

7.1094 In counter-response, Japan argues²⁶⁶⁹ that the United States analysis is based on incorrect data. Japan submits that United States and the USITC rely on figures that merely add together shipments of each type of CCFRS, ignoring the fact that these figures reflect double and triple counting of tons of steel as they go through the various stages of production – an ironic ploy, given that the mills' vertical integration was the reason for conjoining these products into a single like product. A more proper measure of apparent domestic consumption – imports of each distinct finished CCFRS like product plus domestic commercial shipments of those products – shows the clear drop in demand as early as 1999:

Table 4: Change In Apparent Domestic Consumption: 1996-2000²⁶⁷⁰

Year Apparent	Domestic Consumption	Change
1996 75.8		–
1997 78.1		+2.3
1998 84.1		+6.0
1999 82.4		-1.7
2000 83.1		+0.7

7.1095 According to Japan, after strong growth in 1997 and 1998, demand fell noticeably in 1999 and remained low in 2000 – the very period when the domestic industry operating profits began to fall.²⁶⁷¹

7.1096 Japan argues²⁶⁷² that, in fact, during 2000, there were sharp changes in demand, as illustrated below:

Table 5: Change In Apparent Domestic Consumption: Interim Periods 2000-2001²⁶⁷³

Year Apparent	Domestic Consumption	Change
1H 2000	45.0	
2H 2000	38.1	-6.9
1H 2001	36.7	-1.4

7.1097 According to Japan, the USITC analysis is also too static. The United States argues that demand in 2000 was higher than in 1996.²⁶⁷⁴ This statement may be true, but it is largely irrelevant. In most markets, demand increases over time. The issue for understanding the competitive dynamics is not a mechanical comparison of 2000 to 1996, but an analysis of the trends from year to year within

²⁶⁶⁹ Japan's second written submission, para. 128.

²⁶⁷⁰ Sum of total domestic commercial shipments reported in USITC Report Vol. II at Tables FLAT-12, 13, 14, 15 and 17 plus, total imports reported in Tables FLAT- 3, 4, 5, 6, 7 and 9 (Exhibit CC-6.) The addition of the five flat-rolled products is provided in Japan First Submission ANNEX B. Tin mill and GOES are excluded from this analysis. Note the figures here differ from those provided in Japan's first written submission (para. 257) because there exports were not excluded. The United States industry did not export commercially significant quantities, therefore the difference is immaterial.

²⁶⁷¹ According to Japan, the USITC makes another mistake: to consider only aggregate CCFRS demand is to ignore a key difference in trends between finished and semi-finished CCFRS. Increasing imports of semi-finished steel at the end of the period mask the decline in demand for finished steel.

²⁶⁷² Japan's second written submission, para. 129.

²⁶⁷³ USITC Report Vol. II at Tables FLAT-12, 13, 14, 15 and 17 plus, total imports reported in Tables FLAT- 3, 4, 5, 6, 7 and 9 (Exhibit CC-6), See also, Japan's first written submission, Annex B.

²⁶⁷⁴ United States' first written submission, para. 485.

the overall period of investigation, and, if available, the trends within a year. Japan submits that it is ludicrous for the United States to try to ignore the collapse in demand in the second half of 2000, and the role that collapse had on prices and the condition of the domestic industry.²⁶⁷⁵

7.1098 According to Japan, the United States tries to dismiss the correlation between declining demand and declining operating performance.²⁶⁷⁶ If one considers the trends in apparent domestic consumption and imports from 1999 to 2001, the relative importance of the two factors is obvious. From 1999 to 2001, as imports retreated from the market and as the domestic industry captured more and more of the market, operating performance declined. Thus, the decline in domestic industry operating performance correlates with declining demand, not with increased levels of imports. In any event, no effort at all was made to separate and distinguish the effects of demand from imports.²⁶⁷⁷

7.1099 In response, the United States notes that, in its analysis, the USITC explicitly recognized that demand for CCFRS had declined substantially during the last three quarters of the period of investigation. It specifically noted that this demand decline occurred only very late in the period, beginning with the fourth quarter of 2000 and lasting through the first two quarters of 2001. It correctly noted, however, that demand had increased consistently during each of the five years before interim 2001, and that the industry had been experiencing serious injury because of imports since at least 1998, even though demand was still rising in that year. Moreover, the USITC found that, as a result of import competition, the industry's condition continued to deteriorate in 1999 and 2000, even though demand continued to rise during these years. As a result, the USITC properly concluded that the demand declines in interim 2001 had only exacerbated the industry's level of serious injury during that period, and had not been the cause of injury during prior periods. It is clear then that the USITC properly discounted these declines in demand as a significant cause of injury during the period.²⁶⁷⁸

7.1100 In counter-response, New Zealand questions how can a factor "exacerbate" injury – or "contribute to" injury, to use the USITC's language, but not be a cause?²⁶⁷⁹ New Zealand also submits that the data compiled by the USITC itself shows a very strong coincidence, in 2000-2001, between the decrease in demand of 14.9%, and the deterioration in operating margins from -1.4% to -11.5%. During the same period, absolute import volumes decreased by 40% (over 30% down on 1996) and import market share decreased by 2.9%.²⁶⁸⁰ According to New Zealand, the United States does not rebut these figures because it cannot.²⁶⁸¹ New Zealand submits further that there was no serious injury in 1998 contrary to the USITC's and United States oft repeated claims – here as elsewhere the USITC ignored its own figures, which showed the domestic industry producing certain flat steel returning a healthy profit margin of 4% in 1998.²⁶⁸²

Domestic capacity increases

7.1101 New Zealand notes that the USITC acknowledged that increase in domestic capacity explains "in significant part" the decline in the rate of domestic capacity utilization over the period of investigation²⁶⁸³, which it had earlier found to be an indicator of serious injury, and identified a

²⁶⁷⁵ Japan's second written submission, para. 130.

²⁶⁷⁶ United States' second written submission, para. 487.

²⁶⁷⁷ Japan's second written submission, para. 131.

²⁶⁷⁸ United States' first written submission, para. 485.

²⁶⁷⁹ New Zealand's second written submission, para. 3.118.

²⁶⁸⁰ New Zealand's second written submission, para. 3.119.

²⁶⁸¹ New Zealand's second written submission, para. 3.120.

²⁶⁸² New Zealand's second written submission, para. 3.121.

²⁶⁸³ USITC Report Vol. I, p. 63.

reduction in capacity as necessary for the industry's improvement.²⁶⁸⁴ It also noted the arguments of respondents that the presence of new capacity, combined with the failure of the industry to retire older, less efficient capacity, put tremendous pressure on the domestic industry to cut costs in order to generate sales to fill the new capacity, and agreed that "there is a significant incentive to maximize the use of steelmaking assets". "Increased capacity" the USITC concluded, "while likely playing a role in the price declines that helped cause injury, was not an important cause of serious injury to the domestic industry equal to or greater than the injury caused by increased imports".^{2685 2686}

7.1102 The European Communities, Japan, Korea, China and Brazil argue that the USITC acknowledged that domestic capacity increases caused injury.²⁶⁸⁷ However, Japan, Korea and Brazil argue that the USITC made no effort to try to determine how much of the injury should be attributed to the capacity increases.²⁶⁸⁸ More particularly, New Zealand argues that the USITC made no serious attempt to assess the nature and extent of the injury which it acknowledged increased capacity caused.²⁶⁸⁹

7.1103 China reiterates that the Agreement on Safeguards as interpreted by the Appellate Body in *US – Line Pipe* case requires the investigating authority to identify the nature and extent of the alternative factors.²⁶⁹⁰ China submits²⁶⁹¹ that in order to identify the extent of an effect, it is necessary to evaluate its size, amount, volume. China argues that the USITC evaluated the effects qualitatively by comparing the "importance" of those factors, but refrained from providing such a "quantitative" evaluation:

"[B]y finding that capacity increases had some effect on domestic pricing but imports had a far more substantial effect, the USITC appropriately made a qualitative finding on the general level of injury that should be attributed to each factor."

