7.886 Even assuming prices of imports to be lower than prices of domestically produced steel, the European Communities submits that low priced imports could only force down prices if imports had a role in setting prices on the United States market. However, other than an increase to 11.8% in 1998, imports did not have, during the investigation period, more than 10% of market share. Market share in 1999 and 2000, when the domestic industry allegedly suffered serious injury, was very close to that in 1996 and 1997 (9.04%, 9.32%, 9.57% and 9.54%). However, according to the European Communities, there is no suggestion that imports had a significant effect on domestic prices in 1996 and 1997. The European Communities further argues that the USITC does not explain how pricing on 10% of the products comprising the United States domestic market of CCFRS could have had more than a marginal effect on pricing on the overall market.[2209]

7.887 In response, the United States argues that in a relatively price-sensitive market like the CCFRS market, even a relatively small volume of low-priced merchandise can have a dramatic impact on pricing throughout the market. Accordingly, the fact that imports did not occupy a predominant share of the market during the period of investigation does not, by itself, indicate that imports could not have a significant effect on domestic prices.[2210] The United States argues that the complainants appear to recognize that a relatively small volume of merchandise can have a significant effect on prices in the CCFRS market since they argue that the domestic minimills were primarily responsible for price declines in the CCFRS market.[2211] The United States argues that, on a year-to-year basis, minimills shipped a substantially smaller volume of CCFRS to the commercial market than is accounted for by imports.[2212]

7.888 The United States also argues that a small volume of imports could have a substantial impact on prices in a market if the imports are substitutable for domestic merchandise, if they enter the market in increasing volumes, if they begin underselling the domestic merchandise to gain market share, and if they continue to maintain underselling margins in comparison domestic prices as domestic prices decline to meet import price competition. A similar set of circumstances occurred in the domestic CCFRS market between 1998 and 2001 and resulted in price declines in the market during those years. However, the volumes of imports of each of the ten products subject to the steel safeguards measures, including imports of CCFRS, cannot be termed "relatively low".[2213]

7.889 Korea states that it does not agree that imports can drive down prices through underselling *per se*. According to Korea, it is incorrect to presume that underselling, standing alone, demonstrates that imports drove down domestic prices. First, underselling only measures relative prices and demonstrates nothing *per se* about any effects on other prices. Second, changes in market prices are produced by price leaders. Therefore, the question of how imports drive down prices depends on more than just relative prices levels. Korea asserts that it is also noteworthy that the USITC relies only on hot-rolled prices and cold-rolled prices to show that imports drove down prices. However, the USITC staff specifically found that the economic model showed that cold-rolled imports did not have any effect on domestic cold-rolled prices. Moreover, the USITC does not establish that these prices are even representative of trends for slab, plate, or corrosion-resistant steel.[2214] Similarly, Japan

[2209] European Communities' first written submission, para. 472.
[2210] United States' first written submission, para. 473.
[2211] The United States refers in this regard to the European Communities first written submission, paras. 473-475.
[2212] United States' first written submission, para. 474.
[2213] United States' written reply to Panel Question 43 at the second substantive meeting.
[2214] Korea's written reply to Panel question No. 84 at the first substantive meeting

and Brazil argue that the United States methodology places far too much emphasis on underselling alone. They argue that the fact of underselling or overselling alone is of limited relevance.[2215]

7.890 In response, the United States argues that the United States does not agree with complainants that the USITC places too much emphasis on the existence of underselling when assessing whether imports have had an impact on domestic prices during the period of investigation. According to the United States, like the laws of supply and demand, it is an elementary concept of economic theory that purchasers are more likely to shift purchases between suppliers on the basis of price, if the products offered by those suppliers have similar characteristics and share similar conditions of sale.[2216] In other words, as an economist would say, when the elasticity of substitution between two products is reasonably high, a purchaser is likely to make his purchase decision on the basis of which supplier offers the lowest price.[2217] The United States submits that, accordingly, when there is a moderate to high elasticity of substitution between imports and domestic product (which is the case in the CCFRS market), the existence of underselling by imports is a strong indicator that purchasers are likely to shift purchases to imports from domestic producers, and that volume shifts are the result of low-priced import competition. Or, if imports and domestic merchandise are reasonably interchangeable, the existence of underselling is a good indicator that price declines in the market are the result of import price competition. Given these basic economic principles, the United States believes that the USITC places an appropriate amount of weight on underselling in its analysis.[2218]

7.891 Korea also submits that the USITC did not explain or justify its conclusion that imports led price declines.[2219] In this regard, Korea argues[2220] that a review of the USITC evidence cited on this issue does not support the USITC's conclusions that imports led price declines. First, the USITC refers to AUV data comparisons between imports and domestic prices.[2221] That data contains no volumes for either imports or domestic sales. There is also no analysis of how the AUV data establish that import prices led domestic prices down. In other words, the USITC does not describe the method by which lower import prices led domestic prices down. Finally, the USITC acknowledges the limitations with AUV data and state that it does not place "undue weight" on this data because AUVs may be affected by product mix.[2222] Second, the USITC relies on pricing data for hot-rolled and cold-rolled steel only (no other flat products). The non-confidential data in the charts referred to show domestic prices and volumes, but there is no import data whatsoever.[2223] It is not apparent, therefore, what the relationship is between imports and domestic prices during any particular quarter nor how this data establishes that imports of hot-rolled or cold-rolled "led down" prices of hot-rolled or cold-rolled. The USITC also fails to explain at all how the comparisons of hot-rolled and cold-rolled prices have impacted on "flat-rolled" domestic prices. Third, in terms of cold-rolled prices, the

[2215] Japan's written reply to Panel question No. 84 at the first substantive meeting; Brazil's written reply to Panel question No. 84 at the first substantive meeting.

[2216] For instance, USITC Report, pp. FLAT-60, footnote 42.

[2217] United States' second written submission, para. 142.

[2218] United States' second written submission, para. 143.

[2219] Korea's second written submission, para. 148.

[2220] Korea's second written submission, para. 147.

[2221] USITC Report, Vol. I, p. 61 (Exhibit CC-6).

[2222] USITC Report, Vol. I, p. 61, footnote 279 (Exhibit CC-6).

[2223] USITC Report, Vol. I, pp. 61 and 62 (Exhibit CC-6), citing to INV-Y-212 at Tables FLAT-ALT-69-71 (Korea Exhibit 9, "K-9"). While the price comparisons for products referred to appear in the Staff Report, that data is shown only for domestic and non-NAFTA imports. (USITC Report, Vol. II, Tables FLAT-68-71, pp. FLAT-65-68 (Exhibit CC-6)). But the USITC did not perform its causation analysis on non-NAFTA imports alone (USITC Report, Vol. I, pp. 59-66 (Exhibit CC-6)), so this data cannot support the USITC's conclusions with respect to "imports."

USITC refers to "dips" in import prices[2224] (no references to the periods) and historically large sales volumes[2225] (no reference to the period) and states that these were "followed by" sharp cuts in domestic prices[2226] (again, no reference to any periods). The import data is treated confidentially so it is not available to fix these relevant time periods. In other words, the USITC relies on its own assertions as to the relationship between import prices and domestic prices, but offers no evidence of an actual causal relationship between import prices and domestic prices. Moreover, the economic memoranda provided by both the petitioners and respondents to the USITC demonstrated that cold-rolled imports had no significant effect on domestic cold-rolled prices.[2227]

7.892 For the United States' response to the arguments summarized in paragraph 7.891, see paragraphs 7.881-7.890 above.

7.893 Korea also argues that in the case of CCFRS products, there was an alternative explanation of the price declines which the USITC did not adequately consider.[2228] After all, imports of CCFRS declined both absolutely and relative to domestic production between 1998-2001, while expanded minimill capacity gained substantial market share at the expense of both integrated producers on the one hand and imports on the other. This evidence suggests that price levels in the market declined as a result of minimills pricing as minimills expanded capacity and shipments while taking advantage of their increasing cost advantage over integrated producers.[2229] The "price effects" which impacted domestic producers were the price effects caused by the increased capacity and shipments – i.e., volumes – of minimills.[2230] [2231]

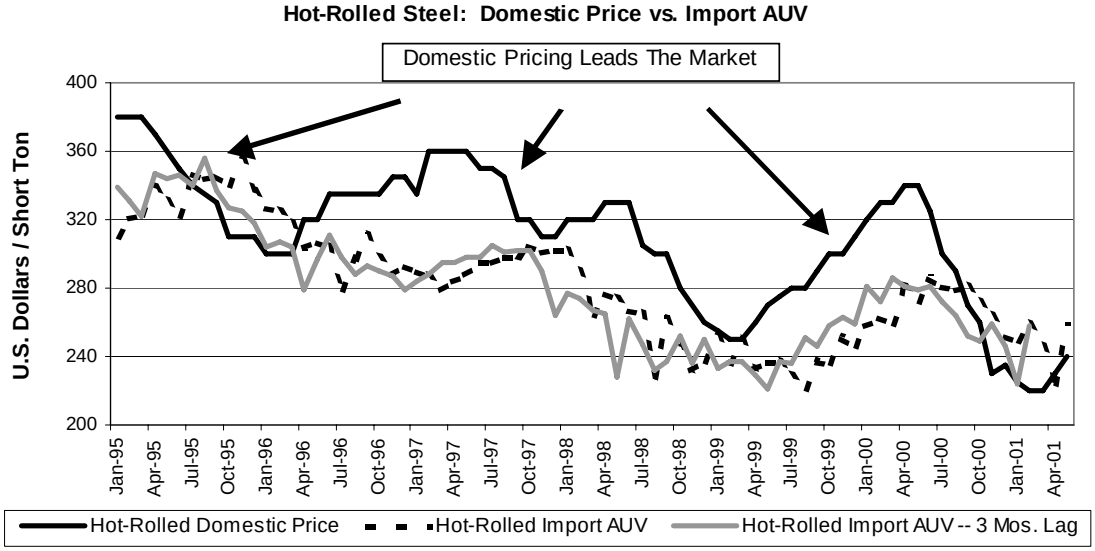
7.894 Similarly, New Zealand submits that, in this case, the price of imports did not play a critical or important role in the decline of industry performance indicators. "Other factors" internal to the domestic market were at work. As the USITC acknowledged, intra-industry competition by minimills, greatly increased domestic capacity, and declining demand were all exerting downward pressure on domestic prices. However, it failed to draw the obvious conclusion that there was, therefore, no genuine and substantial relationship of cause and effect between increased imports and serious injury to the domestic industry.[2232]

7.895 Japan and Brazil submit that, remarkably, given the emphasis placed by the USITC on price as an indicator of the industry's health[2233], it ignored the substantial amount of pricing data it was provided that demonstrated the relationships between domestic and import prices. Brazil further submits that in a steel market where spot sales are a healthy portion of overall shipments, and comprehensive data reflecting spot prices are readily available, the USITC did not pursue the obvious. Despite the fact that it had monthly spot transaction prices for plate, hot-rolled, cold-rolled and coated products, and actually graphed that data in its report[2234], it saw no reason to compare that data with

[2224] USITC Report, Vol. I, p. 62 (Exhibit CC-6).
[2225] USITC Report, Vol. I, p. 62 (Exhibit CC-6).
[2226] USITC Report, Vol. I, p. 62 (Exhibit CC-6).
[2227] Assessment of Econometric Submissions on Flat-Rolled Steel, EC-Y-042 – Response to USTR Request for Additional Information (22 October 2001), p. 1 (Exhibit CC-10).
[2228] Korea's second written submission, para. 157-184.
[2229] Korea's second written submission, paras. 169-176.
[2230] Korea's discussion of the definition of a "market" in its written reply to Panel question No. 141 at the first substantive meeting with the parties, and, the discussion of price effects in Korea's second written submission.
[2231] Korea's written reply to Panel question No. 29 at the second substantive meeting.
[2232] New Zealand's written reply to Panel question No. 29 at the second substantive meeting.
[2233] USITC Report at 62.
[2234] USITC Report Vol. II at OVERVIEW-58.

import unit values. According to Brazil, if anything, a comparison of that data refutes the USITC and United States arguments with respect to price. Based on this more comprehensive data, it is apparent that domestic prices, not import prices, led the market.[2235] [2236] Instead, according to Japan and Brazil, the USITC focused on quarterly price series and simplistic assessments of underselling, not all of which revealed underselling by imports. Both are poor determinants of causation, particularly in light of the extensive and demonstrably reliable monthly pricing data available that showed how relative prices change over time, and whether domestic or import prices lead that trend.[2237]

7.896 Japan relies upon the charts below to argue that there is clear evidence that domestic pricing led import pricing. Building in a three-month lag for import pricing to take into account shipment time, domestic price decreases and increases tend to commence before similar movement in import pricing. Japan submits that this data was corroborated and was before the USITC.[2238] Japan argues that, yet, the USITC largely ignored this data in lieu of its "traditional" and overly simplistic approach.[2239]



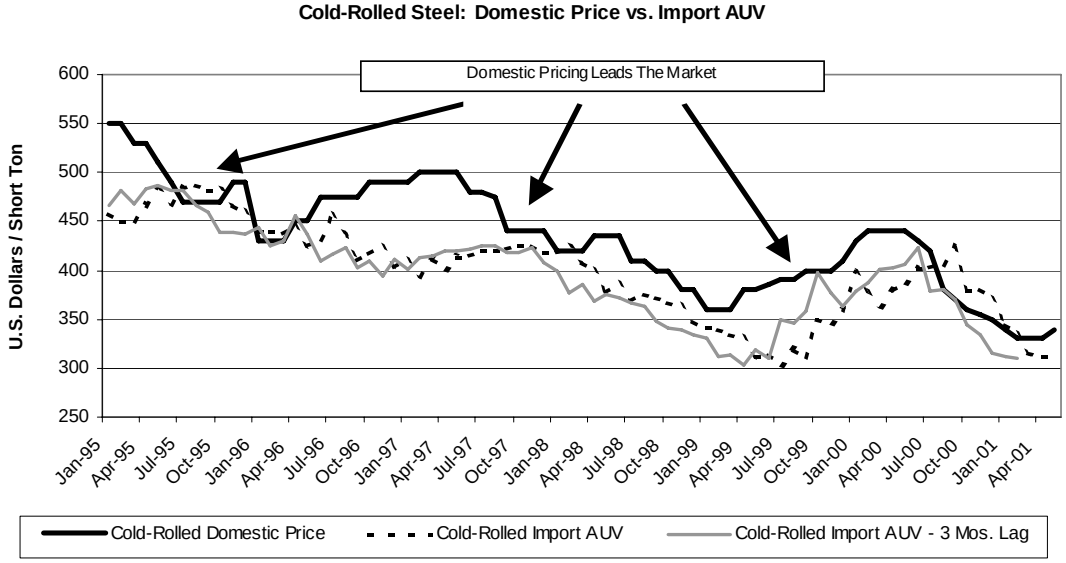
[2235] Japan's written reply to Panel question No. 84 at the first substantive meeting includes such a comparison.

[2236] Brazil's second written submission, para. 73.

[2237] Japan's second written submission, para. 121; Brazil's second written submission, para. 72.

[2238] Exhibits. CC-52 and CC-53

[2239] Japan's written reply to Panel question No. 84 at the first substantive meeting.



7.897 In response, the United States submits that Japan mistakenly tries to minimize the importance of consistent underselling by imports in the CCFRS market by asserting that domestic producers were the price leaders in the CCFRS market.[2240] However, an examination of the charts used by Japan to support this argument shows that the argument has no foundation in fact.[2241] Those charts show clearly that domestic producers attempted to initiate price increases for cold-rolled and hot-rolled steel at three points in the period of investigation but that domestic prices collapsed on each occasion due to persistent underselling by imports throughout the period of investigation.[2242] In sum, the charts relied on by Japan actually show that import underselling, not alleged domestic price leadership, caused the broad price declines in the CCFRS market during the period of investigation.[2243]

7.898 Japan and Brazil argue that the greatest flaw in the USITC's pricing discussion is the fact that the margins of underselling in 1997 were about the same as 1999 and 2000.[2244] In response, the United States asserts that Brazil appears to suggest that this indicates that imports were simply maintaining an appropriate price level below domestic producers in the market. The United States submits that what Brazil fails to acknowledge is that two critical developments occurred in the market in 1998 that dramatically affected conditions of competition in the market and resulted in the depression of domestic CCFRS prices. First, there was a sudden and massive surge of imports in that year as a result of the Asian financial crisis and the continued deterioration in the steel market in the former Soviet Union. Second, as a result of this surge, import prices declined precipitously during that year and continued to decline and remain at low levels through the end of June 2001. While it may be true, as Brazil asserts, that imports maintained a substantial and consistent margin of underselling during the last four years of the period, the record also established that the significant increase in the volume of increasingly low-priced imports in 1998 placed substantial downward pressure on prices during the last three and a half years of the period of investigation.[2245]

[2240] Japan's written reply to Panel question No. 84 at the first substantive meeting.
[2241] Japan's written reply to Panel question No. 84 at the first substantive meeting.
[2242] Japan's written reply to Panel question No. 84 at the first substantive meeting.
[2243] United States' second written submission, para. 144.
[2244] Japan's second written submission, para. 134; Brazil's first written submission, para. 211.
[2245] United States' first written submission, para. 478.

7.899 With respect to the volume effects of imports, Brazil submits that the United States repeats the "analysis" of the USITC, which focuses first on the increase year of 1998, then claims that import volumes in 1999 and 2000 "remained substantially higher" than in 1996 and 1997.[2246] According to Brazil, this statement is misleading. For CCFRS, imports were higher in 1999 and 2000 than in 1996 and 1997. The increase in absolute terms between the two periods was 11%.[2247] However, in terms of import volume relative to domestic production, over the 1996-1997 period, CCFRS imports averaged 10.1% of domestic production. Over the 1999-2000 period, CCFRS imports average 10.6% of domestic production.[2248] Brazil submits that to term this 0.5% increase as "substantially higher" is disingenuous. Indeed, when broken down into the distinct CCFRS products, the majority of products reflect no increase relative to domestic production.[2249]

7.900 Brazil contends that when imports remain a stable part of the overall market, it makes little sense from a volume perspective to blame increased imports for the industry's injury. However, Brazil submits that this appears to be the USITC's analysis – a simple assumption that if imports increase, they must be a cause of serious of injury to the domestic industry. According to Brazil, if the USITC was truly after volume effects, however, those effects can be seen in the steel market rather easily using more appropriate data. For example, in response to the lingering effects theory, there was no substantial build up in inventory levels that could have captured the increased import volume in 1998 and delayed its effects on the market until 1999 and 2000. A review of importers' inventories for each of the distinct CCFRS products reflects levels that were approximately one month or less throughout the period of investigation. The USITC reported that for CCFRS, inventory levels at year end ranged from 7% to 15% of total shipments. This translates into between 0.6 and 1.2 months of inventory.[2250] For many individual products, the inventory levels never exceeded one month.[2251] This means the increased imports in 1998 could not have lingering volume effects in 1999, much less 2000 or 2001.[2252]

7.901 For a discussion of the United States' response to the arguments summarized in paragraphs 7.896-7.900, see paragraphs 7.874 and 7.875.

7.902 Similarly to Brazil, Korea argues that it is axiomatic that the Agreement on Safeguards concerns serious injury caused by increasing import volumes. The import volumes must be increasing and the volumes must be the cause of serious injury. However, the USITC did not rely on increasing volumes of imports after 1998 as the cause of domestic price declines. On the contrary, the USITC acknowledged that import volumes were declining. The USITC cites the price differential itself and the pricing trends of imports as the cause of the industry's injury and concluding that:[2253] "Although the volume of imports was lower in 1999 and 2000, prices of those imports continued to decline".[2254] Therefore, the United States failed to demonstrate that increased volume of imports led to domestic price declines.[2255]

[2246] United States' first written submission at para. 463.

[2247] This is based on a combined import tonnage of CCFRS in 1996 and 1997 of 37.7 million tons, versus a combine import tonnage of CCFRS in 1999 and 2000 of 41.7 million tons. See also Brazil's first written submission, Common Annex A

[2248] USITC Report Vol. II at FLAT 8-11, 13, 16-19, 21; See also Common ANNEX A.

[2249] Brazil's second written submission, para. 70; *see also* Japan's second written submission, para. 117.

[2250] USITC Report Vol. II at Table FLAT-49.

[2251] Ibid.

[2252] Brazil's second written submission, para. 71.

[2253] The USITC also relied on increased inventory levels which is discussed *infra*.

[2254] USITC Report, Vol. I, p. 62 (Exhibit CC-6).

[2255] Korea's second written submission, para. 146.

7.903 In response, the United States submits that basic economic pricing theory indicates that prices can decline as a result of a number of different market conditions, even in the absence of underselling.[2256] For example, it is a basic principle of economic theory that prices can be affected by variations in supply and demand.[2257] In this regard, prices can be driven down when there is increased supply of the product in the market where demand is stable. Similarly, prices can be driven down in a market of stable supply if demand declines. In essence, basic economic theory holds that, when supply of a product outpaces demand (such as a situation where the supply of imports increases substantially in a slowly growing market), prices are likely to be affected by that change in supply.[2258]

7.904 According to the United States, the record showed that an increase in import supply had a substantial impact on pricing in the CCFRS market. Between 1996 and 2000, the market for CCFRS exhibited moderate but steady growth in demand on a year-to-year basis.[2259] On an overall level, the domestic industry's production levels also grew at a moderate and consistent rate between 1996 and 2000.[2260] Accordingly, as a matter of basic economic theory, if imports had grown at a similar consistent but moderate rate, prices in the market should have remained relatively stable during this period. The United States submits that, in fact, that is what happened in the CCFRS market between 1996 and 1997, when domestic production and imports both grew at rates that kept pace with the growth in demand, thus allowing the price of domestic and imported products to remain somewhat stable.[2261] According to the United States, in 1998, however, the stability of this supply and demand equation was fractured by a massive surge of imports into the CCFRS market. In that year, although domestic production grew at a slightly slower rate than demand in the United States market (which itself grew by 3.2%), import volume increased by an extraordinary 31.3%, thus outpacing the growth in demand in 1998 by 28.1 percentage points.[2262] Needless to say, this import surge was accompanied by a decline in CCFRS prices, with the average unit value of imports declining by 8.4% in that one year alone.[2263] At the same time, the AUV of domestic commercial sales fell by 3.1%[2264], even though demand had grown in that year. In essence, in 1998, the massive increase in the supply of imports resulted in a clear and serious depression of prices in the market, a set of circumstances that is again consistent with basic economic price theory.[2265]

7.905 According to Japan, the problem is that the United States does not appear to grasp that various factors cannot be analysed one by one, but must be viewed together to understand how they interact with one another. This is particularly true in this case. In the United States steel market, from 1999 to 2001, several factors converged: demand was stagnant or falling; domestic supply was increasing because of the dramatic increases in domestic capacity; and foreign supply was stable or falling. With domestic firms capturing more and more of a declining market, it simply makes no economic sense to

[2256] For instance, the European Communities', Japan's and New Zealand's, written replies to Panel question No. 84 at the first substantive meeting.
[2257] New Zealand's written reply to Panel question No. 84 the first substantive meeting.
[2258] United States' second written submission, para. 138.
[2259] INV-Y-209, Table FLAT-ALT7 (US-33).
[2260] INV-Y-209, Table FLAT-ALT7 (US-33).
[2261] INV-Y-209, Table FLAT-ALT7 (US-33). United States' second written submission, para.140.
[2262] INV-Y-209, Table FLAT-ALT7 (US-33).
[2263] INV-Y-209, Table FLAT-ALT7 (US-33).
[2264] USITC Report, p. 61. Although these percentages are derived using aggregate annual values, the product-specific pricing charts show similar declines. USITC Report, Tables FLAT-66-FLAT-71 & FLAT-73-74.
[2265] United States' second written submission, para. 141.

exonerate the growing domestic capacity and blame the stable or declining imports. Yet, that is precisely what the USITC did in this case.[2266]

7.906 Japan submits that, indeed, appropriate analysis would consider capacity relative to demand particularly in light of the already existing anti-dumping and countervailing duties orders or investigations that affected the competitive dynamics in the market for CCFRS steel products. The USITC largely ignored the role of anti-dumping and countervailing duties orders and investigations on hot-rolled and cold-rolled steel imports during this key period, and thereby failed to understand the role of expanding domestic capacity.[2267] According to Japan, given these economic forces, it is not at all surprising that domestic pricing generally led import pricing. The United States' claim to the contrary is wrong[2268], and relies on overly simplistic analysis of quarterly AUV, rather than monthly prices.[2269]

