of raw materials and productivity) on an end-to-end comparison (i.e. 1996 against 2000). In so doing, it provided no data that would have indicated the trends of the injury indicators over the period of investigation and would have consequently permitted a proper causation analysis. The European Communities argues that the absence of data showing the trends shows that both the injury and causation analysis had not been adequately reasoned or explained by the USITC.[2067]

(c) Aggregation of data

(i) CCFRS

7.822 The European Communities argues that, as concerns CCFRS, the USITC Report failed to provide a reasoned and adequate explanation of the determination. In particular, the European Communities argues that while separate data sets existed for each of the products which the USITC collapses into the single CCFRS group (that is, for slabs, plate, hot-rolled, cold-rolled and coated), there were no tables that contained data for the five products as grouped together by the USITC. Thus, the injury findings for the single product group of CCFRS were based on aggregated data from the five individual products. The European Communities argues that there were no means to determine how the data for CCFRS as a whole had been calculated and, consequently, whether the conclusions reached by the USITC are justified.[2068]

7.823 Further, the European Communities argues that aggregation involved substantial double-counting issues which, it says, must be accommodated in order to avoid that the aggregated data become unreliable.[2069] The European Communities submits that double counting arose as a result of the fact, *inter alia*, that capacity for some products was also used to produce other products, and that a substantial proportion of products were consumed in the production of downstream products. The European Communities asserts that the USITC was, therefore, aware of these issues as it conducted its investigation. However, it never provided, in the USITC Report (or elsewhere), a table showing and explaining its adjustment of the data to take account of such double-counting.[2070]

7.824 The European Communities submits that the United States cannot, at the same time, pretend to rely on an aggregated group CCFRS and fail to provide correct data for this artificial group which it itself created. According to the European Communities, without such a demonstration, the determination is not reasoned and adequately explained.[2071] The European Communities notes in this

[2066] European Communities' first written submission, para. 388.
[2067] European Communities' first written submission, para. 412.
[2068] European Communities' first written submission, para. 410.
[2069] European Communities' first written submission, para. 411.
[2070] European Communities' written reply to Panel question No. 72 at the first substantive meeting.
[2071] European Communities' first written submission, para. 411.

regard that the overall tables for flat products were regarded as confidential by the USITC.[2072] The European Communities states that, in any event, these tables would not have provided a fully accurate picture of the group of CCFRS because they also included data for GOES and tin mill products.[2073]

7.825 In response, the United States submits that in conducting its investigation, the USITC recognized that the internal consumption of types of CCFRS to produce other such downstream products could lead to double-counting problems if the data for some injury factors (such as production and capacity) were merely aggregated for the five types of CCFRS. It sought the advice of the parties to the investigation as to how these double-counting issues could be minimized.[2074] In making its determinations, the USITC generally relied on combined data for the five types of CCFRS. However, to account for the double-counting problem, it also examined data for the separate types of CCFRS and considered a variety of different ways of measuring these factors, in accordance with arguments made by representatives of domestic and foreign producers. It found that, in most cases, these separate data showed trends that were similar to the aggregated data for the industry as a whole.[2075] [2076]

(ii) Tin mill products

7.826 Norway submits 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). 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".[2077] Norway submits that when this has not been done, an incorrect assessment of injury to the tin mill industry results, given that the alleged injury may be caused to other parts of the operations of these firms.[2078]

7.827 In response, the United States submits that Norway is mistaken. Its argument appears to assume that, if a United States producer produced several different types of steel, it would report its data to the USITC on the basis of all the products it produced. In fact, the USITC's questionnaire instructions required each domestic producer to report all data, including financial data, separately for each of the 33 categories of steel.[2079] Since tin mill was a distinct category for data collection, a producer that produced both tin mill and other types of steel covered by the investigation would have reported its tin mill data separately from data on other categories. Furthermore, the USITC staff examined all domestic producer questionnaire responses to ascertain whether they contained data discrepancies on reported information on factors including shipments, sales, and capacity.[2080] [2081]

(d) Decision-making processes in the context of the USITC's injury determinations

7.828 China argues that because of the tie-vote situation in relation to stainless steel wire, the investigation with respect to this product was not completed until the President decided, in his Proclamation, which determination he was in favour of. China notes that at Article 4 of the Presidential Proclamation, the President decided to "consider the determination of the groups of

[2072] European Communities' first written submission, para. 413.
[2073] European Communities' first written submission, para. 413.
[2074] USITC Report, p. FLAT-15 n. 11, p. FLAT-30 footnote 13, and FLAT-44 footnote 14.
[2075] USITC Report, p. 51 footnote 193, and p. 56 footnote 232.
[2076] United States' written reply to Panel question No. 24 at the second substantive meeting.
[2077] Norway's first written submission, para. 236.
[2078] Norway's second written submission, para. 73.
[2079] Exhibit US-22 (questionnaire instructions); United States' first written submission, para. 319.
[2080] USITC Report, p. OVERVIEW-7.
[2081] United States' written reply to Panel question No. 25 at the second substantive meeting.

commissioners voting in the affirmative" with regard to stainless steel wire. China asserts, however, that the Commissioners voting in the affirmative did not agree upon a single and common determination and the President did not state precisely according to which views he decided to vote in favour of a safeguard measure. China argues that, accordingly, the decision of the President was not supported by clear explanations of why he found that the stainless steel wire industry was suffering injury or threat of serious injury. On the basis of the foregoing, China submits that it is very difficult to determine whether injury factors were properly examined and whether sufficient and sound explanations were given for the Presidential determination.[2082]

7.829 In response to a question posed by the Panel, the United States notes that Chairman Koplan found threat of serious injury based on a like product of stainless steel wire, Commissioner Bragg found threat of serious injury based on a like product of "stainless steel wire products" (including both stainless steel wire and stainless steel wire rope), Commissioner Devaney found serious injury based on a like product of stainless steel wire products, and the other three USITC Commissioners made negative determinations with respect to stainless steel wire. The United States argues that for purposes of determining whether increased imports are causing serious injury to a domestic industry, the "determination of the competent authorities" is a matter of the Member's domestic law. There is a well-established practice under United States law that when USITC Commissioners disagree with respect to the like product definition, the USITC determination is based on the overlap of the determinations of the individual Commissioners. The United States submits that, here, the six Commissioners produced three affirmative and three negative individual determinations concerning stainless steel wire. Under United States domestic law, the President may treat the USITC's equally divided determination as an affirmative determination. An overlap of decisions is acceptable as long as each decision-maker addressed the goods in question and found that the increased imports caused serious injury or threat of serious injury. [2083]

7.830 The United States notes that there is also the separate question of whether the competent authority has presented the "findings and reasoned conclusions reached on all pertinent issues of fact and law" for its determination required by Article 3.1. The United States submits that United States law differentiates between the determination, which is the USITC's conclusion, and the explanation of the determination. When an authority such as the USITC has multiple members and these members do not issue a collective opinion in support of their determination, the Panel should refer to the opinion for each individual member of the authority whose vote was necessary for the authority to reach its determination. The United States argues that the Article 3.1 requirement is satisfied when each member has provided findings and reasoned conclusions that support the ultimate conclusion he or she reached with respect to the goods in question.[2084]

H. CAUSATION

1. Definition and establishment of "causal link"

7.831 Norway, Brazil and other complainants argue that Articles 2.1 and 4.2(b) of the Agreement on Safeguards mean that Members must demonstrate an explicit "causal link" between the increase in imports and any serious injury suffered by the domestic industry.[2085]

[2082] China's first written submission, para. 348.
[2083] United States' written reply to Panel question No. 78 at the first substantive meeting.
[2084] United States' written reply to Panel question No. 78 at the first substantive meeting.
[2085] Norway's first written submission, para. 285; Brazil's first written submission, para. 147.