7.1104 According to China, as the USITC failed to evaluate the capacity increase in an adequate way, it was not able to establish that the effects of this factor were not attributed to the imports.²⁶⁹²

7.1105 In China's view, the impact of capacity increase on the situation of the domestic industry was under-rated. In this regard, China refers to the following chart, comparing net increases in capacity over demand and imports between 1996 and 2000.²⁶⁹³

²⁶⁸⁴ Ibid., para. 358, footnote 22.

²⁶⁸⁵ USITC Report Vol. I, p 64.

²⁶⁸⁶ New Zealand's second written submission, paras. 3.122 and 3.123..

²⁶⁸⁷ Japan's first written submission, para. 262; Korea's first written submission, para. 125; China's first written submission, paras. 359 and 361; Brazil's first written submission, para. 186; European Communities' first written submission, para. 468.

²⁶⁸⁸ Japan's first written submission, para. 262; Korea's first written submission, para. 125; Brazil's first written submission, para. 186.

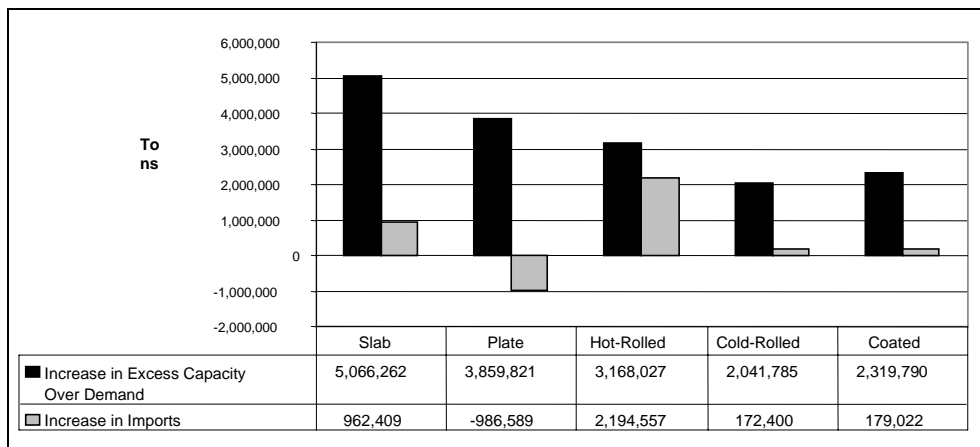
²⁶⁸⁹ New Zealand's first written submission, para. 4.155; New Zealand's second written submission, para. 3.123.

²⁶⁹⁰ China's second written submission, paras. 210 and 211.

²⁶⁹¹ China's second written submission, para. 212.

²⁶⁹² China's second written submission, para. 213.

²⁶⁹³ Brazil's first oral statement, Annex-Figure 3, referred to in China's second written submission, para. 214; Brazil's first written submission, Figure 22; Japan's first written submission, para. 266.



7.1106 On the basis of the foregoing, China argues that as to the alleged negative influence of imports on the pricing dynamics, given the capacity increase and dominant market share of the domestic companies, it is clear that these companies would set the market prices and imports would react to these prices.²⁶⁹⁴

7.1107 Japan and Brazil argue that had the USITC engaged in a more careful analysis, it would have found that domestic capacity increases prompted the domestic industry to lead prices downward.²⁶⁹⁵ Japan and Brazil submit that the domestic share of the total CCFRS steel market grew from 70% in 1998 to 75% in 1999 and 2000 and then to 81.5% in 2001. This gain in domestic share resulted from aggressive domestic pricing. In 2000 and 2001, when industry operating income declined significantly, the combination of excess domestic capacity and declining demand meant that domestic firms were desperately competing for cash flow, all the time with more and more capacity to fill.²⁶⁹⁶ New Zealand argues that imports lost substantial market share after 1998 and particularly sharply in the period most recently preceding the USITC's investigation. During the same period, domestic prices decreased more sharply than import prices and, in some cases, undercut import prices by a substantial margin.²⁶⁹⁷ Japan argues that, ironically, the less imported steel in the market, the more domestic prices fell. The only way to explain this phenomenon is that competition among domestic mills fuelled by growing excess capacity drove down the prices. In Japan's view, it is difficult to see how declining import volumes, rather than increasing capacity and domestic shipments, could somehow cause declines in prices and operating performance.²⁶⁹⁸

7.1108 Korea argues that United States' producers captured virtually all of the increase in consumption, maintained a market share of over 90%, and still suffered from significant overcapacity. Korea further argues that not coincidentally, domestic prices fell and the industry experienced losses. In 2000, the year of the highest production during the period, the industry maintained 34 million tons of excess capacity as it produced 199.9 million tons of CCFRS with a capacity of 234.6 million tons. Korea submits that these numbers are staggering and place the 2.5 million ton increase in CCFRS imports over the entire period into proper perspective.²⁶⁹⁹

²⁶⁹⁴ China's second written submission, para. 215.

²⁶⁹⁵ Japan's first written submission, para. 263; Brazil's first written submission, para. 187.

²⁶⁹⁶ Japan's first written submission, para. 264; Brazil's first written submission, para. 187.

²⁶⁹⁷ New Zealand's first written submission, para. 4.152.

²⁶⁹⁸ Japan's first written submission, para. 265.

²⁶⁹⁹ Korea's first written submission, para. 126.

7.1109 In response, the United States argues that the record indicated that increased imports, not domestic capacity increases, were primarily causing the price declines in the latter part of the period of investigation. In its analysis of this issue, the USITC discussed the nature and impact of these capacity increases on domestic pricing behavior, noting that the industry had added capacity during the period of investigation, and concluded that the capacity additions had outstripped increases in demand during the same period. Although it found that these increases in capacity were generally justified because there had been consistent demand increases in the market, it also recognized that this increased capacity provided the industry with "a significant incentive to maximize the use of steel making assets," which would have an "effect [on] producers' pricing behavior."²⁷⁰⁰

7.1110 However, the United States argues, the USITC also examined the ample record data on pricing to assess the nature and scope of the price effects of both imports and this increased capacity in the market. The record data on pricing – both the price comparison data and the data on average unit values – showed that imports consistently undersold the domestic industry (including minimill producers) throughout the period of investigation²⁷⁰¹, that the large surge of lower-priced imports in 1998 had caused a significant drop in prices in that year, and that imports continued to lead prices down, or keep them suppressed, by consistent underselling through 1999 and 2000. Moreover, even though minimills had added the large bulk of this additional capacity and this additional lower-cost capacity had some effect on prices, the USITC also correctly found that imports of hot-rolled merchandise had consistently undersold the merchandise sold by minimills during the period from 1998 and 2000. Thus, the United States asserts, the USITC properly found that it was increased imports, not capacity increases, that were primarily causing the price declines that occurred during the period from 1998 to 2000.²⁷⁰²

7.1111 In response, the United States argues that the complainants ignore the fact that the record clearly showed, as the US ITC found, that imports led prices down and kept them suppressed during the period from 1998 through 2000, not the domestic industry. Moreover, although the industry did manage to regain some of its lost market share in 1999 and 2000 by actively following downward import prices in those years, the record did not show that the industry utilized its increasing capacity to wrest market share from imports that was held by imports at the beginning of the period. In other words, by following import prices downward in 1998, 1999 and 2000, the industry was only able to regain some of its market share losses, but it was not able to increase its market share over the level it held in 1996.²⁷⁰³

7.1112 In counter-response, New Zealand argues that the United States forgets that it is increased imports, not merely cheaper imports, which must cause serious injury. New Zealand submits that as has been established, from 1999 onwards, imports were in sharp decline. New Zealand argues that the United States ignores data from 2001, by which time imports were down over 30% on 1996 figures, there was a 15.1% increase in domestic capacity on 1996 figures, contrasting with an 8.3% decrease in consumption on 1996 figures.²⁷⁰⁴

7.1113 Japan, New Zealand and Brazil also argue that the USITC refused to discuss the fact that the growth in excess domestic capacity dwarfed the modest increases in imports.²⁷⁰⁵ Brazil notes that the

²⁷⁰⁰ United States' first written submission, para. 491.