7.907 Similarly, the European Communities recalls that a competent authority is obliged to demonstrate, on the basis of objective evidence, a causal link between increased imports and serious injury. According to the European Communities, it is not enough to find a link between imports at low prices and serious injury. Nor is it enough to find a causal link between imports which have increased over a five-year period and serious injury. A competent authority must demonstrate a causal link between imports which have been sharp enough, sudden enough, recent enough and substantial enough and serious injury. Price will often be relevant to explain how the increased volume of imports caused serious injury. The European Communities further submits that price developments are indeed perhaps the most vital factor in determining the effect of increased imports on the domestic industry. This is because one of the most important indicators of injury is financial performance, which depends on the relationship between price and production costs. An analysis of price developments is therefore always important or critical. Having looked at price developments, the most vital issue is determining what is the cause of such developments.[2270]

7.908 The European Communities further submits that all other things being equal, if imports are sold at a higher price than domestic products, it is unlikely that such imports are responsible for any serious injury. Even if import prices are below domestic prices, it must also be shown that imports are the price leader – thus, where imports are say 10% of the market, the question must be asked if imports are capable of setting prices. That is, did imports force the domestic price down, resulting in a poor financial performance by the domestic industry? The USITC has generally failed to demonstrate, on the basis of objective evidence, through an analysis of underselling and market dynamics, the existence of a causal link.[2271]

7.909 Switzerland argues that, in making attacks on the pricing levels of imports that occurred in 1998 and after, the United States forgets that the principal focus of the safeguards investigation are the increased import quantities. While pricing is relevant to the overall analysis, it is not a surrogate for increased import quantities. If there are no increased imports, there cannot be a correlation because the Agreement on Safeguards, and even the United States' safeguards statute are volume driven

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[2266] Japan's second written submission, para. 135.
[2267] Japan's second written submission, para. 136.
[2268] United States' first written submission, para. 494. Japan submits that the USITC had readily available monthly data to better understand pricing dynamics, but instead ignored that data in favor of the much more crude quarterly average unit value data that is uses in other cases. Japan's second written submission, para. 137.
[2269] Japan's second written submission, paras. 137 and 217.
[2270] European Communities' written reply to Panel Question 29 at the second substantive meeting.
[2271] European Communities' written reply to Panel Question 29 at the second substantive meeting.

mechanisms. Article 4.2 of the Agreement on Safeguards explicitly focuses on the quantity of imports, it does not mention anywhere the question of price.[2272]

(iii) Increased imports and industry's performance

7.910 Japan and Brazil argue with regard to CCFRS that there was no "dramatic increase" in imports in 1998.[2273] Japan and Brazil assert that although imports increased somewhat in 1998, imports fell in both 1999 and 2000. At the time of the alleged serious injury, imports were decreasing, not increasing.[2274] Japan adds that by 1999 and 2000, however, imports were being increasingly shut out of the United States market by anti-dumping and countervailing duty cases.[2275] According to Brazil, the same trends in import levels and import share of production appeared in relation to individual CCFRS steel products.[2276] Brazil further argues that when the domestic industry began to experience difficulties in 1999 and 2000, there were no increasing imports to blame.[2277]

7.911 Japan and Brazil also argue that the USITC's "sharp decline" in the domestic industry's performance in 1998 when imports peaked is also a fallacy. According to Japan and Brazil, whether considered as a single aggregate like product in the case of the USITC's analysis, or as individual like products, the domestic industry's performance in 1998 was stable and did not reflect any serious injury.[2278] Japan and Brazil note in this regard that operating profits in 1996, described by the USITC as "reasonable operating profits", were at virtually the same level in 1998. Japan and Brazil surmise 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.[2279] Japan and Brazil also argue that other indicia of domestic industry health, such as improving production and capacity expansions, refute the USITC's rush to find a causal link and serious injury based on 1998 trends.[2280] Japan and Brazil argue that the same flaws in the USITC's logic are demonstrated with respect to the individual CCFRS. In particular, Japan and Brazil argue that the 1998 results were often better than 1996.[2281]

7.912 Similarly, China argues that given that the market share of the domestic industry was 91% in 1996 and 93.1% in interim 2001, that net sales increased by 10.9%, and that domestic shipments increased by 7.2% from 1996 to 2000, it is questionable whether imports really caused injury.[2282] China argues that one would normally expect increased imports to cause injury by shaking the domestic industry's position on the market, which results in diminishing sales and revenues for the domestic industry. In China's view, it is, therefore, difficult to confirm any coincidence between imports and the bad performance of the domestic industry.[2283]

7.913 Japan argues that the only year in which imports had any material increase in market share was 1998 and even then, the increase was a mere 3.0 percentage points.[2284] There simply was no

[2272] Switzerland's second written submission, para. 97.
[2273] Japan's first written submission, para. 233; Brazil's first written submission, para. 163;
[2274] Japan's first written submission, para. 240; Brazil's first written submission, para. 169.
[2275] Japan's first written submission, paras. 239 and 242.
[2276] Brazil's first written submission, paras. 170 and 171.
[2277] Brazil's first written submission, para. 172.
[2278] Japan's first written submission, para. 234; Brazils first written submission, para. 164.
[2279] Japan's first written submission, para. 235; Brazil's first written submission, para. 165.
[2280] Japan's first written submission, para. 236; Brazil's first written submission, para. 166.
[2281] Japan's first written submission, para. 238; Brazil's first written submission, para. 167.
[2282] China's first written submission, para. 378.
[2283] China's first written submission, para. 379.
[2284] USITC Report, Vol. II at Tables FLAT 8-11 and 13, and the complainants' Common ANNEX A.

"continued influx of import volumes" to cause any serious injury.[2285] Import volumes were at stable, historical levels.[2286] According to Japan, the United States highlights the fact that 1998 was a worse year than 1997.[2287] Given that 1997 was a peak year, it is obvious that 1998 measures would be down from 1997. Given the United States' insistence that Japan consider the whole period in context (which Japan does), the USITC should have, but did not, consider 1998 performance relative to 1996 – the best measure of the "pre-increase" period. Japan submits that, moreover, the test is not whether some indicia declined in 1998, but rather whether over the full period, the import increases correlate with declines in industry performance. The comparison between any two years is incomplete. Over the full period, the disconnect becomes quite apparent. In 1999 and 2000, imports levels were not substantially above prior years. Again, the United States argument is not about the volume and market share of imports, but rests squarely on its flawed conclusions with respect to import price levels.[2288]

7.914 Similarly, New Zealand argues that the United States makes no mention of changes in import market share throughout this period, and the only reference to 2001 – when, the United States says, imports from some years previously were still causing "suppression of prices"[2289] – conveniently omits any mention of the precipitous drop in import volumes at this point. According to New Zealand, these were down 40% on interim 2000 levels and over 30% on 1996 levels, a year when the industry nevertheless enjoyed an operating margin of 4.3%.[2290] [2291]

7.915 The United States notes that there was a demonstrable contemporaneous coincidence between increases in CCFRS imports and any declines in the industry's condition. The record clearly showed that the import surge in 1998 had a direct and negative impact on the market share, pricing, and profitability of the CCFRS industry in that same year. More specifically, when import volumes increased by 31.3% and import unit sales values dropped by 8.4% in 1998, the industry's share of the overall market fell by 2.5 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 3.2%, its aggregate gross profits fell by 19.8%, its aggregate operating income levels dropped by 36.9%, and its operating income margins fell by 2.1 percentage points. These declines occurred in a market in which demand grew by 3.2 percent. Given these trends, it is difficult to understand how the complainants could now argue that there were no declines in the industry's overall condition that were directly correlated to the 1998 surge.[2292]

7.916 The United States also argues that the record showed that there was also a clear correlation between the volume and price trends of imports and the continuing declines in the industry's condition in 1999 and 2000. Even though import volumes "slackened somewhat" in 1999 and 2000 from their 1998 surge level, import volumes in both years remained higher than their 1996 and 1997 levels, with import levels being 13.7 percent higher in 2000 than 1996. These elevated levels of imports in 1999 and 2000 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

[2285] United States First Submission at para. 464.
[2286] Japan's second written submission, para. 119.
[2287] United States First Submission at para. 464.
[2288] Japan's second written submission, para. 120.
[2289] United States First Submission at para. 464.
[2290] New Zealand's first written submission, para. 4.127.
[2291] New Zealand's second written submission, para. 3.97.
[2292] United States' second written submission, para. 126.

continued declines in the industry's net unit sales values, gross profits, operating income, and operating income margins.[2293]

7.917 In addition, the United States asserts that the contention that the record showed that the industry was not injured by imports between 1996 and 2000, citing the fact that the industry's net commercial sales, domestic shipment, and production levels all grew during that period, is flawed in two respects. The United States submits, first, that while it may be true that the industry's sales, shipment, and production levels did, in fact, increase during the period between 1996 and 2000, the record reflects that these increases essentially tracked the growth in demand for CCFRS during the period from 1996 to 2000. More importantly, the record shows that the industry was only able to maintain its production, shipment and sales levels between 1999 and 2000 by cutting prices dramatically in response to the extraordinary declines in import pricing that began in 1998 and continued thereafter. As a result of this competitive strategy, the industry's pricing levels and operating income levels dropped precipitously during the period from 1996 to 2000. Accordingly, the industry confronted the Hobson's choice of either maintaining its market share at the expense of lower prices and profit margins or sacrificing sales, reducing production, and closing facilities.[2294]

(iv) Relevance of like product analysis for CCFRS

7.918 Korea notes that the USITC seems to conclude that there was coincidence of trends between the performance of the industry and the increase of imports and the decline of prices with respect to each type of CCFRS as well as for the CCFRS overall. However, in Korea's view, the analysis of trends in imports, prices and industry performance for each of the CCFRSdoes not support this conclusion by the USITC.[2295] According to Korea, in the latter part of the period of investigation, imports declined for each of the products.[2296] Further, Korea submits that the United States could not have shown a "genuine and substantial" causal relationship between imports and injury because the United States looked at an "industry" which was actually various industries in the case of CCFRS and welded pipe.[2297]

7.919 The United States argues that the Panel may not find that the USITC's causation analysis is flawed solely because the USITC's like product and industry analysis is flawed.[2298] First[2299], the Appellate Body has stated that a reviewing Panel should assume that an authority's findings on like product and industry are proper when reviewing that authority's causation findings.[2300] In its *US – Lamb* report, the Appellate Body made clear that it will review the various aspects of the USITC's safeguards decision (i.e., increased imports, injury, causation) as though the authority's decisions on earlier issues had been correct. More specifically, the Appellate Body noted that:

> "[N]otwithstanding the findings we have made previously in this appeal [invalidating the USITC's industry definition for example], we must *assume* in our examination:

[2293] United States' second written submission, para. 127.
[2294] United States' first written submission, para. 468.
[2295] Korea's first written submission, para. 109.
[2296] Korea's first written submission, para. 115.
[2297] The United States, for example, admits that increases in demand for LDLP "stabilized" overall United States demand for welded pipe. (United States first written submission, para. 381) However, if those demand trends, which were admittedly distinct for LDLP due to different end uses, had been considered for LDLP alone, the result might have been very different in terms of its effect on the industry producing that "like" product. Also note USITC Report, Vol. I, p. 166 (Exhibit CC-6).
[2298] United States' second written submission, para. 152.
[2299] United States' second written submission, para. 153.
[2300] Appellate Body Report, *US – Lamb*, para. 172.

> first, that the definition of the domestic industry given by the USITC is correct, and second, that the USITC correctly found that the domestic industry is threatened with serious injury. On this basis, we must examine whether the USITC properly established, in accordance with the Agreement on Safeguards, the existence of the causal link between increased imports and threatened serious injury."[2301]

7.920 The United States submits that, accordingly, even if the Panel were to conclude that the USITC's definition of like product and industry were flawed, it would still need to examine whether the USITC's existing causation analysis was proper under the Agreement; it could not declare the analysis flawed on the grounds that the USITC's like product analysis was found to be flawed.

(b) Tin mill products

(i) Coincidence in time

7.921 Japan and Brazil argue that the lone affirmative vote that found tin mill products to be a separate like product failed to satisfy the standards of Article 4.2(b). More particularly, the vote, by Commissioner Miller, failed to identify a sufficient causal link between increased imports and serious injury. While pointing to the modest increase in operating losses in 1999 when imports gained about 4.9 percentage points of market share, Commissioner Miller ignored the fact that these operating losses persisted in 2000 even when import market share decreased by 2.2 percentage points. Moreover, according to Japan and Brazil, she ignored the fact that the operating losses grew in 2001 even as import market share remained stable. In Japan's and Brazil's view, taken as a whole, these trends do not establish any correlation in time between the import increase and the allegedly injured condition of the industry, and thus fails to establish any causal link.[2302]

7.922 Norway argues that even if the President based his determination on Commissioners Miller, Bragg and Devaney and not just Miller[2303], as has been argued by the United States, Bragg and Devaney make no compelling analyses whatsoever for tin mill products as a separate product; it is simply not addressed.[2304] Norway submits that with different trends in increases between the tin mill products as a separate product on the one hand and as part of the CCFRS groups of products on the other hand, this cannot in any way fulfil the requirement of a "compelling analysis of why causation is still present", in 1999 or later for their part.[2305]

7.923 In response, the United States argues that the record showed a direct correlation between changes in import volumes and changes in the industry's operating margins between 1998 and 2000. For example, in 1998, when import market share increased by 2.8 percentage points, the industry's operating income margin dropped by 2.4 percentage points. Similarly, in 1999, when import volumes surged dramatically (growing by 45% on an absolute level and by 4.9 percentage points in market share terms), the industry's operating loss percentage nearly doubled, dropping from -3.7% in 1998 to -6.9% in 1999. In 2000, however, when import volumes and market share slackened somewhat between 1999 and 2000 (with import market share declining to a still elevated 15.5%), the relatively small improvement in import volumes relieved the pressure imposed by imports on the industry's

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[2301] Appellate Body Report, *US – Lamb*, para. 172.

[2302] Brazil's first written submission, para. 260, Japan's first written submission, para. 295

[2303] See paragraph 7.1228 *et seq* for details of this debate.

[2304] That is why their analyses is not discussed in detail by Norway, simply because their analyses are irrelevant, contrary to the argument by the United States in their first written submission, para. 541.

[2305] Norway's second written submission, para. 137.

operating income levels somewhat, allowing the industry's operating margins to increase slightly, to -6.1%, from a level of -6.9% in 1999.[2306]

7.924 Korea and China note that three USITC Commissioners found that: "The domestic industry experienced serious injury prior to the 1999 surge in imports and continues to experience such injury as imports have declined".[2307] Korea and China argue on the basis of these three USITC Commissioners' conclusions, that since there was no coincidence between imports and injury, there were serious doubts as to the existence of a causal link.[2308]

7.925 Korea submits that, in the end, the United States can point to the opinion of only a single Commissioner who determined that there was a coincidence of trends between imports and the serious impairment of the United States industry. According to Korea, that single Commissioner's evaluation is not supported by the evidence.[2309] China notes that in her separate views, Commissioner Miller also acknowledged that "the industry was unprofitable before and throughout the period". Yet, she stated that imports "are a substantial cause of serious injury" because the industry "suffered a serious downturn in 1999 as imports surged". However, China believes that, although increased imports may partially explain the situation in 1999, Commissioner Miller failed to explain why causation was present before 1999. Indeed, according to China, the industry was already injured in 1996 and 1997 when operating losses were recorded. Thus, in China's view, a very compelling analysis of why causation still is present was not provided although it should have been the case, since there was no coincidence in time between the injury and the increased imports.[2310]

7.926 In response, the United States argues that Commissioner Miller conducted a thorough and objective examination of the trends for imports and the industry's injury factors and reasonably concluded there was a clear correlation between increased import volume and declines in the overall condition of the industry. In particular, the United States argues, she reasonably found that, while the volume of imports increased overall, imports surged in 1999 when they increased by 45.0% from the prior year. She also correctly found that imports also showed their greatest market share gain in 1999, with their market share growing by 4.9 percentage points from 12.8% in 1998 to 17.7% in 1999. She also found that, while the industry had been unprofitable before 1999, it suffered a serious downturn in operating income in 1999 when imports surged into the market. In 1999, the industry's operating income margin dropped by 3.2 percentage points from its level in 1998, to -6.9%. She further found that the growth in imports, particularly the surge in 1999, placed downward pressure on the price of domestic merchandise, with import pricing declined throughout the period but at a more rapid rate than domestic pricing. Domestic prices declined through the period, and were at their lowest levels in 1999, when the import surge occurred.[2311]

7.927 The United States adds that she reasonably found that there was intense price competition between imports and domestic merchandise in contract negotiations during the period of investigation. These facts indicated that the industry's downward trends in 1999 were due directly to the surge in imports in that year. Although import volumes slackened somewhat in 2000 and interim 2001, they continued to exert substantial pricing pressure in the market because of the intense price competition in annual contract negotiations. As a result, the condition of the industry continued to deteriorate

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[2306] United States' first written submission, para. 546.

[2307] Korea's first written submission, para. 117; Korea's second written submission, para. 152; China's first written submission, para. 525.

[2308] Korea's first written submission, para. 117; China's first written submission, para. 525.

[2309] Korea's second written submission, para. 153.

[2310] China's first written submission, para. 526.

[2311] United States' first written submission, para. 544.

during the last year-and-a-half of the period, with the industry's operating margin remaining at -6.1% in 2000 and declining to -7.4% in interim 2001. In sum, Commissioner Miller established that there was a genuine and substantial correlation between import trends and declines in the industry's condition during the latter half of the period of investigation.[2312]

7.928 In response to China's arguments, the United States argues that as the Appellate Body has stated, the appropriate consideration in a safeguards proceeding is whether imports have made a genuine and substantial contribution to a significant overall impairment in the condition of the industry during the period of investigation. A competent authority is not required to assess whether an industry's problems were first caused by imports or whether an industry was in a weakened state before an increase in import volumes during the period. Indeed, the fact that an industry is already in a weakened state does not mean that imports cannot enter the market in such volumes that they seriously injure the already weakened industry. On the contrary, it is precisely in such a situation, that is, when an industry is vulnerable to import competition because it is in an otherwise poor condition, that safeguard remedies are especially appropriate.[2313]

7.929 In counter-response, China submits that its argument that the industry was in an injured state before the increase of imports underlines the absence of coincidence between imports and negative performance of the industry. China argues that the absence of correlation is more obvious when one considers the declining imports towards the end of the period of investigation and notes that the industry is not recovering from injury in spite of the absence of the "substantial" cause of injury. China submits that it is, therefore, clear that there must be other factors responsible for the injury suffered by the domestic industry.[2314]

(ii) Relevance of prices of imports and domestic products

7.930 The European Communities and Norway argue that Commissioner Miller's analysis is predicated on the existence of severe price competition between imports and domestic products. However, according to the European Communities and Norway, the USITC's data does not show that imports undersold domestic products. Rather, it demonstrates that prices of imports were consistently above those of domestic products.[2315] Norway argues that there is no evidence of underselling, which would be necessary to show that increased imports drove the price down.[2316] The European Communities notes that Commissioner Miller states that the pricing data shows "some underselling" by imports on the specific data gathered by the USITC. While there is some underselling, none of it occurs in 1999, which is the period when the domestic industry is allegedly suffering.[2317]

7.931 In response, the United States argues that the complainants mistakenly believe that downward price pressure can only be exerted by means of underselling. The United States submits that, in fact, price-depression can occur when a producer that has been selling its product at a higher price in a market chooses to reduce its prices significantly in the market in order to gain market share. In this situation, to the extent that the higher prices reflect a premium paid by purchasers for the producer's merchandise, the producer's decision to sell its product at a lower price will exert a downward pressure on substitutable products in that marketplace. Accordingly, while it may be true that imports

[2312] United States' first written submission, para. 545.
[2313] United States' first written submission, para. 552.
[2314] China's second written submission, para. 276.
[2315] European Communities' first written submission, para. 483; Norway's first written submission, paras. 333 and 335.
[2316] Norway's first written submission, para. 334.
[2317] European Communities' first written submission, para. 482.

of tin mill steel had not been routinely underselling domestically produced tin mill products during the period, this lack of underselling does not preclude a finding that higher-priced tin mill imports caused price-depression in the market in 1999, 2000, and 2001, as they were sold at increasingly low prices.[2318]

7.932 The United States submits that the record establishes that the surge of imports into the market in 1999 did, in fact, have just such a downward impact on domestic prices. The annual average unit prices of domestic and imported tin mill steel remained relatively stable throughout the period from 1996 to 1998. In particular, the net AUV for domestic commercial sales of tin mill steel ranged between US$610 and US$616 per ton during this period, while the net AUV of imported tin mill steel ranged between US$657 and US$669 per ton.[2319] When imports of tin mill steel surged in 1999, however, the AUV of both domestic and imported merchandise dropped substantially from their levels during 1996 to 1998, with the AUV of imports falling US$73 per ton to US$596 in 1999, and the AUV of domestic merchandise falling by US$26 per ton to US$584 in 1999. In 2000, even though imports slackened somewhat but remained at elevated levels, the AUV of imports and domestic product both remained at depressed levels. Finally, in interim 2001, AUV of imports and domestic merchandise increased somewhat (after the imposition of the anti-dumping duty order on Japanese goods) but remained at levels that were substantially below the pricing levels seen in 1998, before the surge in imports. However, throughout this period, as import pricing declined, domestic pricing did as well, and caused substantial declines in the industry's operating loss levels.[2320]

7.933 In counter-response, the European Communities notes that there is nothing in the USITC Report which explains how serious injury to the domestic industry was caused by increased imports which were not underselling domestic produce. Since the reasoned and adequate explanation must be found in the USITC Report, and the United States has not cited to any such explanation, it must be concluded that the USITC Report does not provide such a reasoned and adequate as required by the Agreement on Safeguards.[2321]

(c) Hot-rolled bar

7.934 The European Communities and China argue that there is no clear coincidence in trends between increased imports of hot-rolled bar and the worsening of the position of the domestic industry.[2322] The European Communities submits that imports of this product increased in 1997 and 1998. However, the domestic industry made comfortable profits in both of those years. In 1999 when imports fell, the domestic industry's profits started also to decrease. According to the European Communities, such a movement is not consistent with imports being the cause of the decline in profits. The European Communities notes that although imports increased between 1999 and 2000, that increase in imports was substantially less than the increase between 1997 and 1998. Moreover, the domestic price fell massively in 1999, when imports were decreasing, and remained steady when imports moved upwards in 2000. Finally, according to the European Communities, United States producers made a larger operating loss in the six months of interim 2001 than in any full year examined, while imports fell massively. The European Communities submits that there is, thus, no

[2318] United States' first written submission, para. 547.
[2319] United States' first written submission, para. 548.
[2320] United States' first written submission, para. 549; United States' second written submission, para. 139.
[2321] European Communities' second written submission, para. 384.
[2322] European Communities' first written submission, para. 492; China's first written submission, para. 405.

clear coincidence in trends between increased imports and serious injury. As already noted, the absence of coincidence requires a "very compelling" explanation.[2323]

7.935 In light of the absence of coincidence, China also argues that "a very compelling analysis of why causation still is present" becomes necessary. China believes that the USITC failed to provide such an analysis.[2324] In this regard, China points out that, in its report, the USITC explained at length the "strategy" that domestic producers had recourse to, in order to compete with imports. China considers that this is not convincing. For example, the USITC states that in 1996, 1997 and 1998, the United States industry maintained its prices and thus lost market shares to imports, as imports undersold domestic production. China argues that if this were right, it would mean that price was a very important factor for purchasers. China questions how it could, therefore, be explained that in 1999, when prices of domestic production were lower than prices of imports, domestic producers did not gain back market shares but instead continued to lose some. In China's view, the truth is that pricing is not such an important factor after all and that if imports gained market shares during the period of investigation, independently of the prices of domestic products, imports cannot have played the role that the USITC states it played. China concludes that the explanation of causation provided by the USITC is wrong, biased and not compelling [2325]