7.832 China and New Zealand submit that, on the basis of Appellate Body jurisprudence, a competent authority's task in determining whether the causal link between increased imports and serious injury exists "involves a genuine and substantial relationship of cause and effect".[2086] In doing this, the competent authority must establish the coincidence between increased imports and serious injury, it must not attribute to increased imports injury caused by other factors, and it must establish non-attribution explicitly and expressly through a reasoned, clear, unambiguous and straightforward explanation.[2087] Switzerland and Norway consider that the determination of the existence of a genuine and substantial relationship of cause and effect usually involves two elements: first, there is typically a coincidence in trends between serious injury and increased imports and second, the transmission of serious injury by increased imports must be shown, in the light of the coincidence (or lack of) between trends.[2088]

7.833 New Zealand adds that Articles 4.2(a) and (b) in combination underline the importance of ensuring that the competent authorities substantiate their determination that increased imports have caused, or threaten to cause serious injury through a proper and objective assessment of all relevant factors bearing on the industry. In New Zealand's view, only in this way can the requisite "causal link", as specifically referred to in Article 4.2(b), be demonstrated.[2089]

7.834 The United States notes that the Appellate Body has described the basic requirements applicable to a causation analysis under the Agreement on Safeguards on several occasions.[2090] As a general matter, the Appellate Body has stated that Article 4.2(b) of the Agreement on Safeguards contains "two distinct legal requirements" that must be satisfied for a safeguard action to comply with the Agreement. First, as indicated in the first sentence of Article 4.2(b), the authority must demonstrate the "'existence of the causal link between increased imports of the product concerned and serious injury or threat thereof.'" Second, as set forth in the second sentence of Article 4.2(b), the competent authority must ensure that the "injury caused by factors other than the increased imports [is] … not … attributed to increased imports."[2091]

2. Correlation

7.835 The European Communities, Japan, Korea, Switzerland, Norway, New Zealand and Brazil argue that the Appellate Body in *Argentina – Footwear (EC)* stated that if causation is present, increased imports "normally should coincide" with a decline in the relevant injury factors.[2092] New Zealand further argues that a coincidence between increased imports and injury factors will provide an important initial indication of a causal link[2093] and that a competent authority should demonstrate such coincidence.[2094] According to the European Communities and Brazil, the facts must demonstrate,

[2086] China's first written submission, para. 352; New Zealand's first written submission, para. 4.111.
[2087] New Zealand's first written submission, para. 4.111; China's first written submission, para. 352.
[2088] Switzerland's first written submission, para. 292; Norway's first written submission, para. 293.
[2089] New Zealand's first written submission, para. 4.110.
[2090] The United States cites the Appellate Body Reports, *US – Line Pipe*, paras. 200-222; *US – Lamb Meat*, paras. 162-188; *US – Wheat Gluten*, paras. 60-92; *Argentina – Footwear (EC)*, paras. 140-47.
[2091] United States' first written submission, para. 401.
[2092] European Communities' written reply to Panel question No. 81 at the first substantive meeting; Japan's written reply to Panel question No. 81 at the first substantive meeting; Japan's second written submission, para. 113; Korea's first written submission, para. 103; Switzerland's written reply to Panel question No. 81 at the first substantive meeting; Norway's first written submission, para. 283; New Zealand's written reply Panel question No. 81 at the first substantive meeting; Brazil's second written submission, para. 63; Brazil's written reply to Panel question No. 81 at the first substantive meeting.
[2093] New Zealand's first written submission, para. 4.113.
[2094] New Zealand's first written submission, para. 4.112.

at a minimum, a correlation in time between the increased imports and the decline in industry performance.[2095]

7.836 New Zealand notes that the Appellate Body has not set out abstract mathematical parameters for how close a degree of coincidence is required.[2096] Similarly, the European Communities and Norway argue that there is no mathematical formula which dictates the applicable time-frame for establishing causal link.[2097] Likewise, Japan and Brazil argue that it is impossible to put forward a precise standard.[2098] Nevertheless, the European Communities, Switzerland and Norway argue that the degree of coincidence between the increased imports and the serious injury suffered should be significant.[2099]

7.837 Japan, Switzerland and Brazil submit that the term "coincide" implies a very tight correlation between increased imports and injury within a narrow period of time. Indeed, the Oxford English Dictionary defines "coincide" as, to "[o]ccupy the same portion of space ... [o]ccur at or during the same time".[2100] Korea argues that the relevance of the coincidence of time between increased imports and materialization of injury is that there logically should be a close connection.[2101]

7.838 The European Communities and Brazil argue that absent this correlation, the increase in imports cannot be said to have caused the serious injury.[2102] More particularly, Brazil submits that in the absence of a correlation between increased imports and serious injury, there can be no causal link, and no measure applied.[2103] Similarly, Norway argues that if there is no correlation between the increase in imports and the serious injury suffered, it is highly doubtful that a causal link exists.[2104]

7.839 The European Communities, Japan and Brazil argue that if there is no coincidence, it is still possible that there is a causal link, but a competent authority must provide a "very compelling analysis" of this causal link.[2105] Switzerland and Norway also submit that in the absence of coincidence, a "compelling analysis" is needed that establishes the existence of a genuine and substantial relationship of cause and effect between increased imports and the serious injury allegedly suffered, in the light of the coincidence of trends, and the means by which such injury is transmitted

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[2095] European Communities first written submission, para. 438; Brazil's first written submission, para. 149.

[2096] New Zealand's written reply to Panel question No. 81 at the first substantive meeting.

[2097] European Communities' written reply to Panel question No. 81at the first substantive meeting; Norway's written reply to Panel question No. 86 at the first substantive meeting.

[2098] Japan's written reply to Panel question No. 81 at the first substantive meeting; Brazil's written reply to Panel question No. 81 at the first substantive meeting.

[2099] European Communities' first written submission, para. 451; Switzerland's first written submission, para. 293; Norway's first written submission, para. 294.

[2100] Japan's written reply to Panel question No. 81 at the first substantive meeting; Japan's second written submission, para. 113; Switzerland's written reply to Panel question No. 81 at the first substantive meeting; Brazil's second written submission, para. 63; Brazil's written reply to Panel question No. 81 at the first substantive meeting.

[2101] Korea's written reply to Panel question No. 81 at the first substantive meeting

[2102] European Communities' first written submission, para. 438; Brazil's first written submission, para. 149.

[2103] Brazil's second written submission, para. 62.

[2104] Norway's first written submission, para. 283.

[2105] European Communities first written submission, paras. 450 and 453; Japan's second written submission, para. 114; Brazil's written reply to Panel question No. 81 at the first substantive meeting; Japan's written reply Panel question No. 81 at the first substantive meeting. Reference is made in this regard to *Argentina – Footwear (EC)* at para. 144.

by increased imports.[2106] Japan and Brazil say that, at a minimum, some level of demonstrable, relevant and "very compelling" correlation between increased imports and serious injury must exist.[2107]

7.840 The United States argues that the Appellate Body has consistently stated that the "primary objective" of a Member when conducting a safeguards investigation is to "determine whether there is 'a genuine and substantial relationship of cause and effect' between increased imports and serious injury and threat thereof." Accordingly, the United States asserts that, when interpreting Article 4.2(a) and 4.2(b), first sentence, of the Agreement, the Appellate Body has stated that the "central" consideration in a causation analysis is assessing whether there is a "relationship between the movements in imports (volume and market share) and the movement in injury factors." The United States adds that, the Appellate Body has indicated that, even in the absence of a "coincidence between an increase in imports and a decline in the relevant injury factors," a competent authority is not precluded from finding that there is the requisite causal link between increased imports and serious injury; instead, the competent authority may still find the causal link needed to justify a safeguard action if the authority provides a "compelling analysis of why causation is still present."[2108]