²⁷⁰¹ USITC Report, p. 63-64 and Tables FLAT-66 to FLAT-71.

²⁷⁰² United States' first written submission, para. 492-93.

²⁷⁰³ United States' first written submission, para. 499.

²⁷⁰⁴ New Zealand's second written submission, para. 3.126.

²⁷⁰⁵ Japan's first written submission, para. 266; New Zealand's first written submission, para. 4.153; Brazil's first written submission, para. 189.

USITC acknowledged that it "is true, as alleged by respondents, that capacity increases did exceed the increases in domestic consumption". However, according to Brazil, the USITC never related that excess capacity to changes in import levels or the shrinking market, as if domestic mills cutting prices and trying to maintain volume in a shrinking market was beyond reasonable consideration.²⁷⁰⁶ Japan and New Zealand argue that with respect to all five CCFRS products, the excess capacity exceeded the modest change in imports over the period. For four out of five products, the excess capacity dwarfs the modest change in imports.²⁷⁰⁷ With so much excess capacity chasing a shrinking total market, Japan argues that it is no wonder that domestic mills were cutting prices and trying to maintain volume. In Japan's view, it makes no sense to blame the modest and declining level of imports for this problem.²⁷⁰⁸

7.1114 In response, the United States submits that the complainants' argument is premised on an "apples" to "oranges" comparison of factors that have differing price effect characteristics. More specifically, instead of comparing the domestic industry's capacity increases during the period to the foreign industry's capacity increases, the complainants simply compared the industry's capacity increases to increases in import shipments. As a theoretical matter, the distinction is critical, because actual shipments of merchandise, whether domestic or import, have a more direct effect on pricing behavior in the market than capacity increases in that shipments reflect actual pricing and sales competition in the market place. The United States submits that, in essence, while the availability of capacity might have some impact on pricing behavior in a market place, the actual price effects of increased capacity are only directly and substantially transmitted to the market when that capacity is used to produce and ship merchandise.²⁷⁰⁹

7.1115 The United States argues that, accordingly, the complainants should have compared the domestic industry's capacity increases to the foreign industry's capacity increases during the period of investigation. If they had, they would have recognized that the foreign industry's capacity increase during the period of investigation was substantially larger than the domestic industry's capacity increases during this period.²⁷¹⁰ More specifically, foreign production capacity grew by 44 million tons during the period from 1996 to 2000, while the domestic industry's production capacity grew by 32.2 million tons. In other words, during a period in which demand in the Asian and other markets was significantly affected by the Asian financial crisis and the continuing deterioration of the steel markets in the former Soviet Union, foreign steel producers increased their aggregate capacity levels by an amount that was 37 percent larger than the domestic industry's capacity increases. The United States argues that, moreover, if complainants had also compared the increase in import shipments during the period with the increase in the industry's shipments between 1996 and 1998, they would have recognized that the import increase during this period was 2.6 million tons, or 60%, larger than the increase in domestic shipments during the same period. Given the substantial increase in import volumes in 1998 and the significant reduction in their pricing levels, it should again not be surprising that the USITC found that increasing import shipments at lower prices had a more substantial impact on pricing levels in the market than did domestic capacity increases and domestic shipments.²⁷¹¹

²⁷⁰⁶ Brazil's first written submission, para. 190.

²⁷⁰⁷ Japan's first written submission, para. 267; New Zealand's first written submission, para. 4.154.

²⁷⁰⁸ Japan's first written submission, para. 267.

²⁷⁰⁹ United States' first written submission, para. 496.

²⁷¹⁰ United States' first written submission, para. 497.

²⁷¹¹ United States' first written submission, para. 498.

7.1116 According to Japan, as a matter of economic theory, it is incorrect to argue that capacity only matters when it is turned into actual shipments.^{2712 2713} Japan submits that one needs to consider capacity in light of barriers to entry facing that capacity. Domestic capacity has no barriers; domestic shipments can easily enter the market. Import capacity has intrinsic disadvantages, due to the lead times and uncertainty. Japan argues that, in this case, uncertainty increased dramatically because of the numerous anti-dumping and countervailing investigations that chased imports from the market.²⁷¹⁴

7.1117 According to Japan, the United States tries to shift the focus to the role of foreign capacity.²⁷¹⁵ Japan argues that this argument is fundamentally misleading, since so little of foreign capacity goes to the United States market. The United States argues that 44 million tons of new foreign capacity is more important than 32.2 million tons of domestic capacity. Yet over the five-year period of investigation, virtually all United States capacity was dedicated to the United States' market²⁷¹⁶, as reflected in the USITC's export statistics, while less than 4% of foreign capacity went to the United States' market.²⁷¹⁷ Japan submits that, by any reasonable measure, domestic capacity mattered much more than foreign capacity, but the USITC did not even try to isolate its effects.²⁷¹⁸

7.1118 Japan submits that the United States also tries to shift the focus away from domestic capacity by focusing on shipment levels.²⁷¹⁹ This argument disingenuously concentrates only on 1998, which is fundamentally misleading. In 1999 and 2000 – the years when domestic industry performance deteriorated – import shipments were down, but domestic shipments were up and domestic capacity was up. In 1999 and 2000, import share of the market was stable at about 10.5% in both years, a level consistent with 1996 and 1997.

Table 6: Change in Import and Domestic Shipments,
Domestic Operating Performance: 1997-2000²⁷²⁰

Year	Change in Import Shipments from Prior Year	Change in Domestic Shipments from Prior Year	Operating Performance in that Year
1997 902		1619	6.1
1998 6031		-111	4.0
1999 -4488		3119	-0.7
2000 77		1190	-1.4

7.1119 Japan says that in 1999 and 2000, when domestic industry operating performance declined, imports were retreating from the market, and domestic shipments were increasing. In both 1999 and 2000, increasing domestic shipments dwarfed changes in the import levels. Japan argues that it is wrong to blame declining imports and to ignore the increasing domestic capacity that was fuelling increasing domestic shipments. At the very least, the impact of domestic capacity increases should

²⁷¹² See Joint Respondents' Posthearing Brief on Flat-Rolled Steel (1 Oct. 2001) (filed by the Law Firm of Willkie Farr & Gallagher) (responding to Commissioner Hillman's question how capacity, as opposed to actual shipments, can affect price.) at 93 (Exhibit CC-55).

²⁷¹³ Japan's second written submission, para. 139.

²⁷¹⁴ Japan's second written submission, para. 140.

²⁷¹⁵ United States' first written submission, para. 497.

²⁷¹⁶ USITC Report, Vol. II, at Tables FLAT-16-21.

²⁷¹⁷ Ibid., at Tables FLAT-30, 33, 36, 39 and 43.

²⁷¹⁸ Japan's second written submission, para. 141.

²⁷¹⁹ United States' first written submission, para. 498.

²⁷²⁰ Japan's second written submission, para. 142, citing USITC Report, Vol. II, at Tables FLAT-12-17 and FLAT-20-25, and Japan's first written submission, ANNEX B.

have been separated and distinguished from imports to test the USITC's theories and ensure that their effect was not mistakenly attributed to imports.²⁷²¹

7.1120 New Zealand also argues that the United States does not seek to challenge the factual observation that excess domestic capacity (i.e. the extent to which capacity exceeded demand, not merely "capacity increases") was over six times greater than the modest increase in imports measured over the period 1996-2000.²⁷²² The United States does not acknowledge the implications of this fact in terms of the relative effect on price of increased domestic capacity as opposed to imports. Instead, the United States responds weakly that the proper comparison is between foreign capacity increases (not actual imports) and domestic capacity increases.^{2723 2724} According to New Zealand, this has to be wrong on two counts. First, Article 4.2(b) requires the establishment of the causal link between increased imports and serious injury to the domestic industry, as distinguished and separated from other factors causing injury to that industry (such as greatly increased excess domestic capacity). Second, a reference to a mere increase in foreign capacity is also economically meaningless absent any consideration of the extent to which this exceeds demand and influences the level of imports into the United States market.²⁷²⁵