7.936 In response, the United States submits that the two complainants that challenge the USITC's finding of causal link, do not address the USITC's analysis and findings. These complainants' arguments are limited to the observation that specific import levels did not produce specific domestic-industry operating income levels. However, the correlation between imports and domestic industry performance is not simply a matter of stating that import level 'X' must produce operating income 'Y'. Instead, imports affect the domestic industry's financial performance through their effects on factors such as output and prices. The USITC's analysis recognized this. Instead of the simplistic comparisons offered by China and the European Communities, the USITC provided a more sophisticated, and consequently, comprehensive, explanation of the correlation between the increased imports and the serious injury. It explained how the imports, and the domestic industry's competitive responses to the imports, affected factors – namely sales revenues and prices – that critically influenced the level of operating income.[2326]

7.937 With respect to the argument that the data do not indicate that there is any correlation between underselling of the domestically produced product by the imports and the domestic industry's market share, the United States submits that this is wrong. As the USITC found, the subject imports made their largest gains in market share during those portions of the period of investigation when there was pervasive underselling by the imports.[2327] Consequently, the United States submits that the arguments of China and the European Communities do not detract from the USITC's conclusion that there was a causal link between the increased imports and the serious injury suffered by the domestic hot-rolled bar industry.[2328]

7.938 In counter-response, the European Communities argues that it is not for the United States to provide an *ex post facto* explanation. The explanation should have been in the USITC Report but is

[2323] European Communities' first written submission, para. 493.
[2324] China's first written submission, para. 405.
[2325] China's first written submission, para. 406.
[2326] United States' first written submission, para. 575.
[2327] United States' first written submission, para. 576.
[2328] United States' first written submission, para. 577.

not there. Consequently, the USITC has failed to provide a reasoned and adequate explanation of its purported establishment of a genuine and substantial causal link.[2329]

(d) Cold-finished bar

7.939 The European Communities submits that it is patently obvious that a comparison of the import trends against financial performance, described by the USITC as the most "pertinent indicator of the industry's condition", shows that there is no correlation of trends which would indicate the presence of a causal link. According to the European Communities, there is a negative correlation. Profits increased as imports increased and decreased as imports decreased.[2330] The European Communities notes that in 2000, when imports were at their highest, the domestic industry improved its performance (operating income improved significantly), while in 1999, when imports were at their lowest level since 1996, the performance of the domestic industry was the worst in the whole period of investigation. 1997 had also seen an increase in imports. The European Communities reiterates that in the absence of coincidence of trends a Member imposing a safeguard measure must provide a very compelling explanation of the existence of a causal link.[2331] In the European Communities' view, there is again no very compelling explanation that establishes the causal link. A comparison of the trends in demand and the industry's financial performance suggests a closer link between demand and profits than exists between imports and profits.[2332]

7.940 In response, the United States submits that the argument the record does not indicate that increases in import volume were coincident in time with declines in industry financial performance ignores the explanation the USITC provided concerning the prevalence of contracts among cold-finished bar producers, which demonstrated why the effects of aggressive pricing by the imports were not immediately reflected in the market. Moreover, the United States submits that the European Communities' analysis is based on a mechanical year-by-year approach. By contrast, an examination of the final two full years of the period of investigation demonstrates that when import volume increased sharply, domestic financial performance declined sharply – exactly the type of temporal correlation that the European Communities contends is lacking.[2333]

7.941 In counter-response, the European Communities notes the United States uses the USITC's finding that 40% of the market for cold-finished bar was based on 6 month to one year contracts to explain the time lag between increased imports in 1998 and the poor performance of the industry in 1999. However, the European Communities notes that when it argued that the development in financial performance in 1999 and 2000 (where financial performance improved as demand increased and imports increased) was due to changes in demand, and that the USITC should have ensured the non-attribution of the injurious effects of changes in demand, the United States highlighted the USITC finding that the poor performance in 1999 was "…to a large extent attributable to declines in demand in that year…".[2334] Thus, the USITC did not consider, as the United States has argued, that the poor performance in 1999 was caused by imports. It considered that the performance in 1999 was due to demand declines. The USITC therefore, did not put any emphasis on the time lag effect.[2335]

[2329] European Communities' first written submission, para. 392.
[2330] European Communities' first written submission, para. 507.
[2331] European Communities' first written submission, para. 507.
[2332] European Communities' first written submission, para. 508.
[2333] United States' first written submission, para. 590.
[2334] United States first written submission, para. 596. USITC Report, Vol. I, p. 107.
[2335] The European Communites notes that the phrase which the United States quotes with respect to long term buying does not support the United States conclusion that this explains the time lag between increased imports and poor financial performance. The sentences before state "The market did not react immediately to the price reductions by the imports. Indeed, neither the absolute volume of the imports nor their market share

Therefore, according to the European Communities, the United States cannot invent, *ex post facto*, the time lag factor. This means that there is no reasoned and adequate explanation, indeed no very compelling analysis, of how, when financial performance improved contemporaneously with increased imports, increased imports could cause serious injury.[2336]

7.942 With respect to the argument that "a comparison of the trends in demand and the industry's financial performance suggests a closer link between demand and profits than exists between imports and profits", the United States submits that this is wrong. For example, although demand increased between 1997 and 1998, profits declined. The enormous 82.3% decline in profits between 1998 and 1999 does not track the far more modest 3.6% decline in demand between those years. By the same token, between 1998 and 2000, when demand declined by only 1.7%, operating income dropped by a very substantial 58.5%. The European Communities' simplistic and incorrect year-by-year comparisons of various indicators, which ignore conditions of competition indicating why certain effects of imports may be lagged, does not in any way demonstrate that the USITC's far more detailed and comprehensive analysis was defective or lacked objectivity.[2337]

(e) Rebar

7.943 China argues that there is an absence of coincidence between the increase in imports of rebar and the decline in the relevant injury factors.[2338] Indeed, according to China, imports mostly increased in 1997, 1998 and 1999, yet, during these 3 years, the industry had a positive operating income.[2339] China argues that moreover, in 1996, before imports surged, the industry had an operating loss of US$76,000 and in 2000, as imports had decreased by 162,779 short tons, the industry had an operating loss of US$24,869,000. Also, prices only began to fall in the last quarter of 1998 and they stopped their fall in the middle of 1999. This means that prices have fallen during only 9 months over a period of three years of increasing imports.[2340] China argues that not only did the industry experience very important profits as imports were increasing and prices were falling, but the industry experienced losses even before imports started to increase. Given the difficult situation of the industry before the decline in prices, and given that the industry experienced its best financial results of the period of investigation as imports were increasing, there is clearly no coincidence between the increase in imports and the alleged decline in the relevant injury factors.[2341]

7.944 The European Communities and China further argue that given the absence of coincidence between the movements in imports and injury factors, the USITC had the obligation to provide a compelling analysis of why causation is still present. Since the USITC did not correctly evaluate the complexity and roles of all relevant factors, China believes that such an analysis has not been provided.[2342] According to China, a 'very compelling analysis' is absent from the USITC Report. China submits that this failure cannot be cured by the extensive and often speculative interpretation of the United States in its submissions.[2343]

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increased in 1999. The lack of immediate reaction by the market may reflect extensive contract sales […]" USITC Report, Vol. I, p. 106. (United States' first written submission, para. 586) .

[2336] European Communities' second written submission, para. 396.

[2337] United States' first written submission, para. 591.

[2338] China's first written submission, para. 433.

[2339] China's first written submission, para. 434.

[2340] China's second written submission, para. 240.

[2341] China's first written submission, para. 435.

[2342] European Communities' first written submission, para. 518; China's first written submission, para. 436.

[2343] China's second written submission, para. 244.

7.945 According to the European Communities, the United States builds an argument of the domestic industry lowering prices to recapture market share. Even if this were true (and it is not reflected in operating income in 1998 or 1999 which were the first years in which imports increased) it is not discussed in the USITC Report.[2344] The European Communities also argues that while the USITC notes a decline in prices in 1999 and 2000, operating losses only started to appear in 2000.[2345] China also submits that it does not agree with the USITC's conclusion that injury was being suffered by the industry because imports lead prices to decrease. According to the USITC, that decrease prevented the industry, on one hand from benefiting from cost reductions during some periods of the period of investigation and, on the other hand, from recovering from increases in costs during the other periods.[2346]

7.946 The United States responds by stating, as the USITC explained, once imports surged in 1998, the domestic industry's loss in market share was immediate. The domestic industry subsequently reduced its prices in an attempt to mitigate further losses in market share. Consequently, the industry's declines in financial performance were more gradual than its declines in market share. An examination of the industry over the final two full years of the period of investigation – 1998 to 2000 – demonstrates that imports increased by 35.8% and the domestic industry's operating income deteriorated from a US$88.2 million operating profit to a US$24.7 million operating loss. According to the United States, this is precisely the type of temporal correlation that is said to be lacking.[2347]

7.947 China argues that the United States has failed to rebut China's argument that there is no coincidence of trends between the increase in imports and the domestic industry decline.[2348] China argues that a coincidence of trends should be found on the basis of movements of injury factors during the whole period of investigation. China contends that what the United States did was to choose a short period of time within the period of investigation. China submits that this arbitrary choice of a period within the wider period of investigation cannot be a reasonably acceptable basis for the examination of the correlation of trends.[2349]

7.948 Also in counter-response, the European Communities argues that neither the USITC nor the United States satisfactorily explain how it can be the case that, after imports having increased each year from 1996 to 1999, in each year gaining more market share, and the domestic industry's operating income also increasing every year over the same period, in 2000, when imports start to decrease, and the domestic industry's market share increasing, the domestic industry crashes to substantial losses.[2350]

7.949 In the absence of a direct correlation, the Appellate Body has required a "very compelling analysis". According to the European Communities, no such analysis appears in the USITC Report. The United States builds an argument of the domestic industry lowering prices to recapture market

[2344] United States' first written submission, para. 603 which does not contain any reference to the narrative section of the USITC Report. Note USITC Report, Vol. I, p. 114, where the USITC discusses the industry's performance in 2000 without suggesting that the industry lowered prices in order to obtain market share.

[2345] European Communities' first written submission, para. 518.

[2346] China's first written submission, paras. 432 and 433.

[2347] United States' first written submission, para. 603.

[2348] China's second written submission, para. 238.

[2349] China's second written submission, para. 239.

[2350] European Communities' second written submission, para. 404.

share. Even if this were true (and it is not reflected in operating income in 1998 or 1999 which were the first years in which imports increased) it is not discussed in the USITC Report.[2351]

7.950 China submits that since argumentation by the United States is groundless and the data clearly shows that the coincidence between the movements in imports and injury factors was absent, the USITC had the obligation to provide a compelling analysis of why causation is still present.[2352] However, according to China, such a "very compelling analysis" is absent from the USITC Report. China submits that this failure cannot be cured by the extensive and often speculative interpretation of the United States in its submissions.[2353]

(f) FFTJ

7.951 The European Communities argues that the United States has not made an adequate and reasoned determination of the existence of a causal link.[2354] In particular, the European Communities argues although the product group is characterised by a high degree of heterogeneity, most products are manufactured to conform to specific standards, and once such conformity is achieved price is the major competitive issue. The USITC's findings on price competition are, therefore, vital. Such findings are, however, seriously lacking.[2355]

7.952 In response, the United States submits that the USITC did not rely exclusively on the pricing data for its conclusions on causal link, as the European Communities mistakenly represents. Instead, the USITC explained that a wide variety of domestic industry's performance factors declined while import penetration increased. The USITC's findings concerning the FFTJ industry's many declines in performance were based on questionnaire data covering the entire industry that no complainant contends was not representative.[2356]

7.953 The United States further argues that the record evidence showed that there was a clear and direct correlation between increases in imports of FFTJ and declines in the FFTJ industry's overall condition during the period of investigation. During the last three full years of the period, 1998 through 2000, imports increased in absolute terms by 28.4% and increased their market share by 11.1 percentage points to 45.6%.[2357] During the same period, the industry experienced substantial and consistent declines in its United States shipments, commercial sales values, employment levels and profitability levels. For example, in 1998 – the mid-point of the period of investigation – the volume of imports increased on an absolute level by 11.2% from their 1997 levels, the ratio of imports to domestic production increased by 7.6 percentage points, and import market share increased by 2.6 percentage points.[2358] In that same year, the industry's condition declined. There was a similar correlation between import increases and declines in the industry's condition in 1999. In that year, import volumes further increased their ratio to domestic production by 7.7 percentage points over

[2351] United States' first written submission, para. 603 which does not contain any reference to the narrative section of the USITC Report. See, USITC Report, Vol. I, p. 114, where the USITC discusses the industry's performance in 2000 without suggesting that the industry lowered prices in order to obtain market share.

[2352] China's second written submission, paras. 242 and 243.

[2353] China's second written submission, para. 244.

[2354] European Communities' first written submission, para. 552.

[2355] European Communities' first written submission, para. 542.

[2356] United States' first written submission, para. 649.

[2357] USITC Report, Table TUBULAR-C-6.

[2358] USITC Report, Tables TUBULAR-8 (p. TUBULAR-10), TUBULAR-45 (p. TUBULAR-38) & Table TUBULAR-C-6. The ratio of FFTJ imports to domestic production increased from 47.7% in 1997 to 55.3% in 1998 while import market share increased from 32.9% in 1997 to 35.5% in 1998.

their 1998 levels and their share of the overall FFTJ market by 2.2 percentage points over their 1998 levels.[2359] At the same time, the industry's condition further declined. Finally, in 2000 – the last full year of the period – import volumes increased on an absolute level by a further 15.3% from their 1999 levels, saw their overall ratio to domestic production increase by 6.7 percentage points, and increased their share of the overall FFTJ market by a further 4.0 percentage points over their 1999 levels.[2360] In that year, the industry's condition further declined.[2361]

(g) Stainless steel bar

7.954 The European Communities argues that there is no coincidence in trends between increased imports and serious injury.[2362] In particular, the European Communities asserts that the USITC clearly considered that it was the increase in imports in 2000 which met the standard for increased imports required by the Agreement on Safeguards. However, according to the European Communities, the USITC itself admitted that until 2000 the level of imports fluctuated. A glance at the data shows that imports decreased from 1997 levels in both 1998 and 1999. Yet, according to the European Communities, it is precisely in this period when imports decreased that the domestic industry registered its worse results.[2363] In particular, imports decreased from 1997 to 1999, when the domestic industry apparently suffered its worse results, and then moved upwards in 2000, when the domestic industry regained profitability, before falling off in interim 2001, when the domestic industry once more fell into loss.[2364] The European Communities argues that given that there is thus no coincidence of trends between increased imports and the serious injury allegedly suffered by the domestic industry, the competent authority must present very compelling arguments to show that increased imports are in fact responsible for the alleged serious injury. According to the European Communities, the USITC did not present such data.[2365] Further, the European Communities argues that the USITC failed to provide a reasoned and adequate explanation of any causal link between increased imports and serious injury suffered by the domestic industry.[2366]

7.955 In response, the United States contends that the European Communities' argument is based on a misleading reading of the record. As can be seen from the USITC's decision, it was true that the absolute quantity of imports "fluctuated somewhat (declining slightly in 1998 and 1999)" as the European Communities asserts. However, the record also showed that apparent United States consumption of stainless steel bar fluctuated during the period although more significantly than imports. As a result, while import quantities on an absolute level may have fluctuated "somewhat" between 1997 and 1999, the market share of imports increased consistently and substantially throughout the period of investigation, as did the ratio of imports to domestic production. Moreover, the record showed that, while imports made these market share gains, they also continued to undersell the domestic producers at significant margins throughout the period. Given this uncontroverted record evidence, the United States submits that it should not be surprising that the USITC found that the substantial increases in import market share that were accompanied by substantial underselling

[2359] USITC Report, Tables TUBULAR-8 (p. TUBULAR-10), TUBULAR-45 (p. TUBULAR-38) & Table TUBULAR-C-6. The ratio of FFTJ imports to domestic production increased from 55.3% in 1998 to 63.0% in 1999 while import market share increased from 35.5% in 1998 to 37.7% in 1999.

[2360] USITC Report, Tables TUBULAR-8 (p. TUBULAR-10), TUBULAR-45 (p. TUBULAR-38) & Table TUBULAR-C-6. The ratio of FFTJ imports to domestic production increased from 63.0% in 1999 to 69.7% in 2000 while import market share increased from 37.7% in 1999 to 41.7% in 2000.

[2361] United States' written reply to Panel Question No. 39 at the second substantive meeting.

[2362] European Communities' first written submission, para. 562.

[2363] European Communities' first written submission, para. 564.

[2364] European Communities' first written submission, para. 564.

[2365] European Communities' first written submission, para. 567.

[2366] European Communities' first written submission, para. 562.

had an increasingly injurious effect in the industry during the period of investigation. In essence, by focusing on minor fluctuations on the absolute quantities in imports during a selected time during the period of investigation, the United States argues that the European Communities is simply hoping to distract the Panel's attention from the larger picture: import market share grew substantially over the period of investigation as a result of underselling and, during that period, the industry's market share, production and shipment levels, and profitability levels went into a free-fall.[2367]

7.956 The United States argues that, moreover, the European Communities' argument also misconstrues the USITC's findings. The USITC did not find, as the European Communities asserts, imports only caused injury to the industry in the year 2000. While it is true that the USITC acknowledged that imports surged to their highest levels of the period of investigation in 2000 and that they caused the industry's condition to deteriorate substantially in that year, the USITC also explicitly found that imports had increased their market share throughout the period and that they had, through increased volumes and underselling, significantly and adversely impacted the industry's condition during the years before 2000.[2368]

7.957 The United States also argues that the European Communities makes much of the fact that the industry managed to return to profitable operating income margins in 2000, despite the fact that imports made their largest surge into the market in that year. Their argument has two flaws. First, even aside from the industry's profitability levels, the industry's market share reached its lowest level of the period of investigation in the face of this import surge. Accordingly, even aside from the declines in the industry profitability levels, imports had a significant negative impact on the industry's condition in that year.[2369] The United States submits that, moreover, the European Communities' argument ignores the fact that the industry's operating income margin was substantially lower in 2000 than in 1996, 1997, and 1998, the first three years of the period of investigation. Although the exact numbers are confidential, the USITC explicitly stated that the industry's operating margins declined "consistently and significantly" through the period of investigation, noting that operating margins fell in 1997 and in 1998, and then dropped to a loss in 1999. Although the industry's margins returned to a profit in 2000, the USITC explicitly noted that this increase was only "slight" and that it was followed by a drop to the lowest margin of the period in interim 2001. Although the exact data is confidential, the industry's operating income level remained substantially below its levels in 1996, 1997 and 1998. Accordingly, the record clearly indicates that there was not a substantial improvement in the industry's injured condition in 2000, as the European Communities suggests; instead, the record shows that the industry's condition continued to remain poor in the face of import competition.[2370]

7.958 In counter-response, the European Communities re-iterates that an increased imports finding required by the Agreement on Safeguards could only potentially be made for 2000. However, injury was determined to exist during the entire period, and was not linked to the increase of imports in 2000. According to the European Communities, the United States does no more than claim that it was justified in finding that the injury suffered before the increase in imports was caused by imports, because imports increased their market share.[2371] However, it is only if imports increased, not increased their market share, that the conditions of the application of safeguard measure can be met. The European Communities submits that the USITC was not charged with finding a causal link between changes in market share and serious injury, but rather between increased imports and serious

[2367] United States' first written submission, para. 667.
[2368] United States' first written submission, para. 668.
[2369] United States' first written submission, para. 669.
[2370] United States' first written submission, para. 670.
[2371] United States' first written submission, para. 667.

injury. In the light of the foregoing, the European Communities submits that the United States has not shown that there was a correlation between import trends and serious injury and has not provided a compelling analysis in the absence of such a correlation.[2372]

(h) Stainless steel wire

7.959 The European Communities argues that Commissioner Koplan did not deal with the correlation of trends, even though three other Commissioners had found that despite consistent underselling there was no correlation between pricing of imports and domestic products. The European Communities notes[2373] that Chairman Koplan's conclusions are directly contradicted by the opinion of the majority. With most relevance to his conclusion that increased imports are the cause of a threat of serious injury, is the conclusion that:

> "[W]e find that stainless wire imports have not had a clear adverse impact on the price of domestic stainless wire during the period of investigation. Although the record indicates that imports consistently undersold domestic wire products the record also indicates that price movements for domestic stainless wire did not clearly correlate with the existence or significance of underselling by imported stainless wire."[2374]

7.960 In order to provide a reasoned and adequate explanation of Chairman Koplan's findings there would have to be a clear rebuttal of this finding. According to the European Communities there is none, and this brings into question, therefore, the basis for the finding of a causal link between increased imports and a threat of serious injury. For this reason, the European Communities submits, the safeguard measures imposed on this basis are unjustified and are thus inconsistent with Articles 2.1 and 4.2(b) of the Agreement on Safeguards, and additionally Articles 3.1 and 4.2(c).

7.961 In response, the United States submits that Commissioner Koplan established that there was a genuine and substantial cause and effect relationship between increased imports and the threat of serious injury to the domestic industry. His analysis established a direct link between increases in the volume of imports during interim 2001 and the significant declines in the overall condition of the stainless steel wire industry during the interim period. He also reasonably found that these trends indicated that there was an imminent threat of serious injury from imports. Finally, he conducted a thorough and objective examination of the effects of other factors and ensured that he did not attribute the negative effects of these other factors to imports in his analysis.[2375]

7.962 The United States also argues that Commissioner Koplan's findings of a correlation between import trends and declines in the industry's condition are not "directly contradicted" by the finding of Commissioners Miller, Hillman, and Okun that stainless steel wire imports had not had a clear adverse impact on domestic prices during the period. The United States notes that the Agreement on Safeguards does not require that all six individual decision-makers reach the same conclusion, or that the individual Commissioners must rebut the findings of others with different conclusions, but requires that the determination, as the Appellate Body said in *US – Line Pipe*, meets the obligations contained in the Agreement on Safeguards. The fact that Commissioners Miller, Hillman, and Okun

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[2372] European Communities' second written submission, para. 422.
[2373] European Communities' first written submission, para. 580.
[2374] USITC Report, Vol. I, p. 238 (footnotes omitted).
[2375] United States' first written submission, para. 721.

disagreed with Commissioner Koplan no more makes his analysis unreasonable than his disagreement with them makes their analysis unreasonable.[2376]

7.963 The United States also argues that Commissioner Koplan's pricing analysis is not inconsistent with the pricing findings of Commissioners Miller, Hillman and Okun. Like these three Commissioners, Commissioner Koplan specifically found that imports had consistently undersold domestic stainless steel wire during the period from 1996 to 2000, but that this consistent underselling had not impacted domestic pricing adversely because the "domestic industry had kept prices of the domestic [wire] product in line with its costs" during that five year period. However, unlike the other three Commissioners, Commissioner Koplan focused his analysis on pricing data for imports and domestic product in interim 2001 and noticed that lowered import pricing had begun interfering with the ability of domestic industry to keep its prices in line with its costs. In particular, he found that, in combination with declining demand, the increase in import volumes and market share caused the price of domestic wire to fall during a period of rising costs and led directly to a decline in the industry's operating income levels in interim 2001. As a result, he reasonably found, the increase in imports and their concurrent underselling had caused the substantial declines in the industry's condition in the final months of the period of investigation, thus showing that imports threatened the industry with imminent serious injury. In other words, Commissioner Koplan's findings about price competition in the market during the first five years of the period were, in fact, consistent with the findings of the other three Commissioners. However, Commissioner Koplan simply placed more emphasis than the other Commissioners on the pricing effects of imports during the last six months of the period, which is a reasonable choice given his finding that imports threatened serious injury to the stainless steel wire industry.[2377]

7.964 The United States claims that the finding of the other three commissioners did not cover interim 2001, while Commissioner Koplan focussed on interim 2001. However, the European Communities submits that the finding quoted by the European Communities in its first written submission was of a general nature and was not limited to a period excluding interim 2001. Moreover, Commissioner Koplan did not discuss underselling at all in his discussion of interim 2001 developments, and thus did not explain in a reasoned and adequate manner, how there was a correlation between pricing for imports and domestic pricing sufficient to establish a causal link.[2378]

(i) Stainless steel rod

7.965 The European Communities argues that as a result of the blanket confidentialization of information, it is practically impossible to determine whether the USITC has provided a reasoned and adequate explanation of the existence of a genuine and substantial causal link. The European Communities argues that the coincidence of trends cannot be assumed. The European Communities submits that imports were relatively close to 1996 levels in 1999. In 1996 the domestic industry made profits. However, in 1999 operating margin "dropped dramatically". According to the European Communities, operating margins were at their worst in interim 2001, a period in which imports had greatly decreased, returning, on the basis of extrapolations, to 1996 levels. The European Communities argues that this does not seem to indicate a coincidence of trends. Therefore, the European Communities submits that the USITC has not provided a reasoned and adequate explanation of its determination of the existence of a causal link between increased imports and serious injury.[2379]

[2376] United States' first written submission, para. 732.
[2377] United States' first written submission, para. 733.
[2378] European Communities' second written submission, para. 434.
[2379] European Communities' first written submission, para. 574.