7.841 The United States adds that, for the ten steel products for which the President imposed a safeguard remedy, the USITC considered all of the record evidence and concluded that there was a clear correlation between the volume and price trends of imports and declines in the overall condition of the industry. Moreover, for each product, the USITC also conducted a detailed and well-reasoned discussion of the ample record evidence showing that there was a genuine and substantial correlation between increased imports and serious injury.[2109]

7.842 The United States argues that although the complainants correctly recognize that the Appellate Body has indicated that there should "normally" be a "relationship between the movements in imports (volume and market share) and the movement in injury factors", their arguments in this regard generally focus almost exclusively on an analysis of correlations in import and industry trends within the same calendar year. This approach fails to appreciate that the full impact of an increase in import volumes or a decline in import prices in one calendar year may not be fully reflected in the condition of the industry until the next calendar year, or even the year after.[2110] The United States also argues that, in many instances, the complainants improperly focus solely on year-to-year correlations between changes in import volumes and changes in industry injury indicia without recognizing that changes in an industry's condition can be the result of both volume and price-based import competition.[2111] The United States argues that the sort of analysis urged by the complainants – that is, an examination only of the correlations between trends in import volume and industry profitability levels – would reflect an imprecise and demonstrably incomplete assessment of whether increased imports, and their pricing patterns, had seriously injured the domestic industry.[2112]

7.843 Korea argues that a lag or disconnect between the increased imports and the serious injury shows the high likelihood that the impact identified is caused by other external factors and not the increased imports. Furthermore, in such a case, the competent authorities should provide an

[2106] Switzerland's first written submission, para. 294; Norway's first written submission, para. 296.
[2107] Japan's second written submission, para. 114; Japan's written reply to Panel question No. 81 at the first substantive meeting; Brazil's written reply to Panel question No. 81 at the first substantive meeting.
[2108] United States' first written submission, paras. 402-403.
[2109] United States' first written submission, para. 425; United States' second oral statement, para. 63.
[2110] United States' first written submission, para. 446.
[2111] United States' first written submission, para. 448.
[2112] United States' first written submission, para. 449.

explanation why and how they still found a causation between the increased imports and the serious injury despite a lack of coincidence.[2113] Similarly, Japan and Brazil concede that it might be possible to find a correlation between increased imports and injury in situations where the effect is lagged. However, they argue that it would be for the "compelling analysis" to explain why such a lag exists and how it operates. In this respect, they assert that the existence of a causal lag is industry and market specific.[2114] The European Communities, Japan, Korea, New Zealand and Brazil argue that the more attenuated the occurrence of serious injury is from the increase in imports (that is, the greater the lapse of time) the more likely that the injury found is due to factors other than the increased imports.[2115] The authorities, therefore, have a higher burden to establish by compelling evidence that the relationship nonetheless exists in such circumstances.[2116]

7.844 In response, the United States argues that these complainants appear to agree with the United States that imports can have a direct, albeit lagged, impact on certain indicia of an industry's condition. In response to questions from the Panel, the United States notes that the complainants have conceded the Agreement on Safeguards does not require increased imports to have a direct and immediate impact on all indicia of an industry's condition in the same year when an import surge occurs. As recognized by the European Communities, under the Agreement on Safeguards, "there is no mathematical formula which dictates the applicable time frame for establishing [a] causal link" between imports and declines in the condition of the industry during the period of investigation. Similarly, Japan agrees that there is "no test for determining when the effect of increased imports on the domestic industry must materialize." In other words, like several other complainants, Japan and the European Communities clearly recognize that the nature of the temporal "correlation" between import increases and changes in an industry's condition is dependant upon the performance factors being examined and the manner in which imports affect those factors.[2117]

7.845 As a result, the United States argues that the complainants are mistaken when they argue that a competent authority must provide a "more compelling" causation analysis if there is a time lag between an increase in imports and declines in certain performance factors of the industry. According to the United States, it is simply not the case that a temporal lag between import increases and declines in industry performance factors indicates a lack of "correlation" or coincidence between the import increase and the performance declines. Natural business cycles or other external factors may cause imports to have a direct but delayed impact on one or more of an industry's performance indicia.[2118]

7.846 The United States argues that an import increase can have an immediate and direct impact on many performance factors for an industry, such as market share, production levels, or shipment

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[2113] Korea's written reply to Panel question No. 81 at the first substantive meeting; Korea's second written submission, para. 135; New Zealand's written reply to Panel question No. 81 at the first substantive meeting.

[2114] Japan's written reply to Panel question No. 81 at the first substantive meeting; Brazil's written reply to Panel question No. 81 at the first substantive meeting.

[2115] European Communities' written reply to Panel question No. 81 at the first substantive meeting; Japan's written reply to Panel question No. 86 at the first substantive meeting; Korea's written reply to Panel question No. 86 at the first substantive meeting; Korea's second written submission, para. 140; New Zealand's written reply to Panel question No.86 at the first substantive meeting; Brazil's written reply to Panel question No. 86 at the first substantive meeting.

[2116] Korea's written reply to Panel question No. 86 at the first substantive meeting; Norway's written reply to Panel question No. 86 at the first substantive meeting.

[2117] United States' second written submission at paras. 117-18.

[2118] United States' second written submission, para. 125.

levels.[2119] Notwithstanding this, an increase in imports can also have a direct but delayed impact on certain performance factors for an industry, such as the industry's employment levels, capital investment levels, or its research and development expenses. For example, a company affected by a substantial surge of imports in one year will not necessarily immediately go into bankruptcy.[2120] On the contrary, most companies will take every action possible to avoid entering bankruptcy because entering bankruptcy will have a substantial negative impact on their commercial reputation and their access to capital. Accordingly, companies may delay entering bankruptcy for a number of years, even after their business has been seriously harmed by a major event such as a sudden and serious surge in imports.[2121] The United States submits that similarly, a company may not immediately cut its workforce when imports first surge into a market. Instead, the company might reasonably take some time to assess whether import increases appeared to reduce its shipment or pricing levels over an extended period, which might indicate that a long-term reduction in the company's work force was necessary to reduce its costs.[2122] Indeed, it is possible that an increase in imports can have both an immediate and a delayed impact on one of the industry's performance factors.[2123]

7.847 In response to this particular argument, Japan argues that the United States offers the simplistic argument that bankruptcies and labour reductions are inherently delayed reactions to market-driven events. Japan argues that, however, this argument misses the point. The question is what caused the bankruptcies and labor reductions. The answer is a decline in sales revenue and profits, which was caused by a decline in prices, as the domestic industry argued and the USITC found.[2124] The USITC considered this as evidence of the industry's injury, but failed to correlate the declining domestic prices to increased imports, which, in fact, stopped increasing in 1998. The question that should have been asked, therefore, is what caused domestic prices to decline. As argued, price effects are far more immediate than bankruptcies and labour reductions, assuming there is no inventory overhang. As there was no inventory overhang in this case, the lack of correlation between import increases and domestic price declines shows that something other than the two-year-old increase in imports was affecting the industry. In proceedings before the USITC, respondents demonstrated the effects of other causes, with which there was a clear correlation with industry performance, but the USITC ignored these proven effects.[2125]

7.848 The United States notes that in the anti-dumping context, an adopted panel report has specifically found that there need not be an immediate temporal link between import trends and declines in an industry's condition to establish a causal link between imports and those declines.[2126] In *Egypt – Steel Rebar*, the Panel rejected Turkey's contention that there must be a strict temporal connection between the dumped imports and any injury being suffered by the industry, noting that this argument:

> "… rest[ed] on the artificial assumption that the market instantly absorbs, and reacts to, imports the moment they enter the territory of the importing country. Such an assumption implicitly rests on the existence of so-called "perfect information" in the

[2119] United States' second written submission, para. 119.
[2120] Japan first written submission, para. 237.
[2121] United States' second written submission, para. 120.
[2122] United States' second written submission, para. 121.
[2123] United States' second written submission, para. 122; See also United States' written reply to Panel question No. 28 at the second substantive meeting
[2124] USITC Report at 62 and 63.
[2125] Japan's written reply to Panel question No. 28 at the second substantive meeting.
[2126] United States' second written submission, para. 123.