7.1121 Japan and Brazil also note that the USITC also pointed to low capacity utilization rates as evidence of injury caused by imports. Brazil and Japan make reference in this regard to the Appellate Body decision in *US – Wheat Gluten*, where the Appellate Body specifically discussed the need to carefully consider increases in capacity and decreases in capacity utilization. However, according to Japan and Brazil, the USITC did not perform the analysis set forth in *US – Wheat Gluten*, including considering the capacity utilization rate, if capacity had remained stable over the period rather than increasing. Japan and Brazil argue that had it performed the analysis, perhaps it would not have rushed to its conclusion.²⁷²⁶

7.1122 In response, the United States argues that the USITC did assess whether capacity increases had caused the industry's capacity utilization declines. The USITC recognized that the industry's production capacity had increased by 15.9% from 1996 to 2000 and that the industry's capacity had increased at a rate that was higher than the increase in demand during that same period, given that consumption had grown by 7.8%. It also correctly recognized that the industry's production levels, while growing, had not kept pace with the increases in the industry's capacity levels. Moreover, after considering the relationship of these two trends, the USITC correctly found that imports were not a significant cause of declines in the industry's capacity utilization rates. Instead, it found that these capacity utilization declines were due "in significant part" to the increase in industry capacity over the period.²⁷²⁷ The United States also argues that, because the USITC did not ascribe any declines in the industry's capacity utilization rates to imports, the Appellate Body's holding in *US - Wheat Gluten* is inapposite to the USITC's CCFRS analysis. As the Appellate Body noted in *Wheat Gluten*, the USITC explicitly found that declines in the industry's capacity utilization rates were the direct result of the increase in imports.²⁷²⁸ Here, the USITC has held the opposite.²⁷²⁹

²⁷²¹ Japan's second written submission, para. 142.

²⁷²² New Zealand's second written submission, para 3.127.

²⁷²³ United States' first written submission, para 496.

²⁷²⁴ New Zealand's second written submission, para. 3.127.

²⁷²⁵ New Zealand's second written submission, para. 3.128.

²⁷²⁶ Japan's first written submission, para. 267; Brazil's first written submission, para. 191.

²⁷²⁷ United States' first written submission, paras. 489-90.

²⁷²⁸ Appellate Body Report, *US – Wheat Gluten*, paras. 82-84.

²⁷²⁹ United States' first written submission, para. 490, fn. 619.

7.1123 Japan and Brazil submit that in 1996, before any alleged import surges, the domestic industry had utilization rates between 80% and 90%. The USITC found the domestic industry to have reasonable operating profits at those operating rates.²⁷³⁰ Japan and Brazil argue that but for the massive increases in new domestic capacity, the industry could have been operating at full capacity and more profitably in 2000. According to Japan and Brazil, the USITC did not even contemplate this analysis.²⁷³¹

7.1124 In response, the United States submits that the above argument is misplaced in two significant respects. First, it ignores the fact, recognized by the USITC, that an industry can be expected to increase its capacity in response to consistent growth in demand in a market, as occurred in the CCFRS market during 1996 through 2000. Second, and more importantly, they ignore the fact that, even if the industry had not increased its capacity levels, imports would still have surged into the market in 1998 at low prices and led prices downward through the remainder of the period. Thus, even if these domestic capacity increases had not occurred, the record shows that imports would still have caused the substantial price declines seen in the market during the period from 1998 through 2000. In this regard, the record shows, for example, that the AUV of imports fell by 10.1% during this period, with all of this decline being represented by lower prices in 1998, 1999 and 2000.²⁷³²

7.1125 Korea notes that the United States says that the USITC "distinguished and separated the price declines attributable to imports from the price declines attributable to capacity increases".²⁷³³ Korea states that it agrees that this is what the USITC should have done but it is not what the USITC did. As the United States explicitly admits, the USITC actually did not focus on separating out the effects attributable to each factor at all and, in fact, merely found that these capacity increases were substantial and therefore "were likely" to have "some" effect on prices but that imports were "far more significant" than capacity increases.²⁷³⁴

7.1126 Korea and New Zealand submit that the USITC failed to establish explicitly, through a reasoned and adequate explanation, that injury caused by this factor was not attributed to increased imports.²⁷³⁵ More particularly, Korea argues that the USITC never explained how it determined that it was imports, not excess domestic capacity, that led prices down. Since the US industry was suffering from low capacity utilization and the relative price of imports continued to rise into the latter part of the period of investigation, it was "plausible" that the domestic industry led prices down in order to increase the market share. Irrespective of all these facts, Korea argues that the USITC did not provide a reasoned and adequate explanation for its conclusive statement that imports, not excess domestic capacity, led prices downward.²⁷³⁶ Similarly, China argues that, while the USITC concluded by stating that this factor likely played a role in the price declines that helped cause the injury, it did not explain how it played this role, nor at which moment it played this role. Moreover, according to China, the USITC did not explain to what extent this factor played a role on the overall situation of the industry.²⁷³⁷

²⁷³⁰ Japan's first written submission, para. 268; Brazil's first written submission, para. 191.

²⁷³¹ Japan's first written submission, para. 268; Brazil's first written submission, para. 192.

²⁷³² United States' first written submission, para. 500.

²⁷³³ United States' first written submission, para. 494.

²⁷³⁴ United States' first written submission, para. 494.

²⁷³⁵ Korea's first written submission, para. 128; New Zealand's first written submission, paras. 4.146 and 4.155.

²⁷³⁶ Korea's first written submission, para. 128.

²⁷³⁷ China's first written submission, para. 367.

7.1127 Korea submits that a more precise consideration of time periods, exact effects, and the means by which prices were affected, are obvious additional analytical tools that could have been employed.²⁷³⁸ Korea submits that such an analytical approach would have revealed what the USITC ignored. The obvious effect of capacity increases on producer performance was to stimulate production and increase sales in order to maximize the efficient use of capacity. In a capital-intensive industry like the steel industry, capacity utilization rates are key. It is self-evident that excess capacity would cause producers to lower prices to sell at additional production to maintain efficient utilization.²⁷³⁹

7.1128 Brazil asks what makes the USITC conjecture on capacity that the Appellate Body found invalid in *US – Wheat Gluten*²⁷⁴⁰ any different from the USITC's "analysis" in this case regarding capacity. In light of substantial domestic capacity increases in excess of demand, the USITC recognized "there is a significant incentive to maximize the use of steel making assets, which can affect producers' pricing behavior".^{2741 2742} Brazil submits that, nonetheless, it offers only a conclusory statement that:

"[I]f increased domestic capacity were in fact the source of the injury to the domestic industry, we would have expected to see the domestic industry lead prices downward, and wrest market share from imports. Therefore, we find that increased production capacity, while likely playing a role in the price declines that helped cause injury, was not an important cause of serious injury equal to or greater than the injury caused by increased imports."²⁷⁴³

7.1129 Brazil questions whether the USITC actually separates and distinguishes causes in this statement; where the reasoned and adequate explanation to support the conclusion is; and where the USITC's actual analysis of the injurious effects of increased excess capacity on the industry are. Because imports are a more important cause of injury than capacity increases, Brazil further questions whether the USITC actually found that there was a genuine and substantial causal link between increased imports and serious injury.²⁷⁴⁴

Intra-industry competition

7.1130 New Zealand notes that cheap and rapidly increasing minimill production, which the United States concedes accounted for a third of total CCFRS production in the United States²⁷⁴⁵ and was "pertinent" to the issue of causation²⁷⁴⁶, was a critical factor in the decline of domestic prices and operating margins.^{2747 2748}

²⁷³⁸ Korea's second written submission, para. 164.

²⁷³⁹ Korea's second written submission, para. 165.

²⁷⁴⁰ Appellate Body Report, *US – Wheat Gluten*, paras. 90-92.

²⁷⁴¹ USITC Report, Vol. I, at 63.

²⁷⁴² Brazil's second written submission, para. 77.

²⁷⁴³ USITC Report, Vol. I, at 64.

²⁷⁴⁴ Brazil's second written submission, para. 77.

²⁷⁴⁵ United States first written submission, para 353, footnote 381.

²⁷⁴⁶ *Ibid.*, para 353.

²⁷⁴⁷ New Zealand's first written submission, para 4.158.