7.966 According to the European Communities, therefore the United States, in imposing safeguard measures, consequently acted inconsistently with Articles 2.1 and 4.2(b) of the Agreement on Safeguards as well as with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

7.967 The United States argues that the USITC established that there was a clear correlation between the growing volumes of low-priced imports in the market and the substantial declines in the industry's condition throughout the period of investigation. In particular, the industry experienced substantial declines in its market share, operating income margins, operating income, production levels, sales revenues, and shipments during the period of investigation, particularly during 1999 and 2000, as import quantities and market share grew considerably from their levels in 1998 and as imports continued to undersell the domestic industry and lead domestic prices downward. The largest declines in the industry's condition during the period occurred in 2000, when the largest import increase occurred. Given the very clear correlation of import volume and pricing trends and industry declines in these years, the United States asserts that the USITC correctly found there was a genuine and substantial correlation between import volume increases and the serious injury being suffered by the domestic industry during the period of investigation.[2380]

7.968 In response, the United States argues that, despite the clear correlation between import volume and pricing trends and declines in industry condition, the European Communities nonetheless contends that the record failed to establish a substantial causal link between movements in import volumes and declines in the stainless steel rod industry's condition. The United States submits that although the European Communities can perhaps be forgiven for basing their arguments on data that was redacted from the opinion as confidential, it is nonetheless clear from the available data and the face of the opinion that their argument is factually mistaken.[2381]

7.969 The United States submits that the argument with respect to the relationship of profits and import levels in 1999 is flawed because imports were not "relatively close" to their 1996 levels in 1999, as the European Communities suggests. Instead, import volumes and market share were both substantially higher in 1999 than 1996, with the absolute quantity of imports being 8.9% higher than 1996 and their market share in 1999 being substantially higher than in 1996. In addition, as the USITC clearly explained in its analysis (even with the redaction of confidential data), imports undersold domestic merchandise in every period of the period of investigation, including 1999, which resulted in the suppression and depression of domestic prices during the last two-and-a-half years of the period of investigation, thus preventing the industry from keeping its prices at a level that would allow it to recoup its nickel costs during this period, including 1999. In other words, the USITC correctly found that, in 1999, the industry's operating income margins fell in direct correlation with the substantial increase in the volume and market share of imports that occurred during that year, and as a direct result of the persistent underselling by imports that occurred throughout the period.[2382] In fact, the USITC specifically noted that the "record shows a clear and direct correlation between changes in the volume of imports and the overall condition of the industry", finding in particular that the industry's operating income level declined in 1999 in conjunction with an increase in import volumes. Given this direct statement on the matter, it is clear not only that the USITC considered the issue raised now by the European Communities but squarely rejected it because it was not consistent with the record evidence.[2383]

[2380] United States' first written submission, para. 699.
[2381] United States' first written submission, para. 700.
[2382] United States' first written submission, para. 701.
[2383] United States' first written submission, para. 702.

7.970 The United States argues that, similarly, the European Communities' argument that import volumes fell back to their 1996 levels in interim 2001 is misleading. The record showed that the decline in absolute import volumes in interim 2001 was related to the decline in demand in interim 2001 and had little impact on the elevated market share of imports or their continued underselling of domestic stainless steel rod. More specifically, while it is true that import volumes on an absolute level fell substantially in interim 2001 from the comparable period in 2000, the decline in import volumes between those two periods was essentially similar to the decline in demand between interim 2000 and 2001, resulting in a minimal decrease in import market share between interim 2000 and 2001. Further, as the USITC noted, imports also undersold domestic merchandise in interim 2001, thus further suppressing and depressing United States prices in that period. Thus, imports retained their substantially increased market share even in the face of declining demand. Again, the record showed, as the USITC found, that there was a clear correlation between import volumes and pricing in interim 2001 and the declines in industry profitability in that year. The European Communities' arguments to the contrary are simply wrong, and can be seen as such from the face of the USITC's opinion, even with certain confidential data redacted.[2384]

7.971 In counter-response, the European Communities submits[2385] that the United States' response to the European Communities' argument that there was no correlation of trends is unpersuasive. According to the European Communities, imports developed as follows from 1996:

Table 2: Stainless Steel Rod – Import Volumes (1996-2001)

	1996	**1997**	**1998**	**1999**	**2000**	**2000 I**	**2001 I**
Imports (vol.)	60,503	78,264	61,439	65,882	82,344	45,647	31,365

7.972 The European Communities argues that losses were apparently "dramatic" in 1999, a year when imports did not particularly increase, and after a year in which imports fell substantially. The European Communities submits that all the United States can do is claim that the level of imports in 1999 could be considered as an increase in imports and that the USITC's statement that "the record shows a clear and direct correlation between changes in the volume of imports and the overall condition of the industry" was sufficient to reject the European Communities arguments.[2386] According to the European Communities, such an assertion does nothing to explain how the underlying facts, which clearly suggest that there is no correlation, can possibly be considered a "clear and direct correlation". There is, therefore, no reasoned and adequate explanation of the existence of a correlation. The Panel should find the USITC's findings insufficient.[2387]

3. Non-attribution

(a) Definition and scope

7.973 The European Communities, Switzerland, New Zealand, Japan and Brazil submit that the mere existence of a coincidence between the increased imports and the decline in industry performance is not enough to establish the existence of a causal link.[2388] Brazil argues that while a

[2384] United States' first written submission, para. 703.
[2385] European Communities' second written submission, para. 429
[2386] United States' first written submission, paras. 701 and 702.
[2387] European Communities' second written submission, para. 430
[2388] European Communities' first written submission, para. 452; Japan's first written submission, para. 217; Switzerland's first written submission para. 294; New Zealand's first written submission, para. 4.113; Brazil's first written submission, para. 151.

correlation between imports and serious injury is relevant and necessary, it is by itself insufficient evidence for imposing safeguards measures.[2389]

7.974 In Brazil's view, the second sentence of Article 4.2(b) appreciates that other factors may be causing the decline in domestic industry performance. Thus, authorities must take the added step of investigating other possible causes, and the injury from those alternative causes "shall not be attributed" to imports.[2390] Similarly, the European Communities, Switzerland and Norway argue that for a causal link to exist, it must be shown that increased imports are responsible for the serious injury. In other words, once the effect of alternative causes has been factored out, the nature of such increased imports must be such as to transmit serious injury to the domestic industry. According to the European Communities, this typically requires a demonstration that the conditions of competition are such that increased imports are responsible for injury suffered.[2391]

(i) The obligation to "separate" and "distinguish"

7.975 The complainants rely upon Appellate Body jurisprudence to argue that in order to comply with the non-attribution requirement, an authority must "separate" and "distinguish" the injurious effects of factors other than increased imports to ensure they are not attributed to imports.[2392] It has been argued that, moreover, a reasoned and adequate explanation must be offered, explicitly establishing how this was accomplished.[2393]

7.976 In this regard, the European Communities, Switzerland and Norway argue that a competent authority must permit a demonstration, as a matter of substance, that: (i) the injurious effects of factors considered to be causing injury have been distinguished from each other; (ii) these injurious effects have been attributed to the factors which are causing them; and (iii) the competent authority has determined, after having attributed injury to all causal factors present, whether increased imports are a "genuine and substantial" cause of serious injury.[2394] Similarly, according to Brazil and Japan, the analytical framework established by the aforementioned cases requires, first, that authorities identify the injurious effects of the known factors other than increased imports and, secondly, that authorities explain satisfactorily the injurious effects of those other factors as distinguished from the injurious effects of the increased imports.[2395] Relying upon Appellate Body jurisprudence[2396], China argues, *inter alia*, that as a first step in the examination of causation, the injurious effects caused to the domestic industry by increased imports must be distinguished from the injurious effects caused by other factors. Then, as a second step, the authorities must attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, "injury" caused by all of these different factors. Any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it assumes that the other causal factors are not causing the injury which has been ascribed to increased imports.

[2389] Brazil's first written submission, para. 151.
[2390] Brazil's first written submission, para. 151.
[2391] European Communities first written submission, para. 452; Switzerland's first written submission, para. 294; Norway's first written submission, para. 295.
[2392] See, for example, European Communities' first written submission, para. 442; Brazil's first written submission para. 153.
[2393] Brazil's second written submission, para. 75.
[2394] European Communities' first written submission, para. 442; Switzerland's first written submission, para. 284; Norway's second written submission, para. 108.
[2395] Brazil's first written submission, paras. 154-155; Japan's first written submission, paras. 218-227.
[2396] China's first written submission, para. 352.

(ii) Identification of the nature and extent of injurious factors

7.977 The European Communities notes that the Appellate Body referred, in *US – Line Pipe*, to the need to explain satisfactorily the "nature and extent" of injurious factors other than increased imports. The European Communities submits that the Appellate Body did not explain further what was meant by this term. One understanding could be that, in order to ensure non-attribution and thus the existence of a causal link, a competent authority must, at least approximately, estimate the effects of alternative factors on the domestic industry, and in so doing ensure that such injury is not attributed to increased imports, such that a final determination of the existence of a causal link, on the basis of objective evidence, can be made. This may be a comparatively simple operation where only one other factor is determined to be causing injury at the same time. This will inevitably become a more complex analysis, necessitating more sophisticated tools, in the event that two or more other factors are causing injury.[2397] For further discussion of the meaning of nature and extent see paragraph 7.989 *et seq*.

7.978 The United States notes that, under the second sentence of Article 4.2(b) of the Safeguards Agreement, a competent authority must also ensure that the "injury caused by factors other than the increased imports . . . [is] not . . . attributed to increased imports."[2398] The United States adds that, although the Appellate Body has explained this requirement in different ways in its prior safeguard reports[2399] it made its clearest statement about the requirements of this provision in its *US - Line Pipe* report.[2400] In that report, the Appellate Body reiterated its prior statements that the second sentence of Article 4.2(b) requires that:

> "In a situation where several factors are causing injury "at the same time," a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated . . . . The non-attribution language in Article 4.2(b) . . . [thus] requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports."[2401]

7.979 The United States further notes that, in light of this, the Appellate Body has stated, the competent authorities should "identify the nature and extent of the injurious effects of the known factors other than increased imports," and "explain satisfactorily" how they have distinguished the effects of those factors from the effects of increased imports.[2402] Accordingly:

> "[T]o fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must established explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms."[2403]

[2397] European Communities' written reply to Panel question No. 31 at the second substantive meeting.
[2398] Appellate Body Report, *US – Line Pipe*, para. 208.
[2399] *See, e.g.*, Appellate Body Report, *US - Wheat Gluten*, para. 70.
[2400] Appellate Body Report, *US – Line Pipe*, paras. 200-217.
[2401] United States first written submission, para. 404.
[2402] Appellate Body Report, *US – Line Pipe*, para. 213. The lack of textual basis for a requirement of an "explicit" finding is discussed in Section F.
[2403] Appellate Body Report, *US – Line Pipe*, para. 217.

(iii) Contribution

7.980 The United States relies upon *US – Line Pipe* and *US – Wheat Gluten* to argue that the Appellate Body has consistently found that imports need not be the "sole cause of serious injury" under Article 4.2(b). Instead, the Appellate Body has stated that the Agreement on Safeguard's requirement of a "genuine and substantial" causal link between imports and serious injury is satisfied if imports simply "contribute to 'bringing about,' 'producing' or 'inducing' the serious injury" being suffered by an industry. In other words, "…the causation requirement of Article 4.2(b) can be met where the serious injury [suffered by an industry] is caused by the interplay of increased imports and other factors". Thus, it is permissible under the Agreement on Safeguards for a competent authority to conclude that increased imports are causing serious injury to an industry, even if other factors are also causing injury, so long as imports themselves contribute substantially to bringing about serious injury.[2404] Accordingly, the Appellate Body has clearly found no fault with the United States statute's "substantial cause" test insofar as it permits the USITC to make an affirmative causation finding if increased imports have made an "important" contribution to serious injury, rather than requiring them to be the "sole" cause of serious injury.[2405]

7.981 Korea and New Zealand agree that increased imports alone do not have to cause serious injury, but they must have a "genuine and substantial relationship".[2406] While the Agreement on Safeguards does not require the demonstration that increased imports alone caused the serious injury, the Agreement does obligate the United States to not attribute injury caused by other factors to imports. If that obligation is met, then there must be a genuine and substantial relationship between the increased imports and the serious injury.[2407] New Zealand adds that while the Appellate Body has said that increased imports do not need to be the sole factor causing serious injury[2408], it has not said that increased imports need only be one cause among many. Article 4.2(b) refers to "the" causal link, not "a" causal link, and the Appellate Body has repeatedly affirmed the requirement for a genuine and substantial relationship of cause and effect between increased imports and serious injury.[2409] [2410]

7.982 Japan and Brazil accept that it may be that a slight increase in imports only aggravates circumstances in which an industry is already experiencing serious injury. While the increased imports did not help the industry, the domestic industry would have been suffering serious injury with or without the increased imports. They submit that in such a case, once the effect of other factors has been separated and distinguished, the connection between the imports and the serious injury is ascertained and the imports cannot be blamed for the serious injury. However, Japan and Brazil argue that the United States seems to be advocating a contributory cause standard. It appears to believe that as long as imports are having some impact no matter how negligible and the industry is suffering serious injury, then imports can be blamed. Japan and Brazil believe this is inconsistent with the obligation of Article 4.2(b) not to attribute other causes to imports. Article 4.2(b) does not allow imports to become the scapegoat for other factors. A competent authority must still find a "genuine

[2404] United States' first written submission, paras. 407, 434 and 441.
[2405] United States' first written submission, paras. 434 and 441.
[2406] Korea's written reply to Panel question No. 87 at the first substantive meeting; New Zealand's written reply to Panel question No. 87 at the first substantive meeting.
[2407] Korea's written reply to Panel question No. 87 at the first substantive meeting.
[2408] Appellate Body Report, *US – Wheat Gluten*, para 67.
[2409] Appellate Body Report, *US – Wheat Gluten*, para 69 confirmed in *US – Lamb*, paras. 168, 177 and 179 and in *US – Line Pipe*, para 211.
[2410] New Zealand's second written submission, para. 3.92.

and substantial" causal link between increased imports and serious injury. According to Brazil, this is certainly more than a contributing cause standard.[2411]

7.983 In response, the United States submits that it does not believe that imports may be considered to be contributing in a "genuine and substantial" way to serious injury if they are having only a "negligible" impact on the industry.[2412] The United States statute itself requires that imports be an "important", that is, a "substantial", cause of the serious injury being suffered by the domestic industry.[2413] Accordingly, to the extent that imports were only contributing "negligibly" to serious injury – that is, in a "small" or "insignificant" way [2414] – the USITC would not be permitted by the United States statute to find that imports are an "important" cause of injury.[2415]

7.984 The United States argues that by requiring the USITC to find that increased imports are an "important" cause of injury and as important as any other cause, the United States statute ensures that the USITC will find there is a "genuine and substantial" causal link between imports and serious injury before issuing an affirmative safeguards finding, as the Appellate Body has stated. In this regard, the United States notes that the standard dictionary definitions of the words "substantial" and "important" show that the words have essentially the same meaning when used to defined the degree of weight that must be given a particular factor in a decision or analysis. The United States asserts that given the ordinary meaning of these two words, it is clear that, by requiring imports to be an "important" cause of serious injury, the United States statute contemplates that the USITC will assess whether there is at least a "genuine and substantial" causal relationship between imports and serious injury in a safeguards proceeding, as required by the Agreement on Safeguards .[2416] The United States adds that, since the Appellate Body has found that the Agreement requires that increased imports "contribute" to "bringing about" or "producing" serious injury in a "genuine and substantial" way, which indicates that imports may be found to have the requisite link to serious injury even when they are not the most important cause of such injury, the Agreement on Safeguards would, therefore, permit a competent authority to find imports are causing the requisite level of serious injury even when they are not the most important cause of such injury. The United States argues that, accordingly, it is clear that, in this respect, United States law contains a more rigorous causation standard than the Agreement on Safeguards.[2417]

7.985 The United States further argues that the requirement to conduct a detailed assessment of the nature and extent of the injury caused by both imports and other non-import factors is not applicable to a factor if that factor is not contributing to serious injury. Accordingly, to the extent that the USITC finds that a factor was not contributing significantly to serious injury, the sole issue for review is whether the USITC's conclusion in this regard was reasoned and supported by the record, not

[2411] Japan's written reply to Panel question No. 87 at the first substantive meeting; Brazil's written reply to Panel question No. 87 at the first substantive meeting.

[2412] Japan and Brazil written replies to Panel questions No. 87.

[2413] 19 U.S.C. §2252(b)(1)(B).

[2414] In this regard, the word "negligible" is defined in the *New Shorter Oxford English Dictionary* as "[a]ble to be neglected or disregarded; unworthy of notice or regard; so small and insignificant as to be ignorable." The *New Shorter Oxford English Dictionary*, 1993 Edition, p. 1900 (US-86). This definition clearly contrasts with the same Dictionary's definition of "important" as "having great significance, carrying with it great weight or consequences, weighty, momentous...." Ibid., p. 1324; United States' first written submission, para. 442.

[2415] United States' second written submission, para. 147.

[2416] United States' first written submission, para. 442.

[2417] United States' first written submission, para. 443.

whether the USITC performed the non-attribution analysis described by the Appellate Body in the *US – Wheat Gluten* case.[2418]

7.986 In counter-response, Korea argues that the United States apparently misunderstands the non-attribution requirement. The Appellate Body has made clear that all factors causing injury must be examined since the only means by which a causal relationship between imports and serious injury can be established is by measuring that causal relationship independent of other factors.[2419] Otherwise, the causal relationship between serious injury and imports is merely assumed, not demonstrated.[2420]

(iv) Quantification

7.987 The European Communities and Brazil suggest that Article 3.5 of the AD Agreement imposes an identical obligation to that contained in the Agreement on Safeguards not to blame imports for other causes before imposing anti-dumping duties and that that Article entails a quantification requirement.[2421] Relying upon the Appellate Body decision in *US – Hot-Rolled Steel* which interpreted that Article, the European Communities and Brazil argue that the USITC's analysis fails to meet the standards set out in the Agreement on Safeguards because it is exclusively based on a relative comparison between individual causes of serious injury and increased imports. It does not involve, therefore, a separation and distinction of the injurious effects of other factors. Nor does it involve the attribution of serious injury suffered by the domestic industry to the various causes of injury individually, thus permitting a determination whether there is a "genuine and substantial" relationship between increased imports and serious injury. The European Communities, Brazil and Japan argue that although the task of non-attribution may be a difficult one, it is the price paid to justify application of trade remedy measures and one to which Members of the WTO agreed.[2422]

7.988 The United States argues that neither the Appellate Body nor previous panels have required that a competent authority "quantify" the precise amount of injury attributed to imports or other injurious factors as part of its non-attribution analysis under Article 4.2(b). To the contrary, the *US – Lamb* and *US – Wheat Gluten* Panels have both stated specifically that a "Member is not necessarily required to quantify on an individual basis, the precise extent of 'injury' caused by each other possible [injurious] factor". Indeed, in its most recent discussions of the attribution issue, the Appellate Body has explained that the Agreement on Safeguards requires only a "reasoned and adequate explanation" not a "quantitative" valuation, of the effects attributable to imports and other factors. Thus, the Agreement plainly permits a qualitative, rather than quantitative, assessment of the "nature and extent" of the injury caused by both imports and other factors in its causation analysis.[2423]

[2418] United States' first written submission, para. 408.

[2419] See Appellate Body Report, *US – Line Pipe*, para. 211 (affirming Appellate Body Report, *US – Lamb*, para. 179, footnote 38).

[2420] Korea's second written submission, para. 154.

[2421] European Communities' first written submission, para. 445; Brazil's first written submission, paras. 156 and 157.

[2422] European Communities' first written submission, para. 445; Japan's second written submission, para. 150. Japan refers to Appellate Body Report, *US – Hot Rolled Steel*, para. 228; Brazil's first written submission, para. 157.

[2423] United States' first written submission, paras. 410 and 435.

7.989 In counter-response, a number of complainants submit that quantification is, in fact, required. China refers[2424] to the following quote from the Appellate Body Report in the recent dispute of *US – Line Pipe*:

> "As ruled in *US – Hot Rolled Steel* with respect to the similar requirement in Article 3.5 of the Anti-Dumping Agreement, so, too, we are of the view that, with respect to Article 4.2(b), last sentence, competent authorities are required to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports."[2425]

7.990 China also notes that the New Shorter Oxford Dictionary defines the words 'nature' and "extent" as follows:[2426]: "Nature: The inherent or essential quality or constitution of a thing, also, an individual element of character, disposition etc.; a kind, a sort, a class". "Extent: The amount of space over which a thing extends, size, dimensions, amount".[2427] China submits that taking the literal meaning of these terms, the word "nature" would obviously stand for the "quality" of a factor, and the word "extent" – synonymous with size, amount – then means the "quantity" of a factor.[2428] Therefore, in China's view, if the Appellate Body requires the identification of the nature and extent of the "other" known factors, it means both the quality and quantity of the injurious effects of the "other" factors. China does not consider, however, that the assessment of the extent to which "other factors" are causing injury necessarily requires a mathematical examination. However, the importance of increased imports in the causation of injury compared to the importance of other factors must be examined so that it can be ensured that there is no manifest error of appraisal. This, says China, has not been done by the United Stataes.[2429] Accordingly, and to that extent, China disagrees with the United States' statement that the prior Appellate Body reports did not require competent authorities to "quantify" the actual effects of the factors on the industry's overall condition, and that the Agreement on Safeguards suggests a qualitative, rather than quantitative assessment of the effects causing injury to the domestic industry.[2430]

7.991 In response, the United States submits that it does not agree with China's interpretation. The substantive Article 4.2(b) obligation with regard to other factors causing injury is a negative one, namely, not to attribute injury caused by such factors to increased imports. Thus, analysis of these other causal factors is needed only to the extent necessary to establish that the injury they are causing has not been attributed to increased imports. The Agreement on Safeguards does not require any particular form of analysis, and if the competent authorities can comply with Article 4.2(b) without evaluating both the quality and quantity of injurious effects attributable to other factors, that analysis would be sufficient.[2431]

7.992 The United States also notes that China is using a dictionary to define terms set forth in an Appellate Body report, rather than a provision of the Agreement on Safeguards .[2432] The findings and conclusions in those reports, however, are not treaty text, nor do they create obligations under the

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[2424] China's second written submission, para. 174; Norway's second written submission, para. 120.
[2425] Appellate Body Report, *US – Line-Pipe*, para. 215 (emphasis added)
[2426] *The New Shorter Oxford English Dictionary*
[2427] China's second written submission, para. 175.
[2428] China's second written submission, para. 176.
[2429] China's second written submission, para. 177.
[2430] China's second written submission, para. 178.
[2431] United States' written reply to Panel question No. 31 at the second substantive meeting.
[2432] China's second written submission, paras. 173-179.

covered agreements, and they should not be interpreted as if they were or did. China errs in attempting to apply to Appellate Body reports an analysis that appears to reflect customary rules of international law for the interpretation of treaties. Moreover, the United States notes that the dictionary definition of the term "extent" used by China in its discussion does not indicate that "extent" means "quantity", as China asserts. Instead, the dictionary definition cited by China indicates that the word "extent" means "[t]he amount of space over which a thing extends, size, dimensions, amount".[2433] This definition simply indicates that "extent" can mean the general "amount" or "size" of a factor; it does not indicate that the size or amount of a factor must be specifically quantified. As long as the competent authorities examine the data relating to the "extent" of an other factor sufficiently to establish that they have not improperly attributed injury associated with that factor to increased imports, they have properly considered the "extent" to which that factor has caused injury to the industry. On the basis of the foregoing, the United States submits that it is not true, as China asserts, that the Appellate Body has, by using this word in its prior reports, suggested that a competent authority must precisely "quantify" the effects of non-import factors in its causation analysis.[2434]

7.993 The European Communities also argues that a competent authority is required to "quantify" factors. Specifically, Article 4.2(a) of the Agreement on Safeguards refers to "factors of [a] quantifiable nature". A competent authority cannot assess serious injury, for instance, without quantifying profit levels, or capacity utilization. An assessment of causal link must inevitably involve assessing such developments, contemporaneously, on a qualitative and quantitative basis.[2435] However, the European Communities understands the United States as arguing that it is not subject to an obligation to accept econometric analyses which would allow it to quantify "how much" injury is caused by increased imports. The European Communities is mildly surprised that the United States, when taking a safeguard measure of the scale of the present steel safeguard measure (with an effect on the lives of many workers and consumers in the United States and all over the world) would not want to use and take advantage of any means offered to it which might permit a more accurate determination[2436][2437]

7.994 Switzerland refers[2438] to the Appellate Body' decision in *US – Wheat Gluten* where it said that:

> "Article 4.2(a) sets forth the factors which the competent authorities "*shall evaluate*" in "determin[ing] whether increased imports have caused or are threatening to cause serious injury to a domestic industry…". Under that provision, the competent authorities must evaluate "all relevant factors ... having a *bearing* on the situation of [the] industry". In evaluating the relevance of a particular factor, the competent authorities must, therefore, assess the "bearing", or the "influence" or "effect" that

[2433] China's second written submission, para. 175 (citing *The New Shorter Oxford English Dictionary*).
[2434] United States' written reply to Panel Question No. 31 at the second substantive meeting.
[2435] European Communities' second written submission, para. 356.
[2436] In this context, the European Communities notes that neither the panel, nor the Appellate Body in *US – Line Pipe* felt the need to discuss the issue of quantification in order to find that the USITC's causation analysis was inconsistent with the Agreement on Safeguards. The Appellate Body did, however, state (para. 215) that the competent authority should:

> "[I]dentify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports."