> market (i.e., that all actors in the market are instantly aware of all market signals.)" [2127]

7.849 According to the United States, in other words, the Panel concluded that a competent authority need not be expected to find that there is a direct and immediate causal link between imports and downward trends in an industry's condition, as the complainants consistently urge.

7.850 Accordingly, the United States contends, the complainants are mistaken when they argue that a competent authority must provide a "more compelling" causation analysis if there is a time lag between an increase in imports and declines in certain performance factors of the industry. It is simply not the case – as the complainants assume – that a temporal lag between import increases and declines in industry performance factors indicates a lack of "correlation" or coincidence between the import increase and the performance declines. Natural business cycles or other external factors may cause imports to have a direct but delayed impact on one or more of an industry's performance indicia.[2128]

7.851 In light of the foregoing, the United States submits that the Panel need not apply a heightened standard of scrutiny to the USITC's analysis simply because there is a temporal lag between an import increase and declines in certain of the performance factors for an industry. Instead, the sole inquiry for the Panel should be whether the USITC's explanation of the causal link between imports and the declines in the industry's condition is "reasoned", "adequate", and "clear" as established in *US Line – Pipe*.[2129]

7.852 Japan and Brazil also submit that in the case of the steel industry, there are active spot markets. In other words, they submit that sales are made on a "spot" basis rather than a contract basis. They argue that this is particularly true for CCFRS products. Thus, if imports themselves are having an effect on domestic prices, that effect will be seen quickly in changes in domestic industry spot market prices. For the same reason, volume effects also can be seen quickly. Japan and Brazil argue that while inventory is an important consideration, the inventory levels in this case do not suggest extended lingering effects. The inventory levels were approximately one month or less. Thus, according to the European Communities, Japan, Korea, New Zealand and Brazil, the United States argument that imports in 1998 could have lingering adverse effects at the end of 1999 is extremely remote and was certainly not proven by the USITC.[2130] Brazil argues that the data relied upon and arguments made by the United States, whether based on volume or price, do not support the "lingering effects" theory, and certainly not in a "compelling" way. Brazil submits that this is clear from a brief review of the volume and pricing information that was before the USITC and from the simplistic assumptions made by the USITC that are never substantiated.[2131]

7.853 The United States submits that while there is a substantial volume of spot sales in the CCFRS market, the market is characterised by a more substantial volume of sales. The United States submits

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[2127] Panel Report, *Egypt – Steel Rebar*, para. 7.129.

[2128] United States' second written submission, para. 124.

[2129] United States' second written submission, para. 125.

[2130] European Communities' written reply to Panel question No. 28 at the second substantive meeting; Japan's written reply to Panel question No. 86 at the first substantive meeting referring to USITC Report Vol. II at Table FLAT-49; Japan's written reply to Panel question No. 28 at the second substantive meeting; Korea's written reply to Panel question No. 28 at the second substantive meeting; New Zealand's written reply to Panel question No. 28 at the second substantive meeting; Brazil's written reply to Panel question No. 86 at the first substantive meeting; Brazil's written reply to Panel question No. 28 at the second substantive meeting

[2131] Japan's second written submission, para. 12; Brazil's second written submission, para. 69; Brazil's written reply to Panel question No. 27 at the second substantive meeting.

that, more specifically, of the 233 purchasers who reported making all or nearly all of their purchases on a spot or contract basis, 128 (or 54%) reported making all or nearly all of their purchases on a contract basis. Moreover, of the 73 purchasers who reported making substantial amounts of both contract and spot purchases, more than twice as many purchasers reported making the larger percentage of their purchases on a contract basis.[2132] In other words, the carbon flat-rolled market cannot be described as merely a spot market; indeed, the majority of purchase decisions in the market are made on a contract basis. Moreover, given the importance of contract sales in the market, it is incorrect for Brazil to suggest that spot prices are the main determinant of pricing levels in the market. Quite clearly, contractual pricing had an important role in market pricing as well.[2133]

7.854 Brazil further submits that the United States seemingly understands and appreciates the significance of the need to find a causal link between increased imports and serious injury to the domestic industry before a measure may be imposed.[2134] However, according to Brazil, the United States never meets its burden of showing how the USITC actually demonstrated a causal link in this case, nor does the attempt by the United States at rehabilitation of the USITC's "analysis" suffice. Brazil submits that increased imports did not "coincide" with a decline in the relevant injury factors of the domestic industry, and the USITC did not provide a "very compelling analysis" of why causation was still present (i.e., some correlation between increased imports and serious injury).[2135]

7.855 In addition, Japan, Switzerland and Brazil argue, that as a matter of law, there is a limit on any time-frame given the threshold requirement under Article 2.1 and Article XIX of the GATT 1947 that increased imports be recent.[2136] Japan, Korea and Brazil argue that a two-year lag, which they contend existed in this case, fails this requirement.[2137] Korea, Norway and Brazil submit that there was no compelling analysis supporting a lag effect and that, rather, the facts support the opposite conclusion. Similarly, Norway argues that the lag effect that has been put forward by the United States is not substantiated – product by product – by the "compelling analysis of why causation is still present" required by the Appellate Body.[2138] Brazil submits further that the United States authorities have provided what, at most, is only a theoretically possible explanation and that that explanation ignores other crucial evidence.[2139] Similarly, Korea argues that the United States has not demonstrated the "vehicle" or means by which the much earlier increase in imports resulted in the serious injury that occurred much later and the USITC certainly did not document that causal link.[2140] Korea adds that the required "compelling analysis" must be found in the USITC Report itself and cannot be offered by the United States via *ex post facto* justifications.[2141]

7.856 The United States also argues that the complainants routinely present causation arguments that are based primarily on comparisons of imports trends with a limited number of selectively chosen

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[2132] USITC Report, Vol. II, p. FLAT-61.

[2133] United States' written reply to Panel question No. 27 at the second substantive meeting.

[2134] Brazil's second written submission, para. 62.

[2135] Brazil's second written submission, para. 62.

[2136] Japan's written reply to Panel question No. 86 at the first substantive meeting; Switzerland's written reply to Panel question No. 86 at the first substantive meeting; Brazil's written reply to Panel question No. 86 at the first substantive meeting.

[2137] Japan's written reply to Panel question No. 86 at the first substantive meeting; Japan's second written submission, para. 115; Korea's second written submission, para. 141; Brazil's written reply to Panel question No. 86 at the first substantive meeting.

[2138] Korea's second written submission, para. 141; Norway's second written submission, para. 134; Brazil's written reply to Panel question No. 81 at the first substantive meeting.

[2139] Brazil's written reply to Panel question No. 86 at the first substantive meeting.

[2140] Korea's written reply to Panel question No. 86 at the first substantive meeting.