²⁷⁴⁸ New Zealand's second written submission, para. 3.136.

7.1131 The European Communities and New Zealand further note²⁷⁴⁹ that the USITC acknowledged the injurious effect of intra-industry competition – "the addition of a greater volume of lower-cost capacity would be expected to have an effect on prices, and we find that it did" – but then, after noting, without explanation, that "imports, rather than minimills, typically led prices downward", the USITC recited its standard mantra:

"[W]e find that minimills were not primarily responsible for the declines in domestic prices or an important cause of serious injury to the domestic industry ... equal to or greater than the injury caused by increased imports."²⁷⁵⁰

7.1132 China and New Zealand argue that by stating that intra-industry competition was not "primarily" responsible for serious injury to the industry, the USITC recognized that minimills were nevertheless responsible, although in a less significant way.²⁷⁵¹

7.1133 Japan argues that in relation to intra-industry competition, it is clear that the USITC decision does not satisfy the non-attribution requirement of Article 4.2(b). In particular, Japan argues that the evidence is both compelling and measurable and shows that each intra-industry competition 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.²⁷⁵² Similarly, New Zealand submits that while the USITC acknowledged that minimill competition had an injurious effect on the domestic industry, it did not explain what these effects were, as distinguished and separated from the serious injury caused by increased imports.²⁷⁵³

7.1134 Japan and Brazil argue that dramatically expanding capacity and shipments by certain segments of the domestic industry had given rise to deleterious competition among domestic producers.²⁷⁵⁴ In this regard, Japan and Brazil argue that intra-industry competition in the CCFRS market was driven by changes in production technology. The emergence of minimills with dramatically lower cost structures placed less efficient integrated mills on their heels.²⁷⁵⁵ Japan and Korea argue that with an extremely competitive cost structure, minimills could charge lower prices and yet still earn attractive operating profits. Weaker integrated mills, using the more traditional blast furnace technology, decided they had to sell CCFRS steel to generate cash flow regardless of the price. Japan submits that competing largely with minimills in the commodity segment of the market, the integrated firms had little choice but to compete with minimills that had much lower costs.²⁷⁵⁶

7.1135 Confronted with tremendous evidence on this account, Japan and Brazil argue that the USITC made no effort to separate and distinguish this alternative cause.²⁷⁵⁷ Japan, Korea and Brazil argue that the USITC recognized the competitive advantage of minimills but failed to fully consider the effects on the rest of the industry because they were not "primarily" responsible for the injury. More specifically, Japan and Brazil state that the USITC noted that minimills "did not typically enjoy cost advantages over integrated producers", and that "a greater volume of lower-cost capacity would be

²⁷⁴⁹ New Zealand's second written submission, para. 3.135; European Communities' first written submission, para 468.

²⁷⁵⁰ USITC Report Vol I, p. 65.

²⁷⁵¹ China's first written submission, paras. 359 and 363.

²⁷⁵² Japan's first written submission, para. 255.

²⁷⁵³ New Zealand's second written submission, para. 3.136.

²⁷⁵⁴ Japan's first written submission, para. 269; Brazil's first written submission, para. 192.

²⁷⁵⁵ Japan's first written submission, para. 270; Brazil's first written submission, para. 193.

²⁷⁵⁶ Japan's first written submission, para. 270; Korea's first written submission, para. 136.

²⁷⁵⁷ Japan's first written submission, para. 269; Brazil's first written submission, para. 192.

expected to have an effect on prices, and we find that it did". It then dismissed the factor by pointing to a quick and flawed examination of hot-rolled prices; import prices apparently were lower than minimill prices. This attempt to dismiss the role of intra-industry competition fails on several counts.²⁷⁵⁸

7.1136 Japan, Korea and Brazil submit that if the US ITC had properly considered this factor, it would have found that mini-mills had low-cost structures that allowed them to price below other domestic producers, yet remain profitable.²⁷⁵⁹ Korea also argues that while the USITC acknowledged that minimills maintain a cost advantage over integrated producers, it dismissed the significance of this fact by observing that that cost advantage existed throughout the period, that is, before and after injury.²⁷⁶⁰

7.1137 New Zealand argues that nowhere in the USITC Report does the USITC segregate the production and pricing data of minimills and integrated producers so that it can assess the effects of minimill production on the industry as a whole. Nor does the USITC consider the obvious competitive disadvantage suffered by integrated mills as a result of legacy and other costs far higher than those borne by minimills.²⁷⁶¹

7.1138 In response, the United States notes that USITC thoroughly discussed the nature and extent of minimill competition on domestic pricing for CCFRS. In particular, the USITC correctly recognized that the record data showed that minimills "did typically enjoy cost advantages over integrated producers," noting that these advantages were due to minimill's lower raw materials costs and the different product mixes of the two categories of producer. As a result of these cost advantages, the USITC found that it was reasonable to expect that the addition of a greater volume of lower cost capacity would have some indirect effect on prices. Based on its assessment of the record, therefore, it concluded that the addition of this lower-cost capacity had some effect on domestic pricing during the period of investigation.²⁷⁶²

7.1139 Moreover, the United States submits that the USITC did not simply assume that the pricing decisions of minimill operators did not cause the substantial price declines that hit the CCFRS market between 1998 and interim 2001. The USITC appropriately examined the ample record evidence that was available on the nature of price competition between minimills, imports and integrated producers.²⁷⁶³ As the USITC noted in its discussion of the competitive effects of minimills, the data indicated that, even though minimills were lower-cost producers than integrated producers, imports, not minimills, were the price leaders in the marketplace and led prices downward throughout the

²⁷⁵⁸ Japan's first written submission, para. 271; Korea's first written submission, para. 135; Brazil's first written submission, para. 194.

²⁷⁵⁹ Japan's first written submission, para. 271; Korea's first written submission, para. 135; Brazil's first written submission, para. 193.

²⁷⁶⁰ Korea's first written submission, para. 136.

²⁷⁶¹ New Zealand's first written submission, para. 4.160.

²⁷⁶² United States' first written submission, para. 507.

²⁷⁶³ In this regard, the United States notes that, during its investigation, the USITC prepared a series of specific charts breaking out the financial and production operations for minimill and integrated producers, separately, and a series of quarterly price comparison charts showing underselling/overselling patterns between minimills, imports and integrated producers. See, e.g., INV-Y-215, pp. 3-11 (US-38); See also Minimill Trade Data (US-60). While some of this material may not be released because it is confidential, the USITC did, in fact, prepare such data and examine it, as can be seen in US-38. Accordingly, New Zealand's assertion that the USITC did not segregate data for these producers in its Report is highly misleading. New Zealand's first written submission, para. 4.160.

period of investigation.²⁷⁶⁴ Indeed, as the USITC pointed out in its analysis, the price comparison data showed that imports consistently undersold minimill producers throughout the entire period of investigation on its sales of hot-rolled merchandise, which accounted for the bulk of minimill shipments during the period.²⁷⁶⁵ Moreover, the record showed that imports undersold minimills consistently on plate and cold-rolled as well during the period as well.²⁷⁶⁶ Given this record evidence, the USITC properly concluded that it was not "low-cost" minimills, but imports, that led prices in the CCFRS market down so consistently during the period from 1998 to 2001.²⁷⁶⁷ Thus, although the USITC reasonably concluded that minimills had played some role in price declines in the market, it also correctly found that it was increased imports, not the operations of minimills, that were the primary cause of the price declines that occurred during the period from 1998 to 2000.²⁷⁶⁸

7.1140 Further, the United States argues that although it was true that the USITC recognized in its analysis that "minimill producers may have been in a better position to withstand low-priced import competition than other domestic producers" due to their cost advantages, the record does not show that minimills were able to maintain a healthy profit margin throughout the period of investigation in the face of lower prices. The United States submits that, instead, the unit operating income for minimills declined from a profit of approximately US\$28 per ton in 1997 to a loss of approximately US\$4 per ton in 1998, when imports surged in the market. Moreover, even though minimills were able to improve their operating income to approximately US\$7 and US\$16 per ton in 1999 and 2000, respectively, the returns obtained by minimills in these two years remained significantly below the strong level obtained by minimills in 1997, that is, before the import surge occurred. Further, minimills' operating income declined to a loss again in interim 2001, as prices fell even further in the market. In other words, despite the complainant's arguments to the contrary, the record shows not that minimills were able to continue earning strong profits throughout the period of investigation, even as prices fell, but that minimills experienced the same operating income declines as integrated producers as a result of the surge of low-priced imports that occurred in 1998.²⁷⁶⁹

7.1141 China notes²⁷⁷⁰ that concerning the intra-industry competition and increased imports, the USITC stated in its report that:

"[I]ndeed, the only way in which the USITC could have more specifically identified the distinct amount of pricing effects caused by these factors would have been to place a quantitative value on the effects caused by each. However, as we have previously noted, the test of the Agreement on Safeguards does not require a

²⁷⁶⁴ USITC Report, p. 65.