[2437] European Communities' second written submission, para. 357.
[2438] Switzerland's second written submission, para. 92.

> factor has on the overall situation of the domestic industry, against the background of all the other relevant factors."[2439]

7.995 Switzerland argues that even though the Appellate Body did not require a quantification of the precise amount, it required the competent authorities to evaluate all relevant factors. Switzerland further argues that an evaluation implies a certain quantification.[2440]

7.996 New Zealand notes that it has never argued for some kind of "pure quantification" standard, although it notes that the United States sensibly does not attempt to deny that quantification must play, at a minimum, a major role in any non-attribution analysis. However, the problem is that the USITC did not come close to meeting the minimum standards which the Appellate Body has established in a line of cases. In short, the United States approach fails in any substantive way to ensure "non-attribution".[2441]

7.997 The United States argues that there is a sound rationale for not requiring a competent authority to "quantify" the effects of imports and other factors on the industry in a safeguards analysis.[2442] In particular, the United States argues that, given the significant number of industry and import factors that must be considered under the Agreement on Safeguards and the United States statute, it is clear that, to "quantify" the effects of imports and other factors, a competent authority would need to develop an economic model to address – that is, "quantify" – the effects of imports and other factors on all factors required to be considered under the Agreement on Safeguards and the United States statute.[2443] The United States submits that the USITC is unaware of any existing individual economic model and analytical structure that accurately and effectively quantifies the effects of imports and other factors on all of the industry indicia that must be analysed under the Agreement on Safeguards or the United States statute. Moreover, the United States argues that, to date, no representative of any party has offered such a model to the USITC during the course of its safeguards proceedings, or even during the course of proceedings before WTO panels. In other words, no one has yet presented to the USITC a single economic model that would adequately and accurately address in a consistent fashion all of the individual industry factors that must be assessed under the Agreement on Safeguards and the United States statute.[2444]

7.998 The United States argues that, moreover, the conclusion that a competent authority must quantify the effects of imports and other factors for only one or two selected criteria of industry condition, would not be consistent with the requirement under Article 4.2(a) that the competent authority assess the effects of imports on all relevant factors having a bearing on the condition of the industry, including its employment levels, productivity levels, or profitability levels. Indeed, according to the United States, picking a criterion (like profits or revenues or production) as a "proxy" for the overall injury being suffered by an industry simply places weight on that particular factor to the exclusion of other important indicia of the industry's condition (such as employment, capacity utilization, or capital investments). The Agreement on Safeguards does not permit such a restricted analysis. Given the foregoing, the United States asserts that it is clear that the Panel should not find

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[2439] Appellate Body Report, *US – Wheat Gluten*, para. 71. (emphasis in original)
[2440] Switzerland's second written submission, para. 92.
[2441] New Zealand's second written submission, para. 3.109.
[2442] United States' first written submission, para. 411.
[2443] United States' first written submission, para. 413.
[2444] United States' first written submission, para. 415.

that the USITC is required to "quantify" the effects of imports on the industry because it would reflect only an imprecise measurement of the overall level of injury suffered by an industry.[2445]

7.999 Brazil submits that the United States' position that qualitative and quantitative analyses are effectively mutually exclusive undertakings, and that one need never inform the other, does harm to the Appellate Body's findings in *US – Wheat Gluten*, *US – Lamb*, and *US – Line Pipe* with respect to non-attribution. Switzerland agrees with Brazil that this case is a perfect exhibition of why "qualitative" analysis, alone, cannot always justify a causation finding under Article 4.2(b) given the many counter-intuitive results that are evident in the USITC's "qualitative" findings.[2446] Brazil further argues that the United States not surprisingly wants to avoid any serious consideration of econometric evidence in this case, since that evidence so completely undermines the simplistic conclusions reached by the USITC.[2447] In effect, the United States contends that if one cannot simultaneously consider every causal factor and every indicator of injury, quantitative analyses are unable to satisfy the non-attribution requirement.[2448] According to Brazil, the argument begs a question that the United States seeks to obscure, namely why should econometric analyses be discredited if they can help inform the qualitative assessment of at least some of those causal factors?[2449]

7.1000 With respect to the argument made by the United States that quantification exercises are invalid unless such an approach quantifies the effects of imports and every conceivable other factor on each and every indicia of injury, Brazil submits that this is a transparent attempt to reduce the quantification requirement to an absurd exercise. Some injury indicia are more amenable to econometric methods (e.g., price, sales) while other injury indicia (e.g., employment) may only be able to be fully measured in conjunction with a large body of descriptive and other evidence.[2450] According to Brazil, the correct interpretation of the econometric approach is that one must incorporate all key relevant variables.[2451] Brazil submits that a reliable statistical regression analysis must use the qualitative descriptions of the industry and product in order to include all important explanatory factors. The fact that there may be other relatively unimportant factors not included in the regression analysis does not make it invalid, it simply is a recognition that, qualitatively and intuitively, based on the evidence these factors had a marginal effect, if any, on industry performance.[2452]

7.1001 Similarly, Japan and Switzerland submit that econometeric studies need not simultaneously consider all indicia of injury (e.g., price, profits, capacity utilization, etc.), to meaningfully contribute to the analysis. In fact, it is quite appropriate to use various approaches to shed light on various factors. If an econometric model allows one to better understand the factors affecting domestic price levels, for example, then it is perfectly acceptable and appropriate to isolate price and perform a regression analysis on those variables that affect price. No one has argued that such a model replaces other modes of analysis for the other factors. However it would be wrong to dismiss data that more accurately assesses particular industry injury indicia.[2453]

[2445] United States' first written submission, para. 416.
[2446] Brazil's second written submission, para. 81; Switzerland's second written submission, para. 94.
[2447] United States' first written submission, paras. 411, 413, 415-416; United States' written reply to Panel question No. 88 at the first substantive meeting.
[2448] United States' first written submission, paras. 413 and 416.
[2449] Brazil's second written submission, para. 82.
[2450] Brazil's second written submission, para. 91.
[2451] Brazil's second written submission, para. 93.
[2452] Brazil's second written submission, para. 94.
[2453] Japan's second written submission, para. 156; Switzerland's second written submission, para. 94.

7.1002 The United States submits that it has not stated that it was "physically" or "theoretically" impossible to develop an economic model that would quantify the effects of imports in some approximate fashion. However, the United States notes that modelling exercises would have significant limitations from the perspective of the Agreement on Safeguards. The development and use of a series of related models suffers from the flaw that the individual models would be generated using different inputs, thus limiting the extent to which the models reflected the same set of factual assumptions. Similarly, a model that focused on one or two specific factors would, by definition, not take account of all of the factors required under the Agreement on Safeguards. Thus, while such a model might accurately reflect the impact of imports on particular indicia of injury, it would only imperfectly reflect the complex economic relationships of factors required to be considered by the Agreement on Safeguards. The use of economic models, with their inherent imprecisions, are no more precise, accurate or "quantitative" an assessment of the injurious effects of imports than the analysis performed by the USITC.[2454]

7.1003 Japan and Brazil argue that quantifying the economic effects of various factors has been undertaken by competition authorities in the United States for some time now, using tools developed by economists and statisticians over many decades. The econometric models are designed specifically to achieve two important goals: (i) to disentangle the relative roles of different factors; and (ii) to quantify the relative importance of each factor. Brazil submits that, in this case, the exercise is less complex than in other settings. The argument made by the United States, both the USITC's during its investigation and now before the Panel, is based primarily on price. According to the United States, the effect of import volumes on pricing is a major source of injury. Thus, the relevant question for the United States in this case concerns the role of increased imports and the extent to which they affected domestic price levels. Japan and Brazil argue that all of the econometric models presented to the United States authorities focused on explaining domestic price levels. The models measured the extent to which import prices and import quantities had any discernible effect on domestic price levels. The models also measured other factors that might be affecting domestic prices, and indicated the relative magnitude of each factor, holding all other factors constant. These models established that domestic price decreases and increases, not import price decreases and increases, were the dominant factor explaining domestic price levels.[2455] Brazil notes that both the domestic industry's model and the foreign producers' model agreed that with respect to two of the three products modelled – hot-rolled, cold-rolled and corrosion resistant CCFRS products – there was no strong statistical evidence that imports had a major effect on price.[2456]

7.1004 Brazil also notes that nowhere in the USITC Report or the Views of the Commission on Injury is there any discussion of: slab – whether and how slab imports could have or did have an effect on prices, given the lack of any market for domestically produced slab and any significant merchant sales of domestic slab; plate – how, given the more than 50% decline in non-NAFTA imports between 1996 and 2000 (1.8 million tons to 0.8 million tons)[2457], and the three million ton increase in domestic capacity over the same period[2458], plate imports can have had any adverse impact on domestic plate prices in any recent period; and hot-rolled – how, given the fact that by interim

[2454] United States' written reply to Panel question No. 88 at the first substantive meeting.
[2455] Japan's written reply to Panel question No. 85 at the first substantive meeting; Brazil's second written submission, paras. 83 and 84; Brazil's written reply to Panel question No. 85 at the first substantive meeting.
[2456] Brazil's written reply to Panel question No. 26 at the second substantive meeting
[2457] Brazil's first written submission, Common Annex A.
[2458] Brazil's first written submission, Common Annex B.

2001 import volume was roughly one-eighth the volume seen in 1998, hot-rolled imports could have had any adverse effect on prices.[2459] [2460]

7.1005 In response, the United States submits that it disagrees with Brazil's assertion that the record evidence in the steel investigation, including the models submitted by the foreign producers and the domestic industry, established that imports were a minor or insignificant factor in explaining domestic pricing levels for CCFRS. The United States reiterates that the record clearly established that imports of CCFRS had a serious and adverse impact on domestic pricing during the period of investigation, and Brazil has not come forth with a fact-based prima facie case to the contrary. Second, the economic model submitted by the foreign producers contained serious methodological flaws that rendered its results inconclusive from an economic perspective, which means that it did not "establish" that imports were a minor determinant of domestic pricing levels, as Brazil contends. Third, not all of the models submitted during the investigation claimed that imports had only a minimal or insignificant effect on domestic pricing, as Brazil has consistently and mistakenly asserted in this proceeding. On the contrary, the model submitted by the domestic industry claimed that imports were the most important determinant of pricing in the market.[2461]

7.1006 Japan and Brazil do not argue that the Agreement on Safeguards requires econometric models in every case. They submit, however, that where the data is readily available, and particularly when much of that data is sourced from the industry itself, it is WTO-inconsistent for a competent authority to dismiss models based on that data and not use them in its assessment and decision-making.[2462] Brazil argues that economic models can be used to evaluate and refine the qualitative conclusions and to measure the relative magnitude of various factors on the main problem of the domestic industry, price. Particularly where a qualitative conclusion appears to have little support (i.e. it is counterintuitive), one would expect quantitative analysis to justify this conclusion.[2463]

7.1007 The European Communities argues that since the burden of demonstrating the existence of a causal link, on the basis of objective evidence, lies with the Member imposing safeguard measures, it should be expected that the causation analysis must become more sophisticated as the complexity of the factual situation to be examined increases. Depending on the complexity of the factual situation, the European Communities submits that it may be the case that only econometric studies, taken together with quantitative and qualitative analysis of the facts, will permit a competent authority to establish, on the basis of objective evidence, the existence of a causal link. Remaining passive in the face of econometric studies which tend to show that there is no causal link must mean that a competent authority has failed to demonstrate, on the basis of objective evidence, the existence of a causal link.[2464] [2465]

7.1008 The European Communities notes that the Appellate Body, in *US – Wheat Gluten* pointed to one means of analysing a factual situation without the use of econometric modelling to estimate the quantification of injurious effects. In analysing the effect of capacity increases it posited two counterfactuals. In one counterfactual, capacity was held constant and in the other imports were held

[2459] USITC Report, Vol. II at Table FLAT-6.
[2460] Brazil's written reply to Panel Question 38 at the second substantive meeting.
[2461] United States' written reply to Panel Question 38 at the second substantive meeting.
[2462] Japan's written reply to Panel question No. 85 at the first substantive meeting; Brazil's second written submission, paras. 83 and 84; Brazil's written reply to Panel question No. 85 at the first substantive meeting.
[2463] Brazil's written reply to Panel question No. 85 at the first substantive meeting.
[2464] Appellate Body Report, *US – Wheat Gluten*, para. 55.
[2465] European Communities' written reply to Panel question No. 33 at the second substantive meeting

constant. In so doing the Appellate Body was able to isolate the effect of capacity increases.[2466] In that investigation, as for many determinations before this Panel, rising input costs were recognized as an alternative cause In such a case, it is possible to hold costs constant, and analyse the profitability of the domestic industry if input costs had not increased. If one were to factor in a further adjustment in fixed costs to take account of increased costs resulting from over-capacity, one could start to isolate the injurious effects of other factors and ensure that such effects are not attributed to increased imports. The European Communities submits that the table below provides an example of such an analysis for increased factory costs, and shows clearly the inadequacies of the USITC's investigation.[2467]

Table 3: Cold-Finished Bar – Unit Value of commercial sales and costs (1998-2001)[2468]

	1998 (actual)	**1999 (actual)**	**1999 (constant)**	**2000 (actual)**	**2000 (constant)**	**2001 (actual)**	**2001 (constant)**
Net. comm. sales	711	667	667	668	668	671	671
Raw materials	480	347	347	368	368	364	364
Direct labor	45	51	51	54	54	58	58
Other factory costs	98	212	***98***	184	***98***	203	***98***
COGS total	623	609	**496**	605	**520**	625	**520**
Gross profit	88	57	**171**	63	**148**	47	**151**
SG&A	44	49	**49**	44	**44**	48	**48**
Operating income (loss)	44	8	**122**	19	**104**	(1)	**103**

7.1009 The European Communities submits that if production had also decreased with a fall in demand, one can determine if the decrease in production is due to decreased sales caused by increased imports or the fall in demand, by holding the market share constant and then determining the extent to which production decreased beyond what it would have been if its market share was constant. [2469]

7.1010 In the following table, Brazil presents the statements that the United States makes underlying why econometric methods should not be relied upon. Brazil states that it concurs with these statements, as they are basic lessons taught in introductory statistics and econometrics courses. Brazil submits that, however, they do not imply that quantification is impossible or unreliable nor do they justify the USITC's decision to disregard the evidence presented in this case. In the second column, Brazils submits that it contains a report of what was actually done in this case using recognized econometric tools to control for the areas of United States' concern.

[2466] Appellate Body Report, *US – Wheat Gluten*, paras. 81-91.
[2467] European Communities' written reply to Panel question No. 33 at the second substantive meeting.
[2468] European Communities' written reply to Panel question No. 33 at the second substantive meeting, The table is based on USITC Report, Vol. II, p. LONG-34, table LONG-28. In the columns marked "constant" the data for "other factory costs" has been kept constant. Figures which have been kept constant have been italicised, and figures which change as a result of the simulation are put in bold.
[2469] European Communities' written reply to Panel question No. 33 at the second substantive meeting.

Statements by United States as to why the econometric approach toward quantification are unreliable	*Relevance for the evidence* presented *in this case*
Regression studies need "a large number of observations"[2470] and that "econometricians strive for at least 30 data point."[2471]	None – Foreign respondents' studies contained 65 data points[2472];
Models must control for the fact that some of the causal factors may be dependent on other variables[2473] (*e.g.*, hot-rolled prices may influence cold-rolled prices, but one must incorporate the fact that hot-rolled prices depend on scrap prices).	None – Foreign respondents studies controlled for the fact that certain factors are dependent on other factors by "nesting" a series of models[2474];
Regression studies must control for statistical issues such as serial correlation and stationarity.[2475]	None – Foreign respondents studies controlled for stationarity and serial correlation by first differencing and AR1 adjustments.[2476]

7.1011 Japan and Brazil contend that given that that foreign respondents' models used statistical techniques that accounted for all of the United States' stated concerns there is no basis for the United States' conclusion that "…given these limitations, a regression model would be no more useful as a means of satisfying the requirements of the Agreement on Safeguards than any other economic model".[2477] Japan and Brazil submit that concerns expressed by the United States were controlled in the model, making its results reliable.[2478]

7.1012 The United States responds by noting that the foreign respondents model did not addresses the issues associated with linear regression models outlined in the United States' written responses to the Panel's first set of questions. As the Panel is aware, in its response to question No. 88 of the Panel's first set of written questions to the parties, the United States noted that linear regression

[2470] United States' written reply to Panel question No. 88 at the first substantive meeting.
[2471] United States' written reply to Panel question No. 88 at the first substantive meeting.
[2472] Brazil's first written submission, Common Exhibits CC-52, 53, 54.
[2473] United States' written reply to Panel question No. 88 at the first substantive meeting.
[2474] Brazil's first written submission, Common Exhibits CC-52, 53, 54. See pp. 227-229 in Orley Ashenfelter, Phillip B. Levine, David J. Zimmerman, *Statistics and Econometrics: Methods and Applications*, (New York, John Wiley and Sons, Inc.), 2003 for a discussion of the statistical basis for "nesting" the endogenous variables. In technical terms, this is referred to as using the "fitted" or "predicted" endogenous variables. *See also* Chapter 15 in Jeffrey M. Wooldridge, *Introductory Econometrics*, (Stamford: Southwestern College Publishing) 2000; pp. 366-369 in G.S. Maddala, *Introduction to Econometrics*, 2nd edition, (New York: Macmillan Publishing),1992.
[2475] United States' written reply to Panel question No. 88 at the first substantive meeting.
[2476] Brazil's first written submission, Common Exhibits CC-52, 53, 54. A discussion of these techniques can be found in many undergraduate textbooks and in nearly every introductory graduate textbook. See W.H. Greene, *Econometric Analysis, 4th edition*, Prentice Hall, 2000; E.R. Berndt, *The Practice of Econometrics*, Addison-Wesley, 1991; W.E. Griffiths, R.C. Hill and G.G. Judge, *Learning and Practicing Econometrics*, John Wiley & Sons, 1993; Peter Kennedy, *A Guide to Econometrics, 4th edition*, MIT Press, 1998.
[2477] Japan's second written submission, paras. 158 and 159; Brazil's second written submission, para. 86.
[2478] Japan's second written submission, paras. 158 and 159; Brazil's second written submission, para. 90.

models had inherent limitations that would complicate their use in a safeguards proceeding, including the fact that linear regression models involving multiple variables are able to estimate the likely effects of individual independent variables in an equation only to the extent that those effects are attributable solely to the independent variable, that is, to the extent that they do not move in tandem with the effects of other independent variables. According to the United States, Brazil appears to misunderstand this problem. Brazil confuses the second limitation outlined by the United States – which is a limitation inherent in multiple variable linear regression models which cannot be specifically controlled for – with the issue of "endogeneity," which is a limitation that a properly designed linear regression models *can* control for. "Endogeneity" is a term used to describe the fact that certain independent variables used in a linear regression may be dependent on other independent variables in the equation. As Brazil appears to recognize, a linear regression model can be properly designed to resolve the endogeneity issue. However, endogeneity does not address the second limitation described by the United States in its response to question No. 88. As that response showed, regression models involving multiple variables are only able to estimate the effects of these individual variables to the extent that those effects are attributable solely to that independent variable. A multiple variable regression analysis would not include in this estimate the effects attributable to such a variable to the extent those effects move in tandem with, and cannot be disentangled from, the effects of other independent variables. These movements in tandem can occur, *whether or not the independent variables are related*. Thus, in a situation in which various factors combine to increase (or decrease) the injury suffered by the industry, a multiple variable regression model would underestimate (or overestimate) the injurious effects of imports because it would not provide an estimate for the effects that imports have in common with other injury factors. Moreover, this limitation of linear regression models is a limitation inherent in every multiple variable linear regression model and simply cannot be controlled for by designing the model in a particular way. The model submitted by the foreign producers simply does not control for this problem.[2479]

7.1013 The United States argues that no complainant has actually provided the Panel with a technical description of an economic model that quantifies the overall level of injury caused by imports.[2480] Moreover, complainants have not provided a technical explanation of the manner in which a competent authority can perform such a quantification. Instead, they have made bald assertions that economists and statisticians have been developing models and techniques to answer these sorts of questions "for more than 100 years".[2481] After noting that the foreign steel producers provided the USITC with an econometric model that quantified the effects of imports in the steel safeguards investigation, they contend that the USITC was required by the Agreement on Safeguards to use the model or develop its own econometric analysis to rebut it.[2482] [2483]

7.1014 In any event, the United States argues that the complainants are mistaken when they imply that the USITC failed to perform a quantitative analysis of the effects of imports on the industry.[2484] The USITC clearly performed a quantitative assessment of the manner in which imports and other factors affected the condition of the industry during the period of investigation. According to the United States, the USITC collected extraordinary volumes of quantitative data concerning the prices and volume of imports, the prices of domestic merchandise, the trade and financial operations of the

[2479] United States' written reply to Panel question No. 38 at second substantive meeting.
[2480] United States' second written submission, para. 130.
[2481] Japan's written reply to Panel question No. 85 at the first substantive meeting; Brazil's written reply to Panel question No. 85 at the first substantive meeting.
[2482] Japan's written reply to Panel question No. 85 at the first substantive meeting; Brazil's written reply to Panel question 85 at the first substantive meeting.
[2483] United States' second written submission, para. 131.
[2484] Brazil's first oral statement, para. 34.

domestic industry, the effect of imports and other factors on the industry's operations, and the conditions of competition in each of the markets in question. After collecting this data, the USITC examined in detail the manner in which imports affected each of the industry's injury indicia and examined the extent to which other factors adversely affected those data. According to the United States, it is clear that this analysis was both detailed and based primarily on quantitative data.[2485]