[2141] Korea's second written submission, para. 142.

industry performance factors. The United States submits that these arguments are flawed because the Agreement on Safeguards requires not a focus on one or two selected criteria but on all of the relevant criteria bearing on the condition of the industry. The United States submits that, in fact, the failures of these arguments become even more evident when one recognizes that the complainants routinely change the indicia used in their causation arguments from product to product. For example, the United States submits that although the European Communities bases its "causal link" argument for CCFRS on an analysis of such injury factors as the industry's capacity, production, scrap costs, and profitability levels, it bases its "causal link" argument for tin mill products almost exclusively on a comparison of the AUV of imports and domestic merchandise. The United States submits that under the Agreement on Safeguards, it is the totality of industry trends, and their interaction, that must be taken into account when a competent authority performs its analysis in a safeguards action.[2142]

7.857 In counter-response, Brazil argues that for all of the complaints from the United States about the complaining party's use of too narrow a time frame or misleading "selected data" to refute the existence of a causal link, Brazil and the other parties have merely de-constructed the USITC's own analysis. Brazil and Korea submit that they have, in fact, examined the entire period of investigation in making their arguments. It was the USITC that focused on selective data and a narrow period. Brazil argues that, moreover, despite its talk about the need for a broader assessment of the industry and imports, the defence by the United States of the USITC Report focuses on the same few factors as the USITC Report itself: import volume, import price, and domestic industry profits.[2143] Similarly, New Zealand argues that the USITC itself focused on the effect of increased import volumes on domestic prices to the exclusion of other factors. Accordingly, it was this analysis which New Zealand took issue with.[2144]

(a) CCFRS

(i) Coincidence in time

7.858 According to Brazil, the USITC's finding of a "causal link" was inconsistent with the facts and, therefore, violated the requirements of Article 4.2(b) first sentence. Brazil argues that the trends in imports and the industry's performance do not provide the correlation demanded by Article 4.2.[2145]

7.859 Brazil and Japan argue that while the USITC alleges that the increase in imports and the decline in the domestic CCFRS industry performance occurred at the same time, the facts show that any injury by the domestic industry occurred only after imports already began to decline.[2146] More particularly, Brazil and Japan argue that the USITC's crucial assertion that in 1998 a surge in imports caused injury to the domestic industry is unsupported by its own data. According to Japan, Korea and Brazil, the evidence shows that when imports were increasing early in the period, the United States industry was not injured; later in the period, when the United States industry arguably was injured, imports were decreasing.[2147] Japan and Brazil argue that, therefore, there was a complete absence of any correlation in time between the increased imports and injury to the domestic industry. According

[2142] United States' first written submission, para. 450.
[2143] Brazil's second written submission, para. 68; Korea's second written submission, para. 133.
[2144] New Zealand's second written submission, para. 3.100.
[2145] Brazil's first written submission, para. 174.
[2146] Brazil's first written submission, para. 161: Japan's first written submission, para. 231.
[2147] Japan's first written submission, para. 232; Korea's first written submission, paras. 105-108; Brazil's first written submission, para. 162;

to the Appellate Body's jurisprudence, this fails the minimum requirement for establishing a causal link.[2148]

7.860 The European Communities, Korea and New Zealand argue that the USITC Report does not demonstrate in any plausible way, a coincidence of trends between increased imports and serious injury[2149] and that this calls into question whether there was a substantial relationship between serious injury and imports.[2150] The European Communities asserts that in the absence of a coincidence of trends, the Appellate Body has required "very compelling" evidence to demonstrate the existence of a causal link. The European Communities and New Zealand argue that the USITC has provided no such compelling evidence.[2151] In Korea's view, a proper analysis of trends would have revealed that imports declined for more than two and a half years, a decline that accelerated during the most recent 18-month period.[2152]

7.861 New Zealand argues that contrary to the Appellate Body's decision in *Argentina – Footwear (EC)*, which recognized that trends in both the injury factors and imports matter as much as absolute levels, and that it is the relationship between the movements in imports (volume and market share) and the movements in injury factors that are central to a causation analysis and determination, the USITC did not make any serious comparison between the alleged serious injury factor of the inability of domestic production operations to function at a reasonable level of profit and trends in either volume or market share of imports. According to New Zealand, a proper comparison of these factors with the domestic operating margin shows no relationship between them. Indeed, according to New Zealand, they prove the opposite of what the USITC assumed.[2153]

7.862 New Zealand asserts in this regard that there is no relationship between import volumes and any injury resulting from declines in domestic operating margins. New Zealand submits that a 5% rise in import volume of CCFRS, from 1996-1997, coincided with a nearly 2% increase in domestic operating margin in 1997, a 31% rise in imports between 1997 and 1998 coincided with a 4% operating margin in 1998, and an 18% fall in imports between 1998 and 1999, which then stayed at the 1999 level through 2000, coincided with a decline, not an improvement, in the operating margin for 1999 and 2000.[2154] According to New Zealand, the interim (first half year) figures for 2000 and 2001 should have indicated to the USITC a trend showing the same lack of coincidence at the end of the period of investigation – a 40% decrease in imports between interim 2000 and interim 2001 coincided with a decline in operating margin to – 11.5% for the first half of 2001. The same trend indicated that the final 2001 import volume total would be over 30% lower than the 1996 total, when the domestic industry enjoyed an operating margin of 4.3%.[2155] According to New Zealand, an analysis of each individual product within the CCFRS category would produce essentially the same result. Thus, according to New Zealand, the USITC claim that increases in imports were linked to declines in domestic operating margins simply cannot be supported.[2156]

[2148] Brazil's first written submission, para. 161: Japan's first written submission, para. 231.

[2149] European Communities' first written submission, para. 471; Korea's first written submission, para. 104; New Zealand's first written submission, para. 4.123; New Zealand's written reply to Panel question No. 81 at the first substantive meeting.

[2150] Korea's first written submission, para. 104.

[2151] European Communities' first written submission, para. 471; New Zealand's first written submission, para. 4.123.

[2152] Korea's first written submission, para. 105.

[2153] New Zealand' first written submission, para. 4.125.

[2154] New Zealand's first written submission, para. 4.126.

[2155] New Zealand's first written submission, para. 4.127.

[2156] New Zealand's first written submission, para. 4.128.

7.863 Similarly, Brazil argues that imports of CCFRS increased from 10.0% of production in 1996 to only 13.2% of production in 1998, before dropping back to 10.5% of production in 2000, and declining even further in interim 2001. The same trend appears when imports are measured either as a percentage of the open market or as a percentage of apparent domestic consumption. Moreover, the USITC itself characterized 1996 operating income of 4.3% as "reasonable operating profits". Operating income in 1998 was virtually the same at 4.0%. Under the circumstances, it would be difficult to conclude that 1998 performance somehow constituted unreasonable operating profits, let alone serious injury. Perhaps appreciating the point, Brazil submits that the USITC sought to maximize its "sharp decline" theory by focusing on 1997 operating income, which was modestly better than 1996 or 1998 and constituted a record peak performance for the industry.[2157] Other indicia of industry performance can also be used to make the point. Moreover, the import and industry performance trends for the distinct CCFRS products – hot-rolled, plate, cold-rolled, and corrosion resistant – all share the same basic relationship.[2158]

7.864 New Zealand adds that the USITC's analysis of movements in import market share of domestic consumption is limited and misleadingly selective in that it highlights certain periodic increases rather than the overall decreasing trend in import market share. It also fails to examine any coincidence between movements in import market share and alleged injury factors.[2159]

7.865 The United States argues that the USITC established that there was a clear correlation between import trends and declines in the industry's condition. The United States notes that the USITC explicitly took into account factors that affected the competitiveness of domestic and imported merchandise in the US market, the trends in import volumes and market share during the period, the pricing effects of imports, and correlations between these trends and changes in the various indicia of the industry's condition.[2160] After conducting this examination, the USITC correctly found that there was a clear correlation between increases in low-priced imports and the substantial declines in the industry's condition during the period. In particular, after noting that the volume levels of imports remained essentially stable in 1996 and 1997[2161], the USITC found that a "dramatic increase in the volume of imports in 1998 – at the midpoint of the period examined – coincided with sharp declines in the domestic industry's performance and condition, which occurred despite growing US demand." Moreover, the USITC noted that this surge of imports in 1998 entered the market at prices that were "generally significantly lower-priced" than during the first two years of the period and that imports were priced significantly below domestic merchandise, thus leading to declines in domestic prices.[2162]