²⁷⁶⁵ In this regard, the United States notes that it was entirely reasonable for the Commission to rely on its price comparison data for two hot-rolled products when assessing whether imports consistently undersold the merchandise sold by minimills. In this regard, the record indicated that hot-rolled steel accounted for the large majority of minimill producers' commercial shipments. Compare, Table FLAT-1 (Minimill Trade Data for Carbon Flat-rolled Steel) with Table G03-1 (Table for Minimill Hot-rolled Steel Trade Data) (US-6 0). Accordingly, Brazil's assertion that the USITC improperly relied on this data to support its analysis is simply misplaced. Brazil's first written submission, para. 197.

²⁷⁶⁶ The United States notes that although the quarterly pricing comparisons are confidential, the record shows that imports undersold minimills on their sales of plate, hot-rolled and cold-rolled steel in the large majority of possible price comparisons during the period, with imports underselling minimills in 64% of possible comparisons (70 of 110 comparisons), at margins ranging up to 30.6%. Ibid. Imports undersold minimills in 76% of possible comparisons (50 of 66) involving plate and hot-rolled merchandise. Ibid.

²⁷⁶⁷ USITC Report, p. 65.

²⁷⁶⁸ USITC Report, p. 65; United States' first written submission, para. 508.

²⁷⁶⁹ United States' first written submission, para. 513.

²⁷⁷⁰ China's second written submission, para. 217.

quantitative valuation of the effects attributable to imports or no-imports factors, respectively, nor has the Appellate Body or any panels construed the Agreement on Safeguards to do so."

7.1142 China argues that the USITC did not perform a quantitative evaluation of the effects of competition between efficient, low cost minimill production and the integrated producers despite the fact that the Agreement on Safeguards as interpreted by the Appellate Body in *US – Line Pipe* case requires the investigating authority to identify the nature and extent of the alternative factors.²⁷⁷¹ China argues that the USITC found that the intra-industry competition between minimills and integrated producers resulted in lowered sales for domestic products and subsequent price cuts. China submits that, obviously, the intra-industry competition had negative effects on the industry, which should have been evaluated.²⁷⁷²

7.1143 China points to²⁷⁷³ the following data on minimill shipments and imports of CCFRS products:²⁷⁷⁴

Table 7: Flat-Rolled Imports

Thousands of tons	1996	1997	1998	1999	2000	Interim 2000	Interim 2001
Minimills shipments	17,951	27,206	31,197	34,516	37,838	17,845	19,322
Imports	18,372	19,274	25,305	20,816	20,893	11,483	6,930

7.1144 China argues that the evidence at hand demonstrates that the intra-industry competition played a certain role in the developments of prices in the market.²⁷⁷⁵ More particularly, New Zealand argues that data available to the USITC shows intra-industry competition to be a critical factor in the decline of domestic prices and operating margins.²⁷⁷⁶ According to New Zealand, by 2001 minimill production of raw steel had reached 47.5% of total United States production. However, in New Zealand's view, not only did the increase in domestic capacity (which was largely from mini mill production) far outstrip demand, but the cheap and efficient nature of this increased capacity accentuated its price-lowering effect. New Zealand submits that minimill production comprised a rapidly growing supply of steel at a time when the USITC itself acknowledged domestic prices were falling. New Zealand argues that the USITC erroneously ascribed this fall in prices to imports, ignoring the fact that it was the growing domestic supply of steel that exerted downward pressure on prices.²⁷⁷⁷ The European Communities states that there is no attempt to distinguish and separate the effect of downward pressure resulting from intra-industry competition from the downward pressure allegedly caused by increased imports. The European Communities submits that, therefore, there was no explicit establishment and no clear, unambiguous and straightforward explanation of how the effects of the other factors are not attributed to increased imports.²⁷⁷⁸

²⁷⁷¹ Appellate Body Report, *US – Line Pipe*, para. 215

²⁷⁷² China's second written submission, para. 219.

²⁷⁷³ China's second written submission, para. 220.

²⁷⁷⁴ USITC Report Vol. II, table FLAT-1, FLAT-3

²⁷⁷⁵ China's second written submission, para. 221.

²⁷⁷⁶ New Zealand's first written submission, para. 4.158.

²⁷⁷⁷ New Zealand's first written submission, para. 4.159.

²⁷⁷⁸ European Communities' first written submission, para. 468.

7.1145 Japan and Brazil argue that the USITC ignored evidence that as minimill pricing fell, minimills still had stronger financial performance. Minimills increased their shipments of all CCFRS and decreased their average unit sales values.²⁷⁷⁹ Japan argues that, remarkably, as minimill volumes increased and prices fell, their profits still increased. According to Japan, the contrast between minimill and non-minimill operating results is dramatic. Minimills did much better in 1999 and 2000 precisely when the other mills began to experience financial difficulties.²⁷⁸⁰

7.1146 Japan and Brazil argue that although the USITC decision applied to all CCFRS products, the USITC analysis cites only an isolated example for a single product, hot-rolled steel. Minimills also make and sell plate, cold-rolled, and even some coated steel. The USITC extrapolates to these other products without any factual basis.²⁷⁸¹ Japan and Brazil also argue, that the USITC ignored substantial evidence to the contrary. The USITC never evaluated the role of minimill competition in different segments of the CCFRS industry, or addressed arguments that minimill pricing was in fact leading integrated mill pricing.²⁷⁸²

7.1147 Brazil argues further that the USITC acknowledged that minimills producing CCFRS accounted for most of the increase of capacity in the United States steel industry during the 1990s. Brazil further argues that there was not just a "greater" volume of lower-cost capacity entering market, it was an enormous volume. More importantly, the evidence revealed that minimills were not simply locked into capacity expansion resulting from investment made prior to 1998. Rather, minimills were still investing in capacity expansion during 1998, 1999 and 2000, when the USITC found the industry situation to be drastically deteriorating.²⁷⁸³

7.1148 In this regard, Korea notes that between 1996 and 2000, the domestic industry's CCFRS capacity increased by 32 million tons. Most of the increase of capacity in the United States' steel industry during the 1990s was accounted for by the minimills utilizing thin-slab technology. According to Korea, the small increase in imports of 2.5 million tons pales in comparison to the huge increase in the low-cost minimill capacity. Still, the USITC brushed aside the impact of minimills' competition with the unsubstantiated conclusive statement that imports "led" prices down.²⁷⁸⁴ Korea argues that even if it were true that the imports, not minimills, led prices down, the volume of low-cost capacity did have an effect on prices, as the USITC admits. Thus, the USITC had an obligation to identify, distinguish and separate the injury arising from low-cost minimill supplies.²⁷⁸⁵

7.1149 Korea adds²⁷⁸⁶ that over the period 1996 through 2000, minimill CCFRS capacity increased by 19.9 million tons, with an additional 1.48 million tons added in interim 2001 vis-à-vis interim 2000.²⁷⁸⁷ More to the point, 8.12 million tons of that mini-mill capacity was added between 1998 through June 2001²⁷⁸⁸, the period during which the United States industry was allegedly being injured by imports. During this same period of 1998 – 2001, however, imports were declining. Thus, at the

²⁷⁷⁹ Japan's first written submission, para. 274; Brazil's first written submission, para. 197.