7.1015 Finally, the United States submits that it is not true that the United States is "eager" to avoid the use of economic models in safeguards investigations. It notes in this regard that it has developed and used such models in its anti-dumping and safeguards investigations. The United States believes, however, that it is important to dispel the notion that the use of economic modeling lends any more accuracy or scientific certainty to the assessment of the amount of injury caused by imports or other injury factors than that afforded by the USITC's current analysis. Economic models are subject to substantial ranges of error due to variations in the reliability, consistency, or amount of statistical data used in them. Moreover, many economic models rely on quantitative inputs (like elasticities of supply or substitution) that are only, in essence, numerical assessments of qualitative judgments about condition of competition in the market. In sum, economic models will generally only result in quantitative estimates of the likely effects of imports on particular indicators of an industry's condition.[2486] The United States points out that economic models are no more precise a method in assessing injury than the examination of hard, quantitative market data that the USITC now performs when conducting its causation analysis.[2487]

7.1016 Japan and Brazil also argue that it is possible to quantify the effects of different factors given that the United States undertook such a quantification exercise in relation to Article 5.1 of the Agreement on Safeguards.[2488] Korea argues that if it can be determined what level of relief is necessary to repair injury caused by imports alone, surely it can be determined what level of injury was caused by imports alone. Korea further submits that it is rather noteworthy that the United States has been able to develop an *ex post facto* economic analysis to attempt to justify its remedy but cannot perform an economic analysis to identify the injury caused by various factors. This is particularly problematic when, according to the Appellate Body in *US – Line Pipe*, the permissible extent of the measure should be found in the analysis of increased imports, causation, and serious injury.[2489]

7.1017 The United States argues that in contrast to the type of quantification envisioned by some complainants, the numeric exercises in the United States' first written submission with respect to Article 5.1 did not purport to measure injury as a whole, or even the actual effect of imports on a particular factor or factors. The United States recognized that the calculations would reflect the underlying qualitative assumptions or qualitative inputs and, as a result, would at best estimate the magnitude of effects, rather than their actual values. However, within these confines, the United States calculations provide a useful confirmation of the qualitative conclusion reached by the United States that the steel safeguard measures were applied no more than the extent necessary to prevent or remedy the injury attributable to imports. The United States submits that only a qualitative

[2485] United States' second written submission, para. 135.
[2486] United States' second written submission, para. 136.
[2487] United States' second written submission, para. 137.
[2488] Japan's written reply to Panel question No. 88 at the first substantive meeting; Brazil's written reply to Panel question No. 88 at the first substantive meeting.
[2489] Korea's written reply to Panel question No. 88 at the first substantive meeting; Korea's second written submission, para. 156; see also Norway's second written submission, para. 159; Norway's first oral statement on behalf of the complainants, paras. 18-20.

evaluation of the effects of imports and other factors of the sort used by the USITC would provide the necessary level of certainty. [2490]

(v) Consistency of the causation test applied by the USITC with WTO jurisprudence

7.1018 Japan and Brazil note that, in this case, the USITC applied the "substantial cause" test prescribed by the United States' statute, which defines "substantial cause" as "a cause which is important and not less than any other cause". They assert that the USITC's limited and narrow causation analysis in the instant case according to which the USITC found that increased imports must be both an important cause of the serious injury or threat and a cause that is equal to or greater than any other cause is essentially the same as its causation analyses in *US – Wheat Gluten*, *US – Lamb*, and *US – Line Pipe*.[2491] The European Communities, Japan, China, Switzerland, Norway, New Zealand and Brazil argue that the Appellate Body found that causation analysis insufficient to meet the requirement of non-attribution under Article 4.2(b) in each of those cases.[2492]

7.1019 Japan argues that, as a growing body of WTO jurisprudence demonstrates, mere compliance with United States law most definitely does not ensure compliance with international obligations of the United States under the WTO Agreement.[2493] The European Communities, Switzerland and Norway note that while they are not challenging, in this dispute, the legislation on the basis of which the United States applies safeguard measures but rather the application of this legislation in this particular safeguard investigation, they cannot but point out that such application continues the practice criticised by the Appellate Body.[2494] Switzerland adds that there can be little doubt that the reason why the United States has been found in successive WTO disputes to have failed to properly ensure the non-attribution of injury caused by other factors to increased imports is the fact that the USITC applies standards which do not meet those of the Agreement on Safeguards.[2495]

7.1020 The European Communities, Japan, Norway, New Zealand and Brazil assert that in each case, the Appellate Body held that the analysis violated the non-attribution requirement because the USITC failed both to "separate" and "distinguish" the injurious effects caused by factors other than imports.[2496] Brazil submits that there is nothing in the USITC's report in this case that distinguishes it from the USITC's prior three reports. The general framework is the same. The USITC employed its "substantial cause" test as it did in the prior three cases, setting forth other causal factors of injury other than increased imports and then individually "examining" their relative causal importance vis-à-vis increased imports to determine if increased imports are important and no less important than each of those causes. As the Appellate Body has stated, such an examination is not enough. According to

[2490] United States' written reply to Panel question No. 88 at the first substantive meeting.

[2491] Japan's first written submission, para. 249; Brazil's first written submission, para. 176.

[2492] European Communities first written submission, paras. 435 and 457; Japan's first written submission, para. 249; Japan's second written submission, para. 105; China's first written submission, para. 425; Switzerland's first written submission, para. 278; Norway's first written submission, para. 301; New Zealand's first written submission, para. 4.120; Brazil's first written submission, para. 176.

[2493] Japan's first written submission, para. 248.

[2494] European Communities first written submission, para. 454; Switzerland's first written submission, para. 297; Norway's first written submission, para. 298.

[2495] Switzerland's first written submission, para. 297.

[2496] European Communities first written submission, paras. 435 and 457; Japan's first written submission, para. 249; Norway's second written submission, para. 115; New Zealand's second written submission, para. 3.110; Brazil's first written submission, para. 177.

Brazil, Article 4.2(b) requires something more to establish a genuine and substantial relationship of cause and effect between increased imports and serious injury.[2497] [2498]

7.1021 Japan and Norway argue that although an examination of the relative causal importance of the different causal factors may satisfy the requirements of United States law, such an examination does not, for that reason, satisfy the requirements of the Agreement on Safeguards. Japan asserts that a review of whether the United States complied with the non-attribution language in the second sentence of Article 4.2(b) can only be made in the light of the explanation given by the USITC for its conclusions on the relative causal importance of the increased imports, as distinguished from the injurious effects of the other causal factors.[2499] Norway argues that since the methodology used to analyse causation is itself flawed, it is not a surprise that the explanation by the USITC of its conclusions is also flawed.[2500] Norway further argues that the United States does not in its first written submission try to explain how they assessed the relative importance of the various factors that they admit contributed to the alleged serious injury, to ensure that increased imports were not attributed the injury caused by other factors.[2501] China also argues that the USITC failed to explain adequately, as required by Article 4.2(b), that injury caused to the domestic industry by other factors has not been attributed to increased imports, and, in consequence, the USITC could not establish the existence of the causal link, as it Article 4.2(b) requires, between increased imports and serious injury.[2502]

7.1022 Japan, Korea, Norway and Brazil argue that in this case the USITC made no attempt to rigorously "separate" or "distinguish" the serious injury caused by factors other than imports or to evaluate the extent these factors injured the domestic industry.[2503] Rather, according to Japan and Brazil, the USITC merely speculated that imports were a "substantial cause" of serious injury, a cause no less important than any other cause.[2504] By way of illustration, New Zealand argues that it is simply not enough to come to some vague and indeterminate conclusion that domestic capacity increases "were likely to have some effect on prices"[2505] but then take the analysis no further.[2506] Korea and Brazil submit that a "mere assertion" used to support a finding of a genuine and substantial causal link "does not *establish explicitly*, with a *reasoned and adequate explanation*, the injury caused by factors other than the increased imports was not attributed to increased imports".[2507] [2508]

7.1023 The European Communities, Switzerland and Norway argue that the USITC's analysis also fails to meet the standards set out in the Agreement on Safeguards because it is exclusively based on a relative comparison between individual causes of serious injury and increased imports. It, therefore, does not involve a separation and distinction of the injurious effects of other factors. Nor does it involve the attribution of serious injury suffered by the domestic industry to the various causes of

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[2497] Appellate Body Report, *US – Lamb*, para. 184.

[2498] Brazil's second written submission, para. 76.

[2499] Japan's first written submission, para. 250; Norway's second written submission, para. 115. Norway refers in this regard to Appellate Body, *US – Lamb*, para. 184.

[2500] Norway's second written submission, para. 115.

[2501] Norway's second written submission, para. 119.

[2502] China's second written submission, para. 190.

[2503] Japan's first written submission, para. 249; Korea's first written submission, para. 121; Norway's first written submission, para. 288; Brazil's first written submission, para. 160.

[2504] Japan's first written submission, para. 247; Brazil's first written submission, para. 175.

[2505] United States first written submission, para 494.

[2506] New Zealand's second written submission, para. 3.124.

[2507] Appellate Body Report, *US – Line Pipe*, para. 220 (emphasis in original).

[2508] Korea's first written submission, para. 119; Brazil's first written submission, para. 177; Brazil's second written submission, para. 77.

injury individually, which would permit a determination whether there is a "genuine and substantial" relationship between increased imports and serious injury.[2509] The European Communities submits further that this relative comparison does not permit the USITC to "establish, explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports".[2510] [2511]

7.1024 Similarly, Brazil argues that finding that increased imports are important and no less important than another cause is not the same as finding a genuine and substantial causal link.[2512] New Zealand argues that according to the USITC's approach, which requires a mere comparison between the causal effect of imports and other factors, as long as no single factor is more important than increased imports, the substantial cause test is met, even though collectively the other factors may be of far greater importance than increased imports. New Zealand submits that this does not require an overall evaluation of whether there is a genuine and substantial relationship between increased imports (as distinguished from other factors) and serious injury. In short, the USITC test allows a conclusion that causation exists even without proof of that genuine and substantial relationship.[2513] Relying upon the Appellate Body decision in *US – Lamb*, a mere "relative causation" assessment by itself does not comply with the requirement to assess the "nature and extent" of the "injurious effects" caused by a non-import factor as distinguished and separated from increased imports.[2514]

7.1025 More particularly, Korea argues that the United States still has not explained the method by which it "disentangled" the injurious effects of other factors from the injurious effects of imports[2515] and it has not explained how it has distinguished the effects of those other factors from imports. Merely commenting on the significance of another factor relative to imports either by comparison ("not less than any other cause") or by degree ("minor") is not sufficient because it does not separately consider or disentangle the effects of each factor in a straightforward and unambiguous manner.[2516]

7.1026 China notes that, as was decided in the *US – Lamb* dispute, an examination of the relative causal importance of the different factors does not satisfy the requirements of the Agreement on Safeguards. However, according to China, the investigating authority can nevertheless comply with Article 4.2(b) of the Agreement on Safeguards by establishing explicitly, with a reasoned and adequate explanation, that injury caused by other factors was not attributed to increased imports.[2517] China argues that in order to do this, in cases where the investigating authority believes that an alleged factor is not causing injury, it must explicitly, clearly and unambiguously state it and explain the reasons why. The explanation must be reasoned and adequate. To proceed otherwise would not ensure that alleged factors have been examined closely enough to establish that they are not contributing to the injury and as a result, there would be no guarantee that injury caused by other factors has not been wrongfully attributed to increased imports. On the other hand, if the investigating authority believes that an alleged factor is causing injury, it must assess that injury and not attribute it to increased imports.[2518] Nevertheless, in China's and Norway's view, when the USITC placed

[2509] European Communities' first written submission, para. 457; Switzerland's first written submission, para. 278; Norway's first written submission, para. 299.
[2510] Appellate Body Report, *US – Line Pipe*, para. 217.
[2511] European Communities' second written submission, para. 336.
[2512] Brazil's first written submission, para. 177; Brazil's second written submission, para. 77.
[2513] New Zealand's first written submission, para. 4.122.
[2514] New Zealand's second written submission, para. 3.124.
[2515] Appellate Body Report, *US – Line Pipe*, para. 211 (affirming Appellate Body Report, *US – Lamb*, para. 179, footnote 38)
[2516] Korea's second written submission, para. 155.
[2517] China's first written submission, para. 425.
[2518] China's first written submission, para. 426.

emphasis on the substantial cause methodology, it failed to fulfil the requirements of Article 4.2(b) of the Agreement on Safeguards since its conclusions regarding the effect of imports as compared to other factors were not clear, unambiguous nor straightforward and further, they did not establish that other factors did not cause injury and that injury caused by other factors was not attributed to increased imports. Moreover, the explanations given by the USITC to support its conclusions were not clear, straightforward, unambiguous. Further, according to China they were not reasoned and adequate.[2519]

7.1027 In response, the United States notes that, to date, the Appellate Body has issued four reports which describe the general principles applicable to a causation analysis in a safeguards proceeding. Nonetheless, the Appellate Body has specifically conceded that the standards it has announced in these reports leave "unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b)". Thus, according to the United States, it is clear that the Appellate Body has left to the discretion of the competent authority the job of developing the appropriate analytical methodologies needed to satisfy the requirements of Article 4.2(b).[2520]

7.1028 The United States also argues that, as can be seen from an examination of the explicit language of the Appellate Body's three prior reports (*US – Lamb*, *US – Wheat Gluten* and *US – Line Pipe*), the Appellate Body has never stated, as the complainants argue, that the USITC's causation methodology is inconsistent with the basic requirements of Article 4.2(b). Instead, on the three occasions that it addressed the USITC's causation analysis, the Appellate Body has faulted the USITC not for its choice of a particular causation analysis or for applying the "substantial cause" standard set forth in the statute, but because the USITC did not perform a "reasoned and adequate" explanation of the nature and extent of the injury caused by non-import factors in those particular cases, in the view of the Appellate Body. The United States submits that in these reports, the Appellate Body has simply found that the USITC should have discussed in more detail its analysis of the causal nexus between imports and injury.[2521]

7.1029 The United States argues that, in fact, the Appellate Body has actually approved the USITC's general analytical approach in several significant respects. For example, in *US- Lamb*, the Appellate Body explicitly noted that, by "examining the relative causal importance of different causal factors" as required under the United States' statute, the USITC clearly engages in the sort of "process to separate out, and identify, the effects of the different factors, including increased imports" that has been required by the Appellate Body in *US – Wheat Gluten*. Although the Appellate Body went on to state that it was, nonetheless, required to examine the USITC's reasoning in detail to assess whether it complied with the analytical guidelines announced in *US – Wheat Gluten*, the United States argues that it is clear from this statement that the Appellate Body does not believe that the "substantial cause" test set forth in the statute and applied by the USITC is inherently inconsistent with the Agreement on Safeguards .[2522]

7.1030 In counter-response, New Zealand concedes that the Appellate Body has observed that the Agreement on Safeguards allows a competent authority appropriate discretion to craft its own methodology. However the United States, in seizing on this point, ignores the fact that the Appellate Body has, nevertheless, gone on to find that the USITC violated the Agreement on Safeguards by

[2519] China's first written submission, paras. 374,464, 480, 497, 520; Norway's first written submission, para. 329.
[2520] United States' first written submission, paras. 417 and 436.
[2521] United States' first written submission, paras. 431, 432 and 437.
[2522] United States' first written submission, para. 433.

failing to provide for a correct non-attribution. In other words, a competent authority has discretion to develop and apply an appropriate methodology – so long as it delivers a result which complies with the Agreement on Safeguards.[2523] [2524]

7.1031 Similarly, the European Communities agrees that the Agreement on Safeguards does not expressly proscribe certain methodologies. However, according to the European Communities, it does prescribe certain functions that any methodology must satisfactorily execute (e.g. ensure non-attribution). The European Communities states that its charge against the United States is not that it is required to apply one methodology or another. Rather, the charge is that the methodology applied by the United States does not permit it to satisfactorily carry out the non-attribution analysis required by the Agreement on Safeguards.[2525] The European Communities requests the Panel to find that, in failing to "establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports", the United States has failed to establish the existence of a genuine and substantial relationship of cause and effect between increased imports and serious injury. Since the USITC applied the same methodology in each of its determinations, the European Communities submits that the methodological flaws that have been identified, by necessity, vitiate each of the individual determinations.[2526]

7.1032 Also in counter-response, the European Communities further argues that it is clear that while panels and the Appellate Body have found that the USITC did not provide a reasoned and adequate explanation, the reason for such findings is that the relative comparison methodology used by the USITC does not permit it to properly establish that the injurious effects of other factors are not attributed to increased imports.[2527] The European Communities states[2528] that it cannot fault the United States for referring to what must be the one remotely positive comment by the Appellate Body with respect to its causation practice. However, the United States can only qualify the statement in *US – Lamb* as "approving" the USITC's causation methodology by quoting very selectively from what the Appellate Body actually said. The European Communities submits that it sees nothing in the USITC Report to indicate how the USITC complied with the obligation found in the second sentence of Article 4.2(b). According to the European Communities, the USITC Report, on its face, does not explain the process by which the USITC separated the injurious effects of the different causal factors, nor does the USITC Report explain how the USITC ensured that the injurious effects of the other causal factors were not included in the assessment of the injury ascribed to increased imports. The USITC concluded only that each of four of the six "other factors" was, relatively, a less important cause of injury than increased imports.[2529]

7.1033 The European Communities also argues[2530] that the United States stretches the language of the Appellate Body in arguing that the Appellate Body actually "approved" the USITC's "general analytical approach". The USITC's general analytical approach, based as it is on a relative comparison, does not permit the USITC to make a reasoned and adequate explanation of how it separated and distinguished the injurious effects of other factors from the injurious effects of increased imports. Indeed, the Appellate Body quoted approvingly the Panel finding:

[2523] Appellate Body Report, *US – Lamb*, para. 181.
[2524] New Zealand's second written submission, para. 3.111.
[2525] European Communities' second written submission, para. 320.
[2526] European Communities' second written submission, para. 355.
[2527] European Communities' second written submission, para. 347.
[2528] European Communities' second written submission, para. 348.
[2529] Appellate Body Report, *US – Lamb*, paras. 184, 185. Footnotes omitted, italicisation in the original, underlining shows the text the United States has quoted in United States' first written submission, para. 433.
[2530] European Communities' second written submission, para. 349.

> "[T]hat the USITC's application of the 'substantial cause' test in the lamb meat investigation as reflected in the USITC Report did not ensure that threat of serious injury caused by other factors has not been attributed to increased imports."[2531]

7.1034 The European Communities submits[2532] that three panels have found the application of the relative comparison methodology to be WTO inconsistent. While two of the panels were reversed on some specific aspects of their reasoning with respect to causation, the Appellate Body did not reverse their ultimate conclusions that the USITC had failed to establish a causal relationship.[2533] The European Communities notes that, in *US – Line – Pipe*, the Panel, with the benefit of the clarifications offered by the Appellate Body's reports in *US – Wheat Gluten* and *US – Lamb*, found:

> "[I]t can be established that the methodology used in its analysis of the injury caused by the oil and gas industry decline has the objective (consistent with applicable United States law) of determining whether this factor is a more important cause of injury than the increased imports. We are not convinced that such a determination is enough to satisfy the requirements of Article 4.2(b), which mandates that injury caused by other factors not be attributed to the increased imports. Indeed, the USITC recognizes that the decline in the oil and gas industry was having injurious effects on the domestic line pipe industry. However, it is not apparent from this analysis how, if at all, the USITC separated the injurious effects of the decline in the oil and gas industry from the injurious effects of the increased imports. The USITC's analysis provides no insight into the nature and extent of the injury caused by the decline in the oil and gas industry. Instead, as in the *United States – Lamb Meat* case, the United States effectively assumed that the decline in the oil and gas industry did not cause the injury attributed to increased imports. As found by the Appellate Body in *United States – Lamb Meat*, such an assumption is inconsistent with Article 4.2(b). The same assumption was effectively made by the USITC in respect of the other causes of injury identified above, since its analysis of those factors was also confined

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[2531] Appellate Body Report, *US – Lamb*, para 187.
[2532] European Communities' second written submission, para. 351.
[2533] In the Panel Report *US – Wheat Gluten*, para. 8.154, the Panel found:

> "[T]hat the USITC examination into whether increased imports were 'a cause that is important and not less than any other cause' of serious injury and the resulting conclusion of the USITC that increased imports are 'an important cause of serious injury and a cause that is greater than any other cause' are not consistent with Article 4.2(b) SA as they do not ensure the non-attribution to imports of injury caused by other factors."

In the Panel Report, *US – Lamb*, para. 7.277 the panel concluded:

> "That the determinations by the USITC in respect of four of the six "other factors" examined do not constitute determinations that these factors made no appreciable contribution to the threat of serious injury. Rather, the USITC found that these four factors were "less important" causes than increased imports of the threat of serious injury, which in our view means that they were contributing in a more than insignificant way to that threat. Therefore, we conclude that the USITC's application of the "substantial cause" test in the lamb meat investigation as reflected in the USITC Report did not ensure that threat of serious injury caused by other factors has not been attributed to increased imports."

> to a determination of whether the injury caused by the relevant factor was not a more important cause of serious injury than increased imports."[2534]

7.1035 The European Communities argues[2535] that the Appellate Body upheld this analysis, expressed in the conclusion of the panel that the USITC "did not adequately explain" how it ensured that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports.[2536] The Appellate Body specifically quoted the findings of the USITC in the *US – Line Pipe* investigation, that:

> "Respondents also argued that we may not attribute injury caused by these factors to the imports. We have not done so. As required by the statute, after evaluating all possible causes of injury, we have determined that imports are an important cause of injury and are not less than any other cause."[2537]

7.1036 The European Communities submits[2538] that this did not "establish explicitly, with a reasoned and adequate explanation, that injury caused by factors other than the increased imports was not attributed to increased imports".[2539] In so doing, the Appellate Body considered the USITC's assertion that it had not attributed injury caused by other factors to increased imports. The European Communities submits that in the present case, the USITC does not even assert, in any of its product bundle determinations, that it has not attributed injury caused by other factors to imports. It simply states, on an individual basis, that other causes are not as important a cause as increased imports. Taken together with the statement of the Appellate Body in *US – Lamb* quoted above, this finding of the Appellate Body is a clear indication that the relative comparison carried out by the USITC does not permit it to provide the reasoned and adequate explanation of separation, distinction, and non-attribution which the Appellate Body has found that Article 4.2(b) of the Agreement on Safeguards requires.

7.1037 The United States points out that the "substantial cause" test set forth in the United States statute does not merely require the USITC to perform a "relative comparison" of injury caused by imports and non-import factors, as has been asserted by the complainants. Instead, the United States statute requires the USITC to make two separate findings when analysing the nature and extent of the injury caused by imports and other factors. First, the USITC must determine that increased imports are in and of themselves an "important" cause of serious injury to the domestic industry. Secondly, the USITC must also determine that imports are as "important" or "more important" a cause of injury than any other factor. Accordingly, it is clear that it is not sufficient under the United States statute for the USITC to find simply that imports are causing more injury than other factors. Instead, the United States statute specifically requires that the USITC must find that imports are an "important" cause of serious injury as well.[2540] The United States submits that, in light of these requirements, it is also clear that the "substantial cause" test does, in fact, require the USITC to identify the nature and extent of the individual factors causing injury to the industry, including increased imports. The statute first requires the USITC to identify the nature and extent of the injury caused by imports by assessing whether increased imports are an "important" cause of serious injury. The statute also requires the

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[2534] Panel Report, *US – Line Pipe*, para. 7.288.
[2535] European Communities' second written submission, para. 352.
[2536] Panel Report, *US – Line Pipe*, para. 7.290; Appellate Body Report, *US – Line Pipe*, para. 222.
[2537] P. I-30 of the USITC Report in the Line Pipe investigation, quoted by the Appellate Body in Appellate Body Report, *US – Line Pipe*, para. 218.
[2538] European Communities' second written submission, para. 352.
[2539] Appellate Body Report, *US – Line Pipe*, para. 220 (emphasis in original).
[2540] United States' first written submission, para. 439.