7.866 The United States argues that, as the USITC correctly noted in its analysis, the record showed that there was a direct correlation between changes in both the volumes and pricing patterns of imports during 1998, 1999 and 2000 and declines in the industry's operating margins in those years.[2163] According to the United States, the 1998 surge in import volume did indeed have a clear and adverse impact on the overall condition of the industry. In 1998 when import volumes increased by 31.3% and import sales values dropped by 8.4% the industry's share of the overall market fell by 2.5 percentage points, its share of the commercial market fell by more than 5 percentage points, its aggregate net sales value dropped by 3.0% (despite an increase in its overall net sales quantity of 0.5%), its average unit sales prices fell by 3.1%, its aggregate gross profits fell by 19.8%, its

[2157] USITC Report, Vol. I, p. 62.
[2158] Brazil's second written submission, para. 65.
[2159] New Zealand's first written submission, para. 4.129.
[2160] USITC Report, pp. 60-62.
[2161] USITC Report, pp. 59-60.
[2162] United States' first written submission, paras. 459-63.
[2163] United States' first written submission, paras. 449, 461-464.

aggregate operating income levels dropped by 36.9%, and its operating income margins fell by 2.1 percentage points from the previous year's level. These declines, argues the United States, occurred in a market in which demand grew by 3.2%.[2164] The United States argues that, moreover, there was a distinct correlation between the volume and price trends of imports and the continuing declines in the industry's condition that occurred in 1999 and 2000. In this regard, even though import volumes "slackened somewhat" in 1999 and 2000 from their 1998 surge level, import volumes in both years remained substantially above 1996 and 1997 levels. Indeed, in the year 2000, import volumes were 13.7% higher than in 1996. Moreover, these elevated levels of imports continued to be sold at prices that were substantially lower than domestic prices, and were, in fact, lower than their 1996 and 1997 levels. As a result of this continued and substantial underselling, imports depressed and suppressed domestic prices in both 1999 and 2000, and caused continued declines in the industry's net unit sales values, gross profits, operating income, and operating income margins.[2165] The United States submits that the USITC record supported these findings. The record showed and the USITC correctly found that there was a direct coincidence between the surge in low-priced imports and declines in the industry's condition in 1998.[2166]

7.867 In counter-response, the European Communities submits that the argument by the United States that it is sufficient to show "a direct correlation between changes in both the volume and pricing patterns of imports during 1998, 1999 and 2000 and declines in the industry's operating margins in those years" implies that it cannot establish increased imports for those years and thus has to rely on pricing patterns.[2167] The European Communities submits that it is quite clear in the Agreement on Safeguards that a competent authority is obliged to establish the existence of a genuine and causal link between increased imports and serious injury.[2168] According to the European Communities, pricing levels may be one of the mechanisms by which such increased imports transmit or cause injury. However, those pricing levels must be linked to increased imports which satisfy the requirements of the Agreement on Safeguards. Pricing levels existing two years after imports have peaked cannot be considered as being linked to the import peak.[2169]

7.868 New Zealand further argues that the United States' argument that the required coincidence can be established between the import increase from 1997-1998 and injury can be easily disposed of. The Agreement on Safeguards requires there to be a coincidence between increased imports and serious injury, not between increased imports and a decline in the industry's condition. There was no evidence of injury in 1998, only a slight drop in operating margins to a still healthy 4%.[2170] Finally, New Zealand argues that the argument that injurious effects from that increase in imports (i.e. between 1997 and 1998) was still occurring in 1999 and some years after that (if accepted as a valid basis for a finding of causation under the Agreement on Safeguards) would denude the coincidence in time requirement of any content. This coincidence did not exist, so the USITC was required to provide a "very compelling analysis" of why causation was still present. It could not and did not, and

[2164] United States' first written submission, para. 470; United States' second written submission, para. 126.
[2165] United States' first written submission, para. 271; United States' second written submission, para. 127.
[2166] United States' first written submission, para. 462.
[2167] European Communities' second written submission, para. 370.
[2168] Article 2.1 refers to imports "in such increased quantities" as to "cause or threaten to cause serious injury" while Article 4.2(a) refers to "increased imports" which have "caused or threatened to cause serious injury" and Article 4.2(b) refers to "the existence of a causal link between increased imports of the product concerned and serious injury or threat thereof".
[2169] European Communities' second written submission, para. 371.
[2170] New Zealand's second written submission, para. 3.98.

indeed provided no evidence whatsoever either of delayed ongoing price effects or of the alleged injury this supposedly led to.[2171]

7.869 The United States illustrates its arguments regarding lag effects in paragraph 7.840 by stating that a number of CCFRS companies entered bankruptcy in 2000 and 2001[2172] even though imports first surged into the market in 1998.[2173] Similarly, the United States argues that the CCFRS industry did not immediately reduce the size of its work force in 1998, when CCFRS imports first surged into the United States market, even though the surge caused substantial market share losses, reduced prices, and reduced profits for the industry.[2174] Instead, the industry first substantially reduced the size of its work-force in 1999, when it became clear that imports would remain at elevated levels in the market and would continue to cause price declines in the market.[2175] [2176]

7.870 Brazil notes[2177] that the USITC stated that:

> "After the initial import surges in 1998, as noted, the volume of imports slackened somewhat but remained above the levels seen in 1996-1997. One way in which the impact of the massive import volume continued to reverberate beyond 1998 was through increased inventories. End-of-period inventories held by importers increased substantially in 1998, as did inventories held by service centers."[2178]

7.871 In light of the foregoing, Korea argues that the USITC's analysis that increased imports in 1998 had lingering effects hinges on the finding, *inter alia*, that importers maintained increased inventories.[2179] Korea argues that the data cited with respect to inventories does not support the USITC's conclusion. Inventory levels turned over rapidly. By way of example, Korea submits that the USITC Report shows inventory levels for all CCFRS inventories held by importers at year-end to range from 7% to 15% of total shipments between 1996 and 2000[2180] – between 0.6 and 1.2 months of inventory over the period. (For many individual CCFRSproducts, inventory levels never exceeded one month.) Thus, according to Korea, in less than three months, the volume effects of imports from the previous or ending quarter would have been depleted. Korea submits that since import volumes after 1998 declined[2181], those import volumes could not have lingering effects at the end of 1999, much less in 2000 or 2001 as suggested by the United States.[2182]

7.872 Similarly, Brazil notes that in 1999, with domestic shipments of CCFRS remaining basically stable compared to 1998, in virtually every product category the mills increased their shipments to

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[2171] New Zealand's second written submission, para. 3.99.
[2172] USITC Report, Table OVERVIEW-11.
[2173] INV-Y-209, Table FLAT-ALT7 (US-33).
[2174] INV-Y-209, Table FLAT-ALT7 (US-33).
[2175] The industry reduced its work force by 4.2% (a total of approximately 4.5 thousand workers) in 1999. INV-Y-209, Table FLAT-ALT7 (US-33). The industry kept its work force at essentially this level in 2000. Ibid.
[2176] United States' second written submission, para. 121.
[2177] Brazil's written reply to Panel question No. 28 at the second substantive meeting.
[2178] Views of the Commission – USITC Report, Vol. I at 60.
[2179] Korea's second written submission, para. 142; see also Japan's second written submission, para. 116.
[2180] USITC Report, Vol. II, Table FLAT-49 at FLAT -43 (Exhibit CC-6).
[2181] Ibid., The bulk, in absolute terms, of the CCFRS inventories held by importers are composed of slab, and slab inventories experienced the greatest growth after 1998 when other flat product inventories declined or stabilized. The "importers" of slab are domestic producers of other flat-rolled products.
[2182] Korea's second written submission, para. 143.