²⁷⁸⁰ Japan's first written submission, para. 274.

²⁷⁸¹ Japan's first written submission, para. 272; Brazil's first written submission, para. 195.

²⁷⁸² Japan's first written submission, para. 273; Brazil's first written submission, para. 196.

²⁷⁸³ Brazil's first written submission, para. 199.

²⁷⁸⁴ Korea's first written submission, para. 137.

²⁷⁸⁵ Korea's first written submission, para. 138.

²⁷⁸⁶ Korea's second written submission, para. 169.

²⁷⁸⁷ United States' first written submission, Minimill Trade Data, Table FLAT-1 (Exhibit US 60).

²⁷⁸⁸ United States' first written submission, Minimill Trade Data, Table FLAT-1 (Exhibit US 60).

beginning of the period, mini-mill CCFRS capacity was less than imports. By the end of the period, minimill CCFRS capacity was approximately three times imports.²⁷⁸⁹

Table 8: Comparison of Minimill Capacity to Flat-Rolled Imports (in thousands of tons)

	1996	1997	1998		1999	2000	Jan-June 2000	Jan-June 2001
Minimills	17,951	27,206	31,197	97	34,516	37,838	17,845	9,322
Imports	18,372	19,274	25,305	05	20,816	20,893	11,483	6,930

Sources: Min imill Cap acity fro m Tab le FLAT-1 (Exhibit United States 6 0); Imp ort Data from USITC Memorandum No. INV-Y-209, Table FLAT-ALT7 (Exhibit CC-90).

7.1150 The United States sub mits that this argument is flawed in se veral respe cts. First, the argument fails because it is based on an "apples" to "oranges" comparison of non-comparable factors. In particular, com plainants' mistakenly com pare the capacity increases of minimill producers to import shipments during the period, when the more appropriate co mparison is to com pare the minimills' capacity increases to capaci ty increases of foreign pr oducers. If the co mplainants had performed this more appropriate comparison, they would have recognized that the foreign in dustry's capacity increase s during the period of investigati on were sub stantially larger than the capacity increases undertaken by minimills during this period. Given this substantial difference in the capacity increases of the two sets of prod ucers, it shoul d not be surprisin g that the U SITC concluded that imports were a more significant cause of price declines in the market than minimills.²⁷⁹⁰

7.1151 The United States argues that, in this sa me vein, the record shows that there was a substantially larger volume of imports shipped into the market than there was of merchandise shipped by m inimills. In particul ar, the vol ume of im ports shipped i nto the US m arket ranged between 18.3 million and 25.3 million tons on annual basis dur ing the period from 1996 to 2000. B y way of comparison, the total volume of all carbon flat-ro lled shipments (including GOES and tin mill steel) made by minimill producers into t he commercial market never exceeded more than 11.9 million tons on an annual basis.²⁷⁹¹ Further, the United States argues that the re cord evidence established tha t imports routinely and consistently undersold domestic and m inimill merchandise throughout the period of i nvestigation, including the years 1998, 1 999, and 2000. Accordin gly, the record clearly confirms that the USITC was correct when it foun d that im ports had a m ore substantial i mpact on market pricing than minimills during the period from 1998 to 2000.²⁷⁹²

7.1152 Korea argues²⁷⁹³ that a comparison of minimill shipments with both shipments by integrated producers and im ports demonstrates how the failure to analyse growth in the minimill sector masks the events in the United States market affecti ng United States producers. Overall United State s shipments of CCFRS steel showed an increase of 13.3 million tons between 1 996-2000. H owever, the data presented b y the United States shows that virtually all of that growth was accounted for b y

²⁷⁸⁹ The United States argues (United States' first written submission, para. 497) that domestic industry capacity shoul d be com pared to foreign capacity, not to i mports. B ut, clearly, si nce at least 99 % of Un ited States industry capacity is directed to the United States market (See USITC Memorandum INV-Y-209, Table FLAT-ALT-7 (Exhibit CC-90)), while roughly a maximum of 3% of for eign capacity is shipped to t he United States market (USITC Re port, Vol. II, Table FLAT-27 at FLAT-30 (Exhibit CC-6)), the pr oper comparison is clearly between United States capacity and imports.

²⁷⁹⁰ United States' first written submission, para. 511.

²⁷⁹¹ Table FLAT-1 (US-60).

²⁷⁹² United States' first written submission, para. 512.

²⁷⁹³ Korea's second written submission, para. 170.

minimills alone: shipments by integrated producers increased by only 1.1 million tons between 1996-2000 while minimill shipments increased by 12.2 million tons. Domestic shipments by integrated producers in the interim period – when the greatest losses occurred – fell by 13.5 million tons (from 91.2 million tons to 77.7 million tons). In contrast, minimill shipments increased by 588 thousand tons. In 1996, minimill shipments accounted for 8.5% of United States shipments. By 2001, minimill shipments had doubled their share of United States shipments.

Table 9: United States Shipments of Flat-Rolled Steel by Minimills, Integrated Mills, and Total (in thousands of tons)

	1996	1997	1998		1999	2000	Jan-June 2000	Jan-June 2001
Minimills	15,749	19,549	21,874	74	26,040	27,306	14,778	5,366
Integrated*	169,058	168,898	167,269	170,573	170,163	91,221	77,689	
Total	184,807	188,447	189,143	196,613	198,069	105,999	93,055	
Minimills as a percentage of total United States shipments	8.5%	10.4%	11.6%	13.2%	14.1%	13.9%	16.5%	

*Integrated is the difference between Total and Mini-Mill.

Sources: Mini-Mill Capacity from Table FLAT-1 (Exhibit United States 60); Total United States Shipments from USITC Memorandum No. INV-Y-209, Table FLAT-ALT7 (Exhibit CC-90).

7.1153 Korea submits that in comparison to the impact of minimills, especially in the key period of 1998-2001 (when imports are alleged to have caused injury), imports had a diminished role in the market. Comparing the increase in minimill shipments to the increase in imports, it is clear that the overall growth in minimill shipments over the period dwarfed the growth in imports (12.2 million tons to 2.6 million tons). It is also clear that while mini-mill shipments grew by 6 million tons during the period in which the United States "industry was allegedly injured by imports", (1998-2000) imports were falling by 4.4 million tons through 2000 and fell by an additional 4.6 million tons in the interim period. Thus, at the beginning of the period of investigation imports were greater than minimill shipments. By the end of the period, minimill shipments were over twice as large as imports.²⁷⁹⁴

²⁷⁹⁴ Korea's second written submission, para. 171.

Table 10: Comparison of Minimill United States Shipments to Imports of Flat-Rolled (in thousands of tons)

	1996	1997	1998	1999	2000	Jan-June 2000	Jan-June 2001
Minimills	15,749	19,549	21,874	26,040	27,906	14,778	15,366
Imports	18,372	19,274	25,305	20,816	20,893	11,483	6,930
Minimills and import shipments	34,121	38,823	47,179	46,856	48,799	26,261	22,296
Minimills as a percentage of minimill and import shipments	46.2%	50.4%	46.4%	55.6%	57.2%	56.3%	68.9%

Sources: Minimill Shipments from Table FLAT-1 (Exhibit United States 60); Imports from USITC Memorandum No. INV-Y-209, Table FLAT-ALT7 (Exhibit CC-90).

7.1154 Korea submits that the impressive growth of minimill shipments both in relation to integrated producers and in relation to imports throughout the period – and especially in the period between 1998-2001 – raises serious doubts about the claim that imports "led prices down" during the 1998-2001 period.^{2795 2796} According to Korea²⁷⁹⁷, these doubts are confirmed by examining the difference in per unit costs of minimills and integrated producers. A comparison of these unit costs shows that in 1996, unit costs of mini-mills were US\$26/ton lower than those of integrated producers in 1996, a figure which grew to US\$70/ton in 2000 before reaching a stunning US\$100/ton in interim 2001. This competitive advantage manifested itself in the market share gains described below.