USITC to "examine factors other than imports" that are causing injury and to compare the "importance" of that injury to that caused by imports.[2541]

7.1038 In counter-response, the European Communities argues that two conclusions can be drawn from comments made by the United States in its submissions and in the USITC Report: the USITC determines the existence of a "substantial" causal link between increased imports and serious injury and thereafter the USITC determines whether, on an individual basis, alternative factors cause injury which is "equal to or greater than" that caused by increased imports.[2542] According to the European Communities, this is not consistent with Article 4.2(b) of the Agreement on Safeguards when the ordinary meaning, viewed in the light of its object and purpose is examined.[2543] More particularly, the European Communities submits that such an approach renders the non-attribution analysis nugatory, and is clearly inconsistent with Article 4.2(b) of the Agreement on Safeguards. It is incorrect to determine that there is a causal link before carrying out the non-attribution analysis. Moreover, the non-attribution analysis requires the separation and distinction of the injurious effects of, on the one hand, all alternative factors, and, on the other hand, increased imports.[2544]

7.1039 The European Communities submits[2545] that the Appellate Body clearly considers that the causal link determination can only be conclusively made after the non-attribution exercise has been carried out. Japan, Korea, China, Norway and New Zealand agree.[2546] According to the European Communities, the panel in *US – Line Pipe* recognized this failing in the United States' methodology:

> "We further note that the USITC immediately determines whether there is a link between the increased imports and the serious injury, without first attempting to separate out injury that is being caused by other factors […] We do not consider that such an analysis allows an investigating authority to determine whether there is "a genuine and substantial relationship of cause and effect" between the serious injury and the increased imports."[2547]

7.1040 In light of the foregoing, the European Communities argues that the USITC, therefore, ignored clear instructions from the Appellate Body, and the Panel's analysis in *US – Line Pipe*.[2548] [2549]

7.1041 In particular, the European Communities argues that in the following instances, the USITC determines that there is a causal link before purporting to examine the injurious effects of other factors:

[2541] United States' first written submission, para. 440.

[2542] European Communities' second written submission, para. 326.

[2543] European Communities' second written submission, paras. 328-331.

[2544] European Communities' second written submission, paras. 327 and 328.

[2545] European Communities' second written submission, para. 332; The European Communities refers additionally to Appellate Body Report, *US – Wheat Gluten*, para. 69 and Appellate Body Report, *US – Lamb*, para. 179.

[2546] Japan's written reply to Panel question No. 41 at the second substantive meeting; Korea's written reply to Panel question 41 at the second substantive meeting; China's first written submission, para. 352; China's written reply to Panel question No. 41 at the second substantive meeting; Norway's written reply to Panel question No. 34 at the second substantive meeting; New Zealand's written reply to Panel question No. 34 at the second substantive meeting.

[2547] Panel Report, *US – Line Pipe*, para. 7.289.

[2548] "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." Appellate Body Report, *US – Gasoline*, page 23.

[2549] European Communities' second written submission, para. 333.

Hot rolled bar

"We consequently conclude that the increased imports were an important cause of the serious injury sustained by the domestic hot-rolled bar industry".[2550]

Cold rolled bar

"Because the imports succeeded in increasing their share of the United States market in 2000, the domestic industry's production and shipments declined from 1999 levels notwithstanding the increase in United States apparent consumption."[2551]

Certain tubular products

"We find that imports have had a negative effect on the domestic industry over the period we have examined, particularly during the recent years of the period."[2552]

"We further find that increased imports are likely to cause serious injury to the domestic industry in the imminent future." [2553]

Carbon and alloy fittings (FFTJ)

"We find that imports are a substantial cause of serious injury." [2554]

Stainless steel bar

"In sum, we find that increased quantities of imports of stainless steel bar during the period were a substantial cause of the declines in the industry's trade and financial condition during this period." [2555]

Stainless steel rod

"In sum, we find that the increased quantities of imports of stainless rod during the period of investigation were an important cause of the declines in the industry's trade and financial conditions during this period." [2556]

Tin mill products

"I also find that increased imports are a substantial cause of serious injury to the domestic industry in that they are a cause which is important and not less than any other cause." [2557]

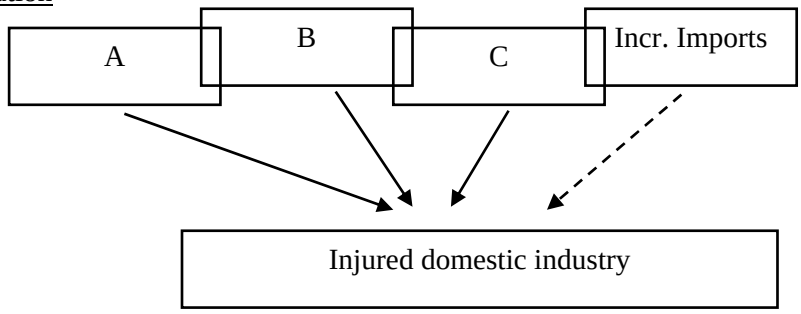
7.1042 According to the European Communities, a Member could not determine that there is a causal link if it cannot determine that imports could have caused the injury which has been observed

[2550] USITC Report, Vol. I, p. 97
[2551] USITC Report, Vol. I, p. 106
[2552] USITC Report, Vol. I, p. 163
[2553] USITC Report, Vol. I, p. 164
[2554] USITC Report, Vol. I, p. 177
[2555] USITC Report, Vol. I, p. 212
[2556] USITC Report, Vol. I, p. 221
[2557] USITC Report, Vol. I, p. 308

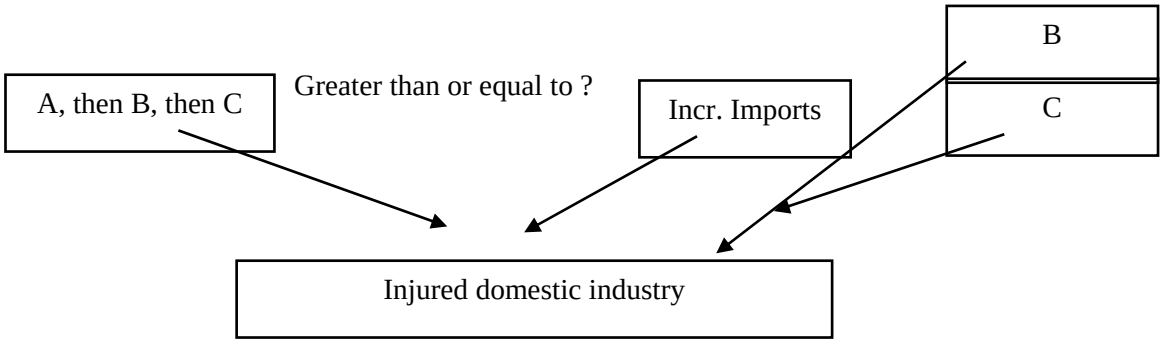
(necessitating the temporal correlation). Nor could it determine that a causal link exists if it only compared the injurious effects which it hypothesised are caused by increased imports with one other factor, because it may be the case that the observed injury is being caused by another factor.[2558] Similarly, Norway argues that the USITC examination of relative causes on an individual basis renders no determination of whether the aggregate effect of other causal factors is such that there is a "genuine and substantial causal link" between imports and injury.[2559]

7.1043 The European Communities submits that it is only by determining whether all of the other factors are, or are not, causing all of the observed injury, that a Member may appropriately ensure that it has not attributed injury caused by other factors to increased imports and thus ensured the existence of a genuine and substantial causal link between increased imports and the serious injury.[2560] The European Communities states that this approach, and the approach taken by the USITC, can be illustrated diagrammatically as follows (where A, B and C are alternative causes of injury):[2561]

Overall situation



USITC examination



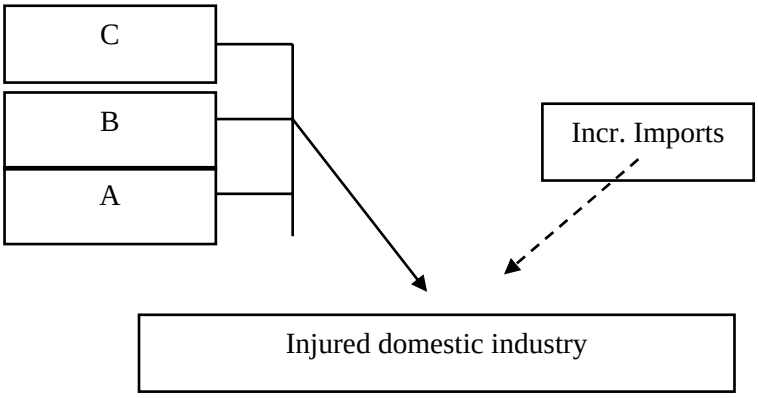
7.1044 According to the European Communities, the injurious effects of A are compared to the injurious effects of increased imports while the injurious effects of B and C are ignored (while the injurious effects of increased imports are assumed). Then the injurious effects of B are compared to the injurious effects of increased imports while the injurious effects of A and C are ignored. Finally,

[2558] European Communities' second written submission, para. 338.
[2559] Norway's second written submission, para. 115.
[2560] European Communities' second written submission, para. 337.
[2561] European Communities' second written submission, para. 338.

the injurious effects of C are compared to increased imports while the injurious effects of A and B are ignored.[2562]

7.1045 By way of example, New Zealand takes the case of a finding by the USITC that five factors are causing serious injury to the domestic industry, only one of which is increased imports. Proper analysis of the relevant data suggests that three of these causes, including increased imports, are particularly important and roughly equivalent to each other in causal effect. Yet, according to New Zealand, the USITC would claim that increased imports, contributing by less than a third to serious injury, met the "genuine and substantial relationship of cause and effect" standard under the Agreement on Safeguards.[2563]

Analysis required by the Agreement on Safeguards



7.1046 The European Communities notes that in its final diagram (above), the combined effects of A, B and C are assessed together, and in this manner it can be determined whether, once the effects of these other factors have been isolated, the hypothetical relationship of cause and effect between increased imports and serious injury is, in fact, genuine and substantial.[2564]

7.1047 The European Communities submits that it is quite clear that this is the analysis which is required by the Agreement on Safeguards. This follows from an interpretation of Article 4.2(b). Article 4.2(b) refers to the situation "when factors other than increased imports are causing injury [...] such injury shall not be attributed to increased imports". The phrase "such injury" is clearly a reference to the injury caused by "factors other than increased imports". A consideration of the object of Article 4.2(b), suggests that all factors must be considered collectively, otherwise it is not possible to determine with certainty the existence of a genuine and substantial relationship of cause and effect.[2565] According to the European Communities[2566], this has also been established by the Appellate Body. In *US – Wheat Gluten* the Appellate Body held, after requiring that the injurious effects of increased imports be distinguished from the injurious effects of other factors that:

[2562] European Communities' second written submission, para. 339.
[2563] New Zealand's second written submission, para. 3.89.
[2564] European Communities' second written submission, para. 340.
[2565] European Communities' second written submission, para. 341.
[2566] European Communities' second written submission, para. 342.

> "[T]he competent authorities can then […] attribute to increased imports, on the one hand, and , by implication, to other relevant factors, on the other hand, "injury" caused by all of these different factors, including increased imports."[2567]

7.1048 The European Communities and Norway argue[2568] that, by analysing the injurious effects of each other factor individually against the injurious effects of increased imports, the USITC is acting inconsistently with Article 4.2(b) of the Agreement on Safeguards. The European Communities and Norway refer to the Panel's decision in *US – Line Pipe*. It stated:

> "[T]he USITC takes each of the other factors, one at a time, and examines its relative causal importance with respect to the serious injury that it has previously determined to exist (*i.e.*, injury that has been caused by increased imports and all other factors). We note that the serious injury under examination remains "polluted" by the injurious effects, however, of the remaining other factors. Therefore, the United States is not assessing the relative causal importance of the injurious effects of the other factor at issue against the injurious effects of the increased imports. Rather, it assesses the injurious effects of the other factor at issue against the injurious effects of increased imports and the remaining other factors. We do not consider that such an analysis allows an investigating authority to determine whether there is "a genuine and substantial relationship of cause and effect" between the serious injury and the increased imports."[2569]

7.1049 In response, the United States submits that the USITC simply does not find that there is a genuine and substantial causal link between imports and serious injury before assuring that other non-import factors are not being attributed to imports. Instead, the USITC first examines whether there is a correlation of trends between increased imports and declines in the overall condition of the domestic industry and then separates and distinguishes the effects of imports from those of other factors before concluding whether there is a "genuine and substantial" causal link between increased imports and serious injury. In other words, the USITC performs both of these analytical steps before ultimately concluding that imports have caused serious injury to the domestic industry.[2570]

7.1050 The United States submits that the European Communities also appears to misunderstand the Appellate Body's guidance concerning a proper causation analysis in a safeguards proceeding. First, the European Communities fails to recognize that the Appellate Body has stated that the "central" consideration in a competent authority's causation analysis is an assessment whether there is a "relationship between the movements in imports (volume and market share) and the movement in injury factors".[2571] Indeed, the USITC examines whether there is such a correlation as the first step in its analysis because the existence of a correlation between import trends and movements in the industry's performance factors is generally a strong indication of a causal link between imports and serious injury. Second, the European Communities' argument also appears to be premised on a mistaken reading of the Appellate Body's discussion of the principles that should guide a competent authority's non-attribution obligation. Although the Appellate Body stated in its *US – Wheat Gluten* report that "Article 4.2(b) presupposes ... *as a first step* in the competent authority's examination of causation that the injurious effects caused to the domestic industry by increased imports are

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[2567] Appellate Body Report, *US – Wheat Gluten*, para. 69.

[2568] European Communities' second written submission, para. 343; Norway's second written submission, para. 118.

[2569] Panel Report, *US – Line Pipe*, para. 7.289. (emphasis added)

[2570] United States' written reply to Panel question No. 41 at the second substantive meeting.

[2571] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

distinguished from the injurious effects caused by other factors", the Appellate Body did not state that this "first step" requires the competent authority to identify the nature and extent of non-import factors *before* assessing whether there was a correlation between increased imports and declines in the condition of the industry. On the contrary, the Appellate Body has expressly stated that the analytical steps satisfying the non-attribution obligation outlined in *US – Wheat Gluten* "simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b)" and are not actually "legal 'tests' mandated by the text of the Agreement on Safeguards".[2572] Moreover, the Appellate Body has specifically stated that it is not "imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities".[2573] In other words, the Appellate Body has not stated that the competent authorities must first isolate and distinguish the effects of non-import factors before assessing whether there is a correlation between import trends and declines in the industry's condition. Rather, the particular sequence of analytical steps does not matter as long as the analysis as a whole complies with the obligations of the Agreement on Safeguards , in line with reports adopted by the Appellate Body.[2574]

7.1051 China makes a similar argument to that put forward above by the European Communities. China refers[2575] to the Appellate Body's finding in *US – Line Pipe* that:

> "The causation requirement in Article 4.2(b) can be met where the serious injury is caused by the interplay of increased imports and other factors." [2576]

7.1052 China submits that the word "interplay" was appropriately chosen as there are several factors, besides increased imports, contributing simultaneously to the situation of the domestic industry. Interaction of all the various factors influences the positive or negative developments in the domestic industry. China submits that it would, therefore, be misleading to make a comparison between increased imports and each of the factors only, instead of analysing the "injurious imports" and the injury caused by the interplay of other factors.[2577]

7.1053 China also refers[2578] to the Appellate Body's finding in *US – Wheat Gluten:*

> "Under Article 4.2(b) of the Agreement on Safeguards, it is essential for the competent authorities to examine whether factors other than increased imports are simultaneously causing injury. If the competent authorities do not conduct this examination, they cannot ensure that injury caused by other factors is not "attributed" to increased imports."[2579]

7.1054 China submits that, accordingly, investigating authorities have to distinguish the effects of increased imports from the effects of all the other relevant interacting factors in relation to the determination as to whether there is a genuine and substantial relationship of cause and effect between the increased imports and serious injury.[2580]

[2572] Appellate Body Report, *US – Lamb*, para. 178.
[2573] Appellate Body Report, *US – Lamb*, para. 178.
[2574] United States' written reply to Panel question No. 41 at the second substantive meeting.
[2575] China's second written submission, para. 181.
[2576] Appellate Body Report, *US – Line Pipe*, para. 209 (emphasis added).
[2577] China's second written submission, para. 182.
[2578] China's second written submission, para. 182.
[2579] Appellate Body Report, *US – Wheat Gluten*, para.91 (emphasis added).
[2580] China's second written submission, para. 183.

7.1055 China notes that the USITC essentially determines whether the imports are as important or more important cause of injury than any other factor. According to China, the USITC basically takes one factor from the group of "other factors" and compares individually their importance, one by one, with the importance of the effects of imports. The United States based its determination on a mere comparison between increased imports and each of the factors taken individually. Such an analysis allowed the United States to artificially identify the existence of a genuine and substantial causal link between imports and injury, without taking into account that the aggregated effect of other factors was a greater cause of injury than increased imports. [2581]

7.1056 China argues, firstly, that the examination on a factor-by-factor basis does not reflect completely the interplay of the factors, and thus, does not show and distinguish the aggregate effect of other causes of the injury suffered by the domestic industry.[2582] Similarly, Norway argues that the USITC looks at imports as one factor to be measured not against the collective weight of the other factors causing injury, but only measured against the other factors one by one.[2583] [2584] Norway submits that whenever there are two or more other factors, the United States is bound to get it wrong. Norway argues that even where there is only one other factor, this other factor will still be discounted should it be "equal to but not greater cause than imports". This is clearly explained by Commissioner Miller in the USITC Report, where she states that: "I thus find that increased imports are a substantial cause of serious injury in that they are a cause which is important and not less than any other cause …".[2585] [2586]

7.1057 Brazil believes that the interplay of various factors on the performance of the domestic industry in the importing country should be analysed.[2587] Similarly, the European Communities submits that assessing the cumulated effects of alternative factors is necessary in order to determine if a causal link exists.[2588] Japan states that separating and distinguishing causes should include consideration of the interplay of factors in the sense that injury caused by the collective interaction of other factors on the one hand, and injury caused by increased imports on the other need to be distinguished.[2589] It would be highly artificial to solely examine each factor separately if it was found that the interplay of various factors affected the industry. It may be that the combined effects of several factors is greater than any factor considered separately. For example, a fall in market demand at the same time that mini-mills added more capacity would produce a much more profound effect on sales and profits of the integrated sector than either single factor considered separately.[2590]

7.1058 China argues, secondly, the factor-by-factor examination is limited to a comparison of the causal importance of each of the factors. It is not a distinction of the mutually reinforcing effects of other relevant factors causing the injury from the imports factor.[2591] China submits that, therefore, by failing to distinguish the injury caused by the collective interaction of other factors on the one hand, from the injurious effects of increased imports on the other, the USITC did not have a proper basis for the determination of existence of a "genuine and substantial causal link" between imports and injury

[2581] China's second written submission, paras. 184 and 185; China's reply to Panel question No. 32 at the second substantive meeting.
[2582] China's second written submission, para. 186.
[2583] United States' first written submission, para. 423.
[2584] Norway's second written submission, para. 116.
[2585] USITC Report, Vol. I, p. 308. (Exhibit CC-6)
[2586] Norway's second written submission, para. 117.
[2587] Brazil's written reply to Panel question No. 32 at the second substantive meeting.
[2588] European Communities' written reply to Panel question No. 32 at the second substantive meeting.
[2589] Japan's written reply to Panel question No. 32 at the second substantive meeting.
[2590] Korea's written reply to Panel question No. 32 at the second substantive meeting.
[2591] China's second written submission, para. 187.

suffered by the domestic industry, and could not have come to the conclusion that imports contributed "substantially"[2592] to the serious injury.[2593] China argues that, accordingly, this approach does not ensure that the serious injury caused by other factors than increased imports that are causing injury to the domestic industry at the same time – simultaneously – is not attributed to imports, as required by Article 4.2(b) of the Agreement on Safeguards.[2594]

7.1059 In response, the United States argues that a competent authority is not required to assess whether imports are a more important cause of serious injury than all other possible factors before imposing a safeguards remedy. The Agreement on Safeguards simply does not contain a requirement that a competent authority find that the injurious effects of imports are greater than the cumulated effects of all other injurious factors. In fact, the Agreement contains no language requiring a competent authority to weigh the importance of the injurious effects of increased imports against any factor, either individually or collectively. Instead, as long as there is a "genuine and substantial" causal relationship between increased imports and a significant overall impairment in the condition of the industry, and as long as the competent authority does not attribute the effects of other factors causing injury to imports, the requirements of the Agreement on Safeguards are satisfied. Indeed, even the Appellate Body has interpreted the Agreement as requiring a competent authority to "separate and distinguish" the injurious effects of individual factors causing injury from one another when performing its injury analysis. Even though this separation and distinction of individual injury factors may be "difficult," the Appellate Body has directed that it be done.[2595]

7.1060 The United States also contends that, in its steel determination, the USITC has taken great pains to identify the nature and scope of the injury caused by both imports and other individual factors, to assess the extent of injury, if any, that each of these individual factors has caused to the industry, and to ensure that it does not attribute the effects of non-import factors to imports in its causation analysis. Indeed, even Japan appears to concede that the United States did actually "isolate" the injurious effects of each of the factors by evaluating the importance of each factor in relation to increased imports. The USITC's efforts in this regard are in full compliance with the principles outlined by the Appellate Body in *US -Wheat Gluten* and other cases, i.e., that competent authorities "separate" and "distinguish" the effects of increased imports from those of all other individual injury factors in safeguards investigations.[2596]

7.1061 In response, the United States submits that a "reasoned and adequate" explanation of the injurious effects of imports and non-import factors will properly take into account the manner in which the interplay of various factors (both import and non-import) have caused injury to an industry. The United States also believes that the USITC's analysis of the injurious effects of imports and non-import factors for all steel products covered by remedies appropriately identified the nature and extent of the injury attributable to all non-import factors, and therefore adequately assured that injury caused by other factors was not attributed to the imports.[2597]

(vi) Treatment of imports from free-trade areas

7.1062 The European Communities, Japan, China, Norway, New Zealand and Brazil argue that in the *US – Wheat Gluten* and *US – Line Pipe* disputes, the Appellate Body held that in excluding NAFTA

[2592] United States' first written submission, para.407.
[2593] China's second written submission, para. 188.
[2594] China's second written submission, para. 189.
[2595] United States' first written submission, para. 533.
[2596] United States' first written submission, para. 534.
[2597] United States' written reply to Panel question No. 32 at the second substantive meeting.

countries from a safeguard measure, the United States must offer a "reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources 'satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards'."[2598]

7.1063 According to the European Communities, China and Norway, since excluded imports may be causing injury, the existence of a genuine and substantial causal link between non-excluded imports and serious injury can only be determined if the injury caused by excluded imports is not attributed to non-excluded imports.[2599] They argue that this requires two steps. First, it must be determined whether excluded imports are causing injury. If it is found that such excluded imports are causing injury then any such injury must not be attributed to non-excluded imports. The European Communities argues that irrespective of when or how a decision is taken to exclude certain imports, a determination must be made showing that the conditions for the application of a safeguard measure are met with respect to non-excluded imports.[2600]

7.1064 Japan, Korea, China, Norway and Brazil argue that increased imports coming from sources that are eventually excluded from the safeguard measure must be treated as an "other" factor in the causation/non-attribution analysis. Norway argues that this requires that they be excluded "up front", and not even considered for "increased imports".[2601] More specifically, Japan and Brazil argue that imports are a causal factor with respect to the issue of serious injury because they compete with the domestic like product. It would undermine the causation analysis required by the Agreement on Safeguards if a competent authority could render some portion of those imports meaningless simply by excluding certain sources from a measure. Korea believes that under Article 2.2 of the Agreement on Safeguards, imports which are not subject to a safeguard measure, cannot be used to satisfy the conditions contained in Article 2.2 and elaborated in Article 4.2 of the Agreement on Safeguards. Brazil submits that it is not enough that the competent authority separates and distinguishes all of the other causal factors other than the subject and excluded imports. If the competent authority does not separate and distinguish the effect of imports from excluded sources, it is potentially sanctioning a measure against subject imports for which there may not be a genuine and substantial causal link to serious injury.[2602] Further, China argues that if a certain portion of imports is not subject to a safeguard measure, then such imports must logically be "other factors"; they do not fall in any "third" category, or a "black hole" of causation.[2603]

7.1065 The European Communities argues that parallelism requires that all the conditions for the application of a safeguard measure must exist with respect to the imports to which the measure is

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[2598] For instance, European Communities' first written submission, para. 488 et seq.; Japan's written reply to Panel question No. 82 at the first substantive meeting; China's second written submission paras. 191-193; Norway's written reply to Panel question No. 82 at the first substantive meeting; New Zealand's written reply to Panel question no. 82 at the first substantive meeting; Brazil's second written submission, para. 102; Brazil's written reply to Panel question No. 82 at the first substantive meeting.