distributors both absolutely and relative to total shipments, indicating that the distributors were not carrying excess inventory as a result of the 1998 surge in imports and liquidating that inventory rather than buying from United States' mills. In addition, the mills themselves were not carrying aberrational levels of inventories as a result of the effect of the import surge in 1998 on the market. As a ratio to shipments, mill inventories of hot-rolled and cold-rolled products at the end of 1999 were below 1997 levels, inventories of slab were almost identical to pre-surge levels both absolutely and relative to shipments, imports of plate were up half a percentage point relative to shipments (because of a decline in consumption), and inventories of coated (corrosion resistant) CCFRS products were up slightly relative to shipments primarily because the industry increased production by over 3.3 million tons while shipments increased only 3.1 million tons. In short, according to Brazil, there is no evidence from distributors that the 1998 surge in CCFRS imports created an inventory problem either at the mills or at those customers that would be most affected by high inventory levels and decrease purchases as a result. In discussing inventories, the USITC also failed to note that the end of period inventories of the domestic CCFRS producers actually declined between 1998 and 1999, going from 10.5 million tons to 9.8 million tons.[2183] [2184]

7.873 Brazil also notes that the importer inventory data which appears in the USITC Report does not support a finding that the 1998 surge in CCFRS imports created a build-up of inventory at the importer level which hung over the market into 1999, 2000 and interim 2001. First, the CCFRS inventory levels of importers at the end of 1998 had only increased from 27 days to 32 days of shipments. By the end of 1999, the inventory levels of finished CCFRS products held by importers was only slightly above the level of 1997 and comparable relative to shipments to 1997 levels. The only apparent lingering inventory problem was a significant increase in inventories of slabs held by importers.[2185] Brazil submits that the only inventory information in the USITC Report or the Views of the Commission on Injury relating to a lingering effect of the 1998 import surge does not support the conclusion that the 1998 surge in imports led to inventory levels that continued to adversely affect the market into 1999 and beyond. While the United States may attempt in response to this question to rehabilitate the lack of facts and reasoning behind the USITC's claim, there is nothing in the record which supports the claim. There is a dearth of information on distributor inventory levels and, as indicated above, what there is does not support the USITC theory. The same is true for producer inventories. As for importer inventories, it is difficult to see how a five day increase in importer inventory levels in the aggregate could continue to have effects into 1999, 2000 and 2001. Furthermore, given that the inventory levels for finished CCFRS products had returned to 1997 levels by the end of 1999, the only possible lingering inventory effect could be from continued high levels of slab inventories. However, the United States has nowhere explained how slab imported and used exclusively to benefit United States producers of CCFRS products could injure those producers importing slabs, much less explained how increased inventories of slabs could adversely affect producers of CCFRS as a whole. Thus, in order to "buy into" the USITC lingering effects theory, the Panel would have to accept that a meager five day increase in inventories reverberated through the market for 30 months and caused serious injury, or that inventories of imported slabs used by the very industry that is claiming to be injured reverberated through the market for 30 months and caused serious injury.[2186]

7.874 The United States argues that the record clearly showed there was, in fact, a substantial increase in the inventory levels of importers during the period. Importer inventories of CCFRS grew from 788 thousand tons in 1997 to 1.322 million tons in 1998, for an increase of nearly 67.7% in that

[2183] Brazil's first written submission, Common Annex B.
[2184] Brazil's written reply to Panel question No. 28 at the second substantive meeting.
[2185] USITC Report, Vol. II at Table FLAT-49.
[2186] Brazil's written reply to Panel question No. 29 at the second substantive meeting.

one year. Similarly, in 1999, importer inventories increased by an additional 8.5% (to 1.434 million tons) from their 1998 levels, and then by an additional 19.2% in 2000 (to 1.709 million tons). Inventory levels increased between interim 2000 and interim 2001 as well. Moreover, the ratio of importers' inventories to their shipment levels also increased significantly during this period. Between 1997 and interim 2001, the ratio of importer inventories of CCFRS to importer shipments increased from 7.3% to 17.5%, more than doubling during this period.[2187] Indeed, the ratio increased during each year of this period, growing from 7.3% in 1997 to 8.6% in 1998, 11.0% in 1999, 15.1% in 2000, and 17.5 percent in 2001. In other words, the United States argues, the level of importers' inventories grew considerably, both on an absolute and a relative level, between 1998 and 2001, thereby placing substantial pressure on importers to reduce their pricing levels to move this merchandise out of inventory.[2188]

7.875 The United States also notes that the USITC did not rely upon importer inventories as a critical aspect of its causation analysis. Although the USITC did clearly note that the increased levels of inventories during the last three years of the period were an indication that imports were having substantial negative effects in the market during the last half of the period of investigation, the USITC did not rely on this fact as the sole, or even the most critical aspect, of its causation analysis for CCFRS products. Second, aside from ignoring completely the service center inventory data cited by the USITC, Brazil has also performed a series of calculations to support its arguments that result in a significant manipulation of the inventory data. For example, Brazil has removed slab inventory data from its calculations – something wholly without basis given that slab was an integral part of the CCFRS product and industry. When these numbers are included, the number of days on hand of inventory held by importers *more than doubles* from 1997 through 2000, from 27 days on hand to 55 days on hand. In other words, Brazil has reduced the number of days on hand for importer inventories by taking out that part of the inventory data that most directly contributed to the increase in importer inventories during the period, thus resulting in a calculation that would obviously and clearly reduce the number of days on hand. Third, Brazil's arguments only reference the importer inventory data from the USITC's report. The United States argues that Brazil completely ignores the fact that the USITC also relied upon the substantial increase in inventories of CCFRS at service centers in its causation discussion. In this regard, the USITC correctly recognized that inventories at service centers showed steady and significant increases throughout the period, going from 2.7 months of supply on hand in 1996, to 3.0 months in 1997, to 3.2 months in 1998 and 1999, to 3.7 months in 2000, to 3.8 months in interim 2001. In absolute terms, these inventories increased by 50 percent over the period of investigation, as shown in the following table:[2189]

Service center inventories of CCFRS (net tons)

1996	**1997**	**1998**	**1999**	**2000**
2.6 million	3.0 million	3.3 million	3.4 million	3.9 million

[2187] USITC Report, Vol. II, Table FLAT-49 (p. FLAT-43). For ease of reference, the United States is relying on the percentages set forth for importer inventories for all carbon flat-rolled products during these periods, which include small volumes of GOES and tin mill products. As can be seen, these percentages would not change more than minimally if the inventories of tin mill and GOES products were excluded.

[2188] United States' written reply to Panel question No. 71 at the second substantive meeting.

[2189] United States' written reply to Panel question No. 71 at the second substantive meeting.

7.876 Brazil and Japan argue that the USITC's difficulty with the timing of events also permeates its discussion of bankruptcies. According to Brazil and Japan, the data shows that the problems facing the domestic steel industry occurred much later in the period when imports were already declining, not during 1998. In particular, according to Brazil and Japan, a causation analysis demands assessment of when the relevant companies declared bankruptcy. Japan and Brazil assert that eight of the ten CCFRS producers declared bankruptcy after 1998. Most declared bankruptcy in 2000 and 2001, including the companies that were the larger of those producers that declared bankruptcy. On a tonnage basis, the firms declaring bankruptcy in 2000 and 2001 constituted nearly 83% of total tonnage of all the CCFRS mills declaring bankruptcy over the period.[2190]

7.877 The United States argues in response that companies who begin experiencing financial difficulties as a result, for example, of lost market share and lowered prices due to import competition would not be expected to immediately seek bankruptcy protection in the first year in which those difficulties occurred. Instead, due to the negative ramifications associated with bankruptcy (e.g., inability to obtain credit, imposition of higher credit costs, reluctance of suppliers to provide materials, and inability to attract other forms of capital), most companies spend several years struggling to regain their competitive footing before eventually entering the bankruptcy process. Indeed, because of the lag between initial declines in financial performance and a company's entry into bankruptcy, the fact that eight of ten companies entered bankruptcy in 2000 and 2001, rather than 1998, shows that there was, indeed, a likely correlation between the surge in low-priced imports that occurred in 1998 and thereafter and these bankruptcies.[2191]

7.878 In illustrating its argument in paragraph 7.846 that an increase in imports can have both an immediate and a delayed impact on one of the industry's performance factors contained**,** the United States submits that, as the USITC noted in its report, the massive surge in CCFRS imports in 1998 directly caused significant declines in the price of domestic and imported merchandise in that year, with AUV of imports falling by 8.4% and those of domestic commercial sales falling by 3.2%.[2192] Although there was a clear and direct impact of this surge on prices in 1998, the surge also had a lagged negative effect on domestic pricing levels in 1999 and 2000, in that elevated levels of low-priced imports were able to continue depressing prices from their already depressed 1998 levels. In this regard, the 1998 imports surge permitted elevated levels of imports in 1999 and 2000 to drive prices down to lower levels than would have occurred in the absence of the 1998 surge.[2193]

(ii) Relevance of volume and price effects of imports

7.879 New Zealand notes that central to the USITC's finding of causation is the claim that increased volumes of imports entered the market "at prices that undercut and depressed and suppressed domestic prices". This allegedly caused serious injury.[2194] Brazil further submits that the USITC used underselling, in part, as a proxy for the proposition that imports led pricing downward in the United States market.[2195] According to New Zealand, the USITC concluded that as a result of the fall in domestic prices from 1998, industry profits turned to losses in 1999, 2000 and the first six months of 2001.[2196] However, New Zealand asserts that the chain of causation is simply not there. Similarly,

[2190] Japan's first written submission, para. 237; Brazil's first written submission, para. 168; see also para. 7.847 , which provides Japan's written reply to Panel question No. 28 at the second substantive meeting.
[2191] United States' first written submission, para. 447.
[2192] INV-Y-209, Table FLAT-ALT7 (US-33) and USITC Report, p. 61.
[2193] United States' second written submission, para. 122.
[2194] New Zealand's first written submission, para. 4.132.
[2195] Brazil's second written submission, para. 72.
[2196] New Zealand's first written submission, para. 4.132.

the European Communities submits that an examination of the data suggests this assertion is barely credible.[2197]

7.880 According to New Zealand, in order to establish that imports drove down domestic prices, it would be necessary to show that imports led domestic prices down and that domestic products lost market share. However, New Zealand submits that neither of these things happened. In fact, what the data shows is that during the relevant period there was an increase in domestic product market share as domestic product prices decreased more sharply than import prices.[2198] New Zealand argues that close attention to the relationship between movements in market share, operating margins, and prices of a kind not found in the USITC's brief analysis – reveals that from interim 2000 – interim 2001, CCFRS domestic prices decreased more sharply than import prices in both percentage terms and absolute terms. New Zealand argues that the same trend is true for the period investigated as a whole.[2199]

7.881 In response, the United States argues that the above argument is premised on a mistaken reading of the record. During the period of investigation, imports of CCFRS undersold domestic merchandise by substantial margins in a substantial majority of possible price comparisons, even during the last year and a half of the period of investigation. More specifically, the public versions of the USITC's quarterly price comparisons for the slab, plate, hot-rolled and one cold-rolled price comparison products all show imports underselling domestic merchandise by substantial margins on the large majority of price comparisons through 2000. Moreover, on one of the two cold-rolled price comparison products, imports routinely undersold the domestic product through the first quarter of 2001. While the domestic product did undersell imports on these products in a majority of instances in interim 2001, this underselling only occurred after the domestic merchandise had pursued the imports downward on prices through the three years prior to that time.[2200] The United States acknowledges that for the remaining cold-rolled price comparison product, the industry undersold imports during 2000 and in interim 2001, usually by small margins. However, it argues that the record also shows that imports of this cold-rolled product nonetheless consistently undersold the domestic industry by substantial margins during 1998 and 1999, when the industry experienced substantial declines in its profitability levels.[2201]

7.882 Moreover, the United States argues that there was a clear correlation between the persistent underselling by imports and declines in the prices and profitability levels of the domestic industry.[2202] The United States argues that the record established that (1) the elasticity of substitution between imports and domestic merchandise was moderate to high; (2) imports routinely undersold the domestic merchandise throughout the period of investigation; (3) import prices fell substantially as imports surged in 1998 in response to the Asian crisis and the acceleration in the financial deterioration of the former republics of the Soviet Union, and generally continued to decline throughout the remainder of the period; (4) even though there was an improvement in import and domestic prices in 2000, imports continued to undersell domestic merchandise by substantial margins on most price comparisons during 2000; (5) domestic price declines followed decreases in import prices during the period; and (6) the moderate to high level of substitutability between imports and

[2197] European Communities' first written submission, para. 472.

[2198] New Zealand's first written submission, para. 4.133; See also Brazil's first written submission, paras. 74, 210-211.

[2199] New Zealand's first written submission, para. 4.134.

[2200] United States' first written submission, para. 475.

[2201] United States' first written submission, para. 476.

[2202] European Communities' first written submission, paras. 472 & 475; New Zealand's first written submission, para. 4.133.

domestic merchandise showed that domestic price declines were due, to a significant degree, to aggressive import underselling. As a result, the industry's revenues and profitability levels declined substantially from 1998 to 2000.[2203]

7.883 With respect to the argument that domestic prices were falling more quickly than import prices during the latter half of the period, the United States argues that this ignores the conditions of competition in the marketplace. According to the United States, it should not be surprising that domestic prices were falling faster than import prices, during a period when domestic producers were attempting to maintain market share by eliminating the substantial price undercutting that imports were engaged in throughout the period of investigation. In such a situation, the United States argues, domestic producers will be forced to cut their prices at a more rapid rate than imports to avoid a loss of additional market share. Given that domestic prices were routinely higher than imports throughout the period, such a decline does not indicate that it was domestic producers who were leading prices downward.[2204]

7.884 With respect to New Zealand's argument that the USITC's price suppression and depression findings are flawed because, "[t]o establish that imports drove down domestic prices, it would be necessary to show that imports led down domestic prices and the domestic product lost market share", the United States argues that that argument ignores basic economic reality. Although it is true that a combination of import and domestic price declines and a loss of domestic market share might be a good indication that imports have suppressed or depressed domestic prices, it is not the case that price-suppression or depression will necessarily be accompanied by market share losses. Instead, according to the United States, significant price-suppression or depression can occur without market share losses if the domestic producers choose to compete closely on price with imports rather than lose market share. In this situation, the domestic producers may maintain a relatively stable market share in the face of aggressive import pricing competition but experience significant pricing and profitability declines. Indeed, this is exactly what occurred in the CCFRS market in 1999 and 2000, after domestic producers realized that they had lost substantial market share in 1998 due to a massive influx of lower-priced imports. By lowering their prices in response to import price declines, the industry was able to limit their loss of market share.[2205]

7.885 In counter-response, New Zealand argues that what the relevant data reveals is domestic producers wresting market share from imports at the same time as domestic prices decreased more sharply than import prices.[2206] The United States' attempt at rebuttal conveniently ignores the facts. For example, by interim 2001 – the most recent period – domestic producers had increased their market share by a full 2.9% compared with interim 2000[2207] – a period when domestic prices fell by 13% as contrasted with 4% for imports. Put another way, by interim 2001 imports held a mere 6.9% of the market, compared with 9.3% in 1997 and 11.8% in 1998 – when no-one is claiming serious injury existed. Also, this interim 2000 – interim 2001 2.9% gain in domestic market share coincided with a sharp (14.9%) decline in domestic demand and a precipitous (40%) fall in imports. According to New Zealand, all of this points to price pressure coming from domestic producers, not imports.[2208]

[2203] United States' first written submission, para. 472.
[2204] United States' first written submission, para. 477.
[2205] United States' first written submission, para. 479.
[2206] New Zealand first written submission, paras. 4.132-4.136.
[2207] The United States cannot rationally discount the significance of a decrease of this magnitude in import market share while constantly stressing the significance of the 2.5% increase in market share from 1997 to 1998.
[2208] New Zealand's second written submission, para. 3.104.