[2599] European Communities' written reply to Panel question No. 82 at the first substantive meeting; China's second written submission, paras. 195-196; Norway's written reply to Panel question No. 82 at the first substantive meeting.

[2600] European Communities' written reply to Panel question No. 82 at the first substantive meeting; Norway's written reply to Panel question No. 82 at the first substantive meeting.

[2601] Norway's second written submission, para. 182.

[2602] Japan's written reply to Panel question No. 82 at the first substantive meeting; Korea's written reply to Panel question No. 82 at the first substantive meeting; China's second written submission, paras. 197 and 198; Brazil's second written submission, para. 103; Brazil's written reply to Panel question No. 82 at the first substantive meeting.

[2603] China's second written submission, para. 198.

applied. If an investigating authority does not determine whether excluded imports are causing serious injury (as opposed to "contributing importantly" to serious injury), and does not then ensure that injury caused by such excluded imports is not attributed to the non-excluded imports, the causation analysis is automatically flawed.[2604] Similarly, New Zealand and Brazil argue that absent a reasoned and adequate explanation for an exclusion that establishes explicitly that the subject imports satisfied the conditions for the application of a safeguard measure, a violation of the parallelism requirement does result in a WTO-inconsistent causation analysis.[2605] Korea argues that if parallelism is violated, the measure is not limited to the extent necessary to remedy the serious injury caused by the increase in imports subject to the measure. For the same reason, the causation analysis in such a case is inconsistent with the requirement set out in the Agreement on Safeguards because serious injury caused by sources excluded from the measure was not treated as an "other factor" and attributed to imports covered by the measure.[2606] In contrast, Japan argues that a violation of the parallelism requirement does not automatically result in a WTO-inconsistent causation analysis. The Appellate Body has stated that parallelism requires that "the imports included in the determination made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2". Through a reasoned and adequate explanation of an exclusion that establishes explicitly that the subject imports satisfied the conditions for the application of a safeguard measure, the competent authority can effectively cure the parallelism violation.[2607]

7.1066 In response, the United States argues by way of general response that although the Appellate Body has stated that the United States must perform a parallel "causation" analysis with respect to the injury caused by non-NAFTA imports when it excludes Canada and Mexico from a safeguards remedy, it has not stated that the United States must perform a separate non-attribution analysis for these imports, either in its initial causation analysis covering all imports, or in the causation analysis performed as a part of the required "parallelism" analysis discussed in the *US – Wheat Gluten* and *US – Line Pipe* cases.[2608]

7.1067 The United States argues, as an initial point, that there is nothing in the language of the Agreement on Safeguards or the findings of the Appellate Body that indicates that the USITC must consider Canada and Mexican imports to be an other factor causing injury when performing its initial assessment of whether imports have caused serious injury to the industry. At this stage of the USITC's analysis – that is, before the USITC considers whether Mexico and Canada should be excluded from the remedy – the USITC is required by the United States statute and the Agreement on Safeguards to assess whether imports from all sources have been a substantial cause of serious injury to the domestic industry. In this regard, the United States notes that the United States statute and the Agreement on Safeguards both require the USITC to perform its general causation analysis by including "imports" – that is, all imports of the product concerned, not merely those eventually included in the measure – in its analysis. Moreover, according to the United States, the Appellate Body has not indicated in its prior findings that there is any reason for a competent authority to exclude any category of imports from its initial injury analysis. Accordingly, under the language of the statute and the Agreement, there is simply no basis for the USITC to treat these products in its initial injury analysis as though they were something other than imports.[2609]

[2604] European Communities' written reply to Panel question No. 83 at the first substantive meeting.

[2605] New Zealand's written reply to Panel question No. 83 at the first substantive meeting; Brazil's written reply to Panel question No. 83 at the first substantive meeting.

[2606] Korea's written reply to Panel question No. 83 at the first substantive meeting.

[2607] Japan's written reply to Panel question No. 83 at the first substantive meeting.

[2608] United States' first written submission, para. 452.

[2609] United States' first written submission, para. 453.

7.1068 The United States points out that the second sentence of Article 4.2(b) of the Agreement – which is the provision of the Agreement that requires a competent authority not to attribute to imports the effects of other factors – specifically states that, "when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports".[2610] Accordingly, the Agreement on Safeguards indicates that a non-attribution analysis is only required for factors "other than imports" that may be causing injury to the domestic industry, even when certain imports are excluded from the remedy.[2611]

7.1069 The United States argues that, similarly, there is no reason that the USITC should be required to treat these imports as a "non-import" cause of injury in the context of its "parallelism" causation analysis. The United States asserts that the Appellate Body in *US – Wheat Gluten* has found that the Agreement on Safeguards requires the United States to perform a second causation analysis that excludes Canadian and Mexican imports from its assessment of the causal link between imports and the condition of the industry, when the United States finds that Canadian and Mexican imports should be excluded from the safeguards remedy under the NAFTA exclusion. However, the requirement that the United States exclude these imports from its "parallelism analysis" in effect requires the United States to treat these imports as an "other" cause of injury and to distinguish the price and volume effects of NAFTA imports from non-NAFTA imports.[2612]

7.1070 In counter-response, Norway submits[2613] that when describing the legal rule applicable under the Agreement on Safeguards, the United States is agreeing that it has made a mistake, and that it is required after all to do a non-attribution analysis treating these imports as an "other" factor causing injury. In the words of the United States:

> "[T]he Appellate Body has found that the Safeguards Agreement requires the United States to perform a second causation analysis that excludes Canadian and Mexican imports from its assessment of the causal link between imports and the condition of the industry, when the United States finds that Canadian and Mexican imports should be excluded from the safeguards remedy under the NAFTA exclusion.[2614] However, the requirement that the United States exclude these imports from its 'parallelism analysis' in effect requires the United States to treat these imports as an 'other' cause of injury and to distinguish the price and volume effects of NAFTA imports from non-NAFTA imports."[2615]

7.1071 China submits that, as the excluded NAFTA imports are to be seen as "other factor" within the meaning of Article 4.2(b) of the Agreement on Safeguards, the United States is wrong in stating that nothing in the Agreement on Safeguards, as construed by the Appellate Body reports requires the United States to conduct a non-attribution analysis of the NAFTA imports.[2616] The European Communities argues[2617] that it is undeniable that the Appellate Body has not said, in so many words, that a competent authority must conduct a non-attribution analysis for excluded imports. However, the Appellate Body has said that in order to satisfy the requirement of parallelism:

[2610] Agreement of Safeguards, Article 4.2(b).
[2611] United States' second written submission, para. 150.
[2612] United States' first written submission, para. 454.
[2613] Norway's second written submission, para. 126.
[2614] Appellate Body Reports *US – Wheat Gluten*, para. 96; *US – Line Pipe*, para. 179 *et seq.*
[2615] United States' first written submission, para. 454. (emphasis added)
[2616] China's second written submission, paras. 198-199.
[2617] European Communities' second written submission, para. 362.

> "[I]t would be necessary for the United States to demonstrate, consistent with our ruling in *US – Wheat Gluten*, that the USITC provided a *reasoned and adequate explanation* that *establishes explicitly* that imports from non-NAFTA sources 'satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*.' "[2618]

7.1072 According to the European Communities, evidently, in order to ensure that non-FTA imports satisfy the conditions for the application of a safeguard measure, a Member must show that all the elements of a determination justifying the imposition of a safeguard measure are present for the non-excluded imports.[2619] The European Communities submits that this is confirmed when Article 4.2(b) of the Agreement on Safeguards is read in light of the Appellate Body's findings on parallelism. Article 4.2(b) provides that "when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports". "Increased imports" in this phrase must be read as non-excluded imports, because a competent authority must find a genuine and substantial relationship of cause and effect between such non-excluded imports and serious injury. Consequently, "factors other than increased imports" must be understood as all non-import factors (e.g. increased capacity, declining demand etc.) and, if a Member decides to exclude certain imports, also those excluded imports.[2620]

7.1073 The complainants submit that the USITC did not conduct any specific evaluation of non-NAFTA imports. Rather, it evaluated NAFTA imports, concluding that the exclusion of NAFTA imports would not change its findings of injury and causation as to total imports.[2621] However, according to China and Brazil, this finding does not meet the obligation to explain how the facts support a finding that non-NAFTA imports alone caused serious injury or threat of serious injury. As such, it does not reflect a proper non-attribution analysis of NAFTA imports. The USITC's analysis of non-NAFTA imports, therefore, did not meet the Appellate Body's standard as set forth in *US – Line Pipe*, which requires a "reasoned and adequate explanation that establishes explicitly" that such imports alone caused serious injury to the domestic industry.[2622]

7.1074 The United States submits that notwithstanding the lack of an explicit requirement in the Agreement on Safeguards , however, the USITC did, in fact, properly isolate the effects of NAFTA from non-NAFTA imports in its parallelism analysis.[2623] The United States submits that the USITC appropriately discussed the nature and extent of the injurious effects of non-NAFTA imports and distinguished their effects from those of NAFTA imports. In fact, the USITC found that imports from Canada and/or Mexico did not constitute a substantial share of imports and did not contribute importantly to injury for a number of the products covered by the President's remedies. For these

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[2618] Appellate Body Report, *US – Line Pipe*, para. 188. (emphasis in the original)

[2619] European Communities' second written submission, para. 363.

[2620] European Communities' second written submission, para. 364.

[2621] See, for example, European Communities' written reply to Panel question No. 82 at the first substantive meeting; Norway's written reply to Panel question No. 82 at the first substantive meeting; Brazil's second written submission, para. 105. As noted in Brazil's first written submission, the USITC actually found in several cases that imports from NAFTA countries contributed importantly to the serious injuries of the domestic industry! For example, in the USTC's CCFRS analysis, the USITC found that imports from NAFTA accounted for a substantial share of total imports and Mexican imports contributed importantly to the serious injury caused by imports. USITC Report Vol. I at 66. Similarly, in its hot-rolled bar and cold-finished bar analysis, the USITC found that Canadian imports represented a substantial share of total imports and contributed importantly to serious injury caused by imports. Ibid., at 100, 107.

[2622] China's second written submission, paras. 204 and 205; Brazil's second written submission, para. 105.

[2623] United States' second written submission, para. 151.

products, the United States submits that it is clear that the USITC concluded that Canadian and Mexican imports of these products were not a significant cause of injury to the domestic industry. Moreover, for the products for which the USITC did find that imports from Mexico and Canada would contribute importantly to injury, the USITC nonetheless performed an analysis that isolated the effects of non-NAFTA imports from those of NAFTA imports and concluded that non-NAFTA imports were still a substantial cause of serious injury to the industry in question. Having done so, the USITC clearly performed an analysis designed to identify the nature and extent of the injury caused by both NAFTA and non-NAFTA imports and to distinguish the effects of both groups of imports from one another.[2624]

7.1075 In counter-response, the European Communities and China note that surprisingly, on the one hand, the United States says that there is no obligation that the NAFTA imports be subject to a non-attribution analysis and, on the other hand, it argues that it conducted the non-attribution analysis as required under Article 4.2(b) when it segregated the Canadian and Mexican imports from the other imports whenever they were excluded from the safeguard measure, and separated and distinguished the effects of the NAFTA imports from the non-NAFTA imports.[2625]

7.1076 The European Communities notes that the USITC conducted a three-step analysis of excluded NAFTA imports pursuant to the United States statute. It determined, first, whether imports from NAFTA countries, considered individually, accounted for a substantial share of total imports and second, whether imports which accounted for a substantial share, contribute importantly to the serious injury or threat thereof (i.e. they are an important cause, but not necessarily the most important cause).[2626] Upon request from the USTR, the USITC Reported additional information concerning non-NAFTA imports in the Second Supplementary Report. In the Second Supplementary Report, the USITC "analysed" whether excluding imports from Canada and Mexico would lead to the conclusion that non-excluded imports are still a "substantial cause of serious injury to the domestic industry". This was only done for those products for which the first and second steps required under the NAFTA Implementation Act were satisfied. No additional information or analysis was provided for Israel and Jordan.[2627]

7.1077 The European Communities argues that the required analysis under Article 4.2(b) is first to establish whether the other factor (in this case the excluded imports) is a cause of injury to the domestic industry and second to ensure that the injurious effects of such other factors are not attributed to non-excluded increased imports. According to the European Communities, none of the steps of the USITC's analysis of NAFTA imports follows the analysis required under Article 4.2(b). Whether Canadian or Mexican imports were among the top five suppliers, and if so, whether they contributed "importantly" to serious injury has no relevance for the simple question of whether such imports actually caused injury. The USITC's analysis of NAFTA imports does not provide for a reasoned and adequate explanation of how the facts support a finding that there was a genuine and substantial causal relationship between non-excluded imports and serious injury. Indeed, the simple conclusion that "we [the USITC] would have reached the same result had we excluded imports from Canada and Mexico from our analysis", coupled with an analysis of *excluded* imports, was judged by the Appellate Body in *US – Line Pipe* not to be a "reasoned and adequate explanation of how the facts support the determination" that *non-excluded* imports satisfy the conditions for application of a

[2624] United States' first written submission, para. 455.

[2625] European Communities' second written submission, para. 361; China's second written submission, para. 200.

[2626] These requirements of the NAFTA Implementation Act are explained in more detail at USITC Report, Vol. I. pp. 34 and 35.

[2627] European Communities' second written submission, para. 366.

safeguard measure.[2628] The European Communities argues that the United States has, in conducting such an analysis, failed to establish whether imports from Canada, Mexico, Israel or Jordan are causing injury, has not separated and distinguished the injurious effects of such imports, and has not ensured that the injurious effects of excluded imports, together with the effects of other non-import alternative causes of injury have not been attributed to non-excluded imports.[2629]

(vii) Duty to provide a reasoned and adequate explanation in the context of the causation analysis

7.1078 China argues that it must be explicitly established, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous.[2630] China claims that the USITC failed to provide a clear and unambiguous explanation that injury caused to the domestic industry by the other factors was not attributed to imports. China submits that, indeed, a conclusion that increased imports of a particular product are an important cause and a cause no less important than any other cause of serious injury to the domestic industry in the USITC Report was only a relative comparison of the effect of increased imports as compared to the effects of other factors. China further argues that an extensive interpretation of the Commissioners' findings in the United States' submissions cannot replace the lack of an explicit, reasoned and adequate explanation of "non-attribution" and an appropriate assessment of the injurious effects of other factors in the USITC Report in relation to CCFRS[2631], tin mill products[2632], hot-rolled bar[2633], cold-finished bar[2634], rebar[2635], welded pipe[2636], FFTJ[2637], stainless steel bar[2638], stainless steel wire[2639] and stainless steel rod.[2640]

7.1079 The European Communities also relies upon Appellate Body jurisprudence to argue that the last sentence of Article 4.2(b) obliges a competent authority, in separating and distinguishing the injurious effects of the increased imports from the injurious effects of other factors, to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as to explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports. The European Communities argues that this explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms. In the European Communities' view, only after making this analysis can the competent authorities determine the existence of a genuine and substantial causal link.[2641]

7.1080 In response, the United States argues that, for each of steel product covered by a remedy, the USITC established explicitly, in a well-reasoned and detailed manner, that it did not attribute injury caused by non-import factors to increased imports. Consistent with the conclusions of the Appellate Body, the USITC appropriately identified and distinguished the effects of imports from those of other

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[2628] Appellate Body Report, *US – Line Pipe*, para. 195.
[2629] European Communities' second written submission, para. 367.
[2630] China's first written submission, para. 352.
[2631] China's second written submission, paras. 225 and 226.
[2632] China's second written submission, paras. 285 and 287.
[2633] China's second written submission, para. 231.
[2634] China's second written submission, para. 236.
[2635] China's second written submission, para. 244.
[2636] China's second written submission, paras. 249 and 251.
[2637] China's second written submission, paras. 254 and 260.
[2638] China's second written submission, paras. 262 and 264.
[2639] China's second written submission, para. 292.
[2640] China's second written submission, paras. 266, 268 and 270.
[2641] European Communities' first written submission, para. 444.

factors when performing its causation analysis. By doing so, it ensured that it did not attribute the injurious effects of those factors to imports when finding that there was a "genuine and substantial" causal link between increased imports and the serious injury being suffered by the industry. Moreover, its conclusions with respect to the nature and extent of injury attributable to these causes are supported by ample record evidence.[2642]

(b) Measure-specific argumentation

(i) *CCFRS*

Factors considered by the USITC

Declining domestic demand

7.1081 New Zealand and other complainants argue that declining demand, not imports, was a significant cause of the alleged injury to the domestic industry.[2643]

7.1082 China notes[2644] that, in dealing with the declining demand in the United States market, the USITC found that:

> "We thus find that the domestic industry was already injured by increased imports when demand began to decline, and declining demand, while not the cause of the injury found here, contributed to the industry's continued deterioration at the end of the period."[2645]

7.1083 Brazil notes that the USITC reached the conclusion that demand did not matter.[2646] Similarly, Japan and New Zealand argue that the USITC simply dismissed the decline in demand as a limited, end-of-the-period phenomenon.[2647] New Zealand questions why such data should be discounted.New Zealand points out that the USITC also rejected the relevance of a decline in demand because "[i]njury was shown well before the latter portion of 2000, when demand began to decrease, and injury was first shown in 1998, when demand was increasing (and when imports surged)". According to New Zealand, while this may support an argument that decreased demand was not the sole cause of injury for the entire period and in respect of all CCFRS, it does not establish that it was never a cause at all. Further, New Zealand argues that serious injury did not in fact occur in 1998.[2648]

7.1084 New Zealand and China argue that, while the USITC dismissed decline in demand on the basis that the industry was injured before the demand started to decline, it acknowledged that the decline in demand contributed to the injury. Nevertheless, New Zealand argues that a review of the available data shows the USITC analysis of decreased demand to be simplistic, cursory and flawed.[2649]

7.1085 China argues that the USITC Report did not establish that decline in demand was not attributed to injury caused by increase in imports. According to China, it is limited only to description

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[2642] United States' first written submission, para. 426.
[2643] New Zealand's first written submission, para. 4.144.
[2644] China's second written submission, para. 207.
[2645] USITC Report, p. 63.
[2646] Brazil's first written submission, para. 182.
[2647] Japan's first written submission, para. 256; New Zealand's first written submission, para. 4.142.
[2648] New Zealand's first written submission, para. 4.142.
[2649] New Zealand's first written submission, para. 4.145.

of demand developments, noting that the demand was higher in 1999 than in 1996, dropping in late 2000.[2650]

7.1086 Japan and Brazil argue that the USITC failed to separate and distinguish the injury to the domestic industry attributed to declining demand from the entire injury experienced by the domestic industry.[2651] Japan argues that the evidence is both compelling and measurable and shows that declining domestic demand is a more important cause of the domestic industry's injury than imports. In Japan's view, had the USITC separated and distinguished these alternative causes, it could not have concluded that increased imports caused any serious injury.[2652]

7.1087 Brazil argues that the evidence shows that operating margins correlated strongly with demand – falling when demand falls – and did not correlate at all with import levels.[2653] According to Japan and Brazil, even as imports fell, and even as the domestic firms captured more and more of the market, industry performance deteriorated.[2654] Brazil submits that the most logical conclusion is that total demand decreased too rapidly.[2655] Japan and Brazil argue that the same basic pattern found in the aggregated data applies to all the individual finished CCFRS products.[2656] Similarly, China and New Zealand argue that the United States ignored the correlation between demand declines and declining operating performance and it made no attempt to distinguish the effects of this factor from the injury caused by the imports.[2657]

7.1088 In addition, in the view of Japan and Brazil, the USITC ignored the fact that when demand for CCFRS products declined, imports declined even more sharply, suggesting that at least some purchasers of domestic steel were buying less steel, not switching to imports, thus impacting negatively on the industry's financial performance.[2658] According to Japan and Brazil, had the USITC properly distinguished this factor, it would have realized this fundamental point. They submit that, instead, the USITC misconstrued the relationships among demand shifts, changes in imports, and changes in domestic industry operating performance, claiming demand was but an end of period event that had no bearing on the issue of injury.[2659]

7.1089 According to Korea, the USITC determined that demand declined significantly at the end of the period, and that the declining demand "contributed to the industry's continued deterioration at the end of the period".[2660] Korea argues that, at the same time, very significant new (low-cost) capacity had recently come on-stream. Korea argues that the industry, faced with greater United States capacity, cut prices to maintain volumes in response to a shrinking market.[2661] Korea further argues that imports also declined significantly during this period so that domestic industry market share increased from 90.2% to 93.1% of the market over the 18-month period.[2662] Korea submits that since

[2650] China's second written submission, para. 209.
[2651] Japan's first written submission, para. 256; Brazil's first written submission, para. 180.
[2652] Japan's first written submission, para. 255.
[2653] Brazil's first written submission, para. 180.
[2654] Japan's first written submission, para. 258; Brazil's first written submission, para. 182.
[2655] Brazil's first written submission, para. 182.
[2656] Japan's first written submission, para. 259; Brazil's first written submission, para. 183.
[2657] China's second written submission, para. 209; New Zealand's first written submission, para. 4.144.
[2658] Japan's first written submission, para. 256; Brazil's first written submission, para. 180.
[2659] Japan's first written submission, para. 257; Brazil's first written submission, para. 180.
[2660] Korea's first written submission, para. 134.
[2661] Korea's first written submission, para. 132.
[2662] Korea's first written submission, para. 133.

demand declines clearly affected the industry's performance, the USITC should have identified and isolated those effects.[2663]

7.1090 China and New Zealand also argue that the USITC wrongly dismissed this factor entirely as a cause of injury and as a consequence failed to consider the nature and extent of that injury, as distinguished from the injury attributed to imports. It did so by means of a short generalised discussion which focused narrowly and exclusively on one part of the period of investigation, and failed to analyse the available data fully and properly. [2664]

7.1091 Brazil asks what makes the USITC's treatment of declining demand, found invalid by the Appellate Body in *US – Line Pipe*, any different from the USITC's "analysis" of declining demand in this case? Brazil submits that the USITC in this case begins with an assumption that serious injury was already being caused by imports, noting that "the domestic industry showed signs of injury . . . well before the latter portion of 2000, when demand began to drop off" and that "the period of increased demand was also when imports surged".[2665] It then concludes:

> "We thus find that the domestic industry was already injured by increased imports when demand began to decline, and declining demand, while not a cause of injury found here, contributed to the industry's continued deterioration at the end of the period. Indeed, the losses experienced by the industry in 1999 and 2000 as a result of import left the industry in a much weakened position to face the slowdown in demand."

7.1092 Brazil argues that the only distinction that it sees is that the USITC was at least prepared to admit that declining demand in the *US – Line Pipe* dispute was a causal factor, just that it was not as important as increased imports.[2666] Brazil submits that in this case, the USITC takes the more novel approach of injecting an assumption about increased imports into the analysis before it even considers declining demand, so as to render declining demand a non-issue. Yet, implicit in the USITC's discussion is the fact that declining demand did play a role in injury, whether it was only an aggravating role, or a contributing role. The problem is there is no way to really tell based on the USITC's discussion.[2667]

7.1093 In response, the United States argues that the complainants' contention that the USITC improperly discounted demand declines as a significant source of injury to the industry is factually wrong. According to the United States, the record clearly showed that the industry's operating income levels did not fluctuate with demand. Although the industry's operating income margins did increase between 1996 and 1997 at the same time as a growth in demand, its operating margins declined in each of 1998, 1999 and 2000, even though demand grew in each of these years. The United States submits that the only distinction, in fact, between 1997 and the three subsequent years is a simple one: there was a substantially higher volume of imports in the markets in these years than in 1997 levels and these imports were priced at substantially lower levels than in 1997.[2668]

[2663] Korea's first written submission, para. 134.
[2664] China's first written submission, para. 359; New Zealand's first written submission, para. 4.143.
[2665] USITC Report, Vol. I. at 63.
[2666] Appellate Body Report, *US – Line Pipe*, para. 207 (citing *Circular Welded Carbon Quality Line Pipe*, Inv. No. TA-201-70, USITC Pub. 3261 (December 1999) at I-28).
[2667] Brazil's second written submission, para. 79.
[2668] United States' first written submission, para. 487.