Table 11: Comparison of Minimills and Integrated Cost of Goods Sold for Hot Rolled (\$/ton)

	1996	1997	1998	1999	2000	Jan-June 2000	Jan-June 2001
Minimills	\$311.21	301.77	293.67	250.23	257.24	266.91	232.61
Integrated	\$337.26	333.64	324.46	300.07	326.84	315.70	332.18
Minimills below integrated	\$26.05	31.87	30.79	49.84	69.60	48.79	99.58

Source: Public Versions of Supplementary Material Cited in Views of Commissioners in Investigation No. TA-201-73, *Steel*, Memorandum No. INV-Y-215 (1 May 2002) ("USITC Memorandum No. INV-Y-215"), Tables STL20H3I.WK4 (Flat: Hot-Rolled Integrated) and STL20H3M.WK4 (Flat: Hot-Rolled Minimill) (Korea Exhibit 10, "K-10").

7.1155 Korea further argues that not coincidentally, the cost advantage was used by minimills to lower prices and gain market share at the expense of both integrated producers and imports. Moreover, even when integrated producers were consistently selling hot-rolled steel at higher prices than minimills, those prices of integrated producers were below their Cost of Goods Sold in 2000 and

²⁷⁹⁵ United States' first written submission, para. 509.

²⁷⁹⁶ Korea's second written submission, para. 172.

²⁷⁹⁷ Korea's second written submission, para. 173.

2001. In contrast, minimill prices were always above their Cost of Goods Sold throughout the period of investigation.²⁷⁹⁸

Table 12: Unit Selling Price of Hot-Rolled/Comparison of Minimill and Integrated Prices (unit: US\$/ton)

	1996	1997	1998	1999	2000	Jan-June 2000	Jan-June 2001
Minimills prices	\$321.20	\$328.62	\$296.32	\$271.12	\$283.66	\$316.81	\$233.51
Integrated prices	\$353.24	\$365.16	\$350.00	\$308.23	\$320.14	\$332.97	\$269.07
Minimills below integrated	\$32.04	\$36.54	\$53.68	\$37.11	\$36.48	\$16.16	\$35.56

Source: USITC Memorandum No. IN V-Y-215, Tables STL20H3I.WK4 (Flat: Hot-Rolled Integrated) and STL20H3M.WK4 (Flat: Hot-Rolled Mini-Mill) (Exhibit K-10).

7.1156 According to Korea²⁷⁹⁹, a comparison of the difference in profitability between mini-mills and integrated producers reveals that: between 1999-2001, the only period in which mini-mills had a negative operating profit was in interim 2001, when imports had declined to their absolute low point in terms of both absolute and relative levels. Moreover, this was the period (first half of 2001) when the negative effect of a major demand downturn was felt as the USITC and the United States admit.²⁸⁰⁰ In fact, the United States uses 1996 as the base profit in its numerical analysis due to the similarity of demand in 1996 and the first half of 2001. Mini-mills also lost money in 1996.²⁸⁰¹

Table 13: Comparison of Mini-Mill and Integrated Mill Operating Profitability and Imports as a Percentage of United States Production

	1996	1997	1998	1999	2000	Jan-June 2000	Jan-June 2001
Minimill operating profitability	-1.5%	4.1%	-3.4%	2.8%	4.9%	11.7%	-4.1%
Integrated mill operating profitability	-0.7%	4.1%	1.6%	-10.4%	-8.1%	-0.1%	-30.1%
Imports relative to all flat-rolled production	10.0%	10.2%	13.2%	10.6%	10.5%	10.8%	7.4%

Sources: USITC Memorandum No. INV-Y-215, Tables STL20H3I.WK4 (Flat: Hot-Rolled Integrated) and STL20H3M.WK4 (Flat: Hot-Rolled Mini-Mill) (Exhibit K-10); *Korea first written submission*, para. 84, Chart 3.

7.1157 According to Korea, a proper analysis of the role of minimills calls into serious question the USITC's causation analysis that declining imports "led prices down" when it was mini-mills alone that gained market share between 1998 through interim 2001. More importantly, an analysis of the minimill part of the industry shows that an analysis of integrated and minimills together masks the relative movements in domestic industry indicators and the role of imports in the market. The USITC

²⁷⁹⁸ Korea's second written submission, para. 174.

²⁷⁹⁹ Korea's second written submission, para. 175.

²⁸⁰⁰ United States' first written submission, para. 1094.

²⁸⁰¹ United States' first written submission, para. 1094.

failed to properly identify and separate these significant effects from intra-industry competition and instead, attributed them to imports.²⁸⁰²

7.1158 Further, New Zealand argues that although the USITC acknowledged that minimill production had an effect on prices and that it contributed in some part to the alleged injury, it failed to assess the full impact of intra-industry competition or provide a reasoned and adequate explanation of the relationship of injury caused by this factor to any injury allegedly caused by imports.²⁸⁰³ China and New Zealand argue that the USITC failed to identify, and explain, the nature and extent of the injurious effects of intra-industry competition as distinguished from the alleged injurious effects of increased imports, and to establish explicitly through a reasoned and adequate explanation, that injury caused by this factor has not been attributed to increased imports.²⁸⁰⁴

7.1159 Brazil asks what makes the USITC's simplistic explanation that: "...the loss of Wool Act payment hurt lamb growers and feeders and caused some to withdraw from the industry", found invalid by the Appellate Body in *US – Lamb*²⁸⁰⁵, any different from the USITC's "analysis" in this case regarding intra-industry competition. Acknowledging the greater volume of lower-cost minimill capacity in the market, and finding that this lower-cost capacity did have an effect on prices, the USITC offers yet another conclusory statement:

"[W]e find that minimills were not primarily responsible for the declines in domestic prices or an important cause of serious injury to the domestic industry, which is equal to or greater than the injury caused by increased imports."²⁸⁰⁶

7.1160 Again, Brazil questions where the USITC actually separates and distinguishes causes in this statement; where the reasoned and adequate explanation to support the conclusion are; and where the USITC's actual analysis of the injurious effects of increased excess capacity on the industry is. Because imports are a more important cause of injury than capacity increases, Brazil further questions whether the USITC actually found that there was a genuine and substantial causal link between increased imports and serious injury.²⁸⁰⁷

7.1161 Finally, the United States cautions the Panel not to rely on Korea's comparisons of the volumes of minimill and import shipments. According to the United States, these comparisons are misleading because they compare double-counted minimill shipments (and capacity and production) data to import shipment data that is not double-counted.²⁸⁰⁸ The minimill shipment numbers used by Korea all do double-count shipments of slab, hot-rolled carbon steel, and cold-rolled steel that were internally consumed by minimills in the production of downstream CCFRS products. For example, the record indicates that, of the 27.9 million tons of CCFRS shipped by minimills overall in 2000, 16.043 million tons (or more than 57%) was internally transferred for the production of downstream products, the vast majority of which consisted of plate, hot-rolled and cold-rolled carbon flat steel.²⁸⁰⁹ In other words, if double-counting of internal transfers is eliminated, the actual tonnage of CCFRS shipped by the minimills is overstated in Korea's charts by at least a factor of two. By way of contrast, the import shipment data used in Korea's charts do not double-count import shipments because, when these shipments are imported and used to produce downstream merchandise, they are then considered

²⁸⁰² Korea's second written submission, para. 176.

²⁸⁰³ New Zealand's first written submission, para. 4.161.

²⁸⁰⁴ China's first written submission, para. 369; New Zealand's first written submission, para. 4.156.

²⁸⁰⁵ Appellate Body Report, *US – Lamb*, paras. 185 and 186.

²⁸⁰⁶ USITC Report Vol. I at 65.

²⁸⁰⁷ Brazil's second written submission, para. 77.

²⁸⁰⁸ These comparisons are contained in Korea's second written submission, paras. 169-176

²⁸⁰⁹ See Minimill Trade Data, p. 1 (Exhibit US-60).

domestic production and shipments. The United States submits that, in other words, Korea's analysis relies on comparisons of overstated volumes of minimill shipments against import shipment data that are not overstated. In order to properly compare minimill shipment volumes against import volumes, Korea should have compared commercial shipments by minimills against import shipments (as the United States did in its first written submission) because these numbers do not double-count the internal transfers of CCFRS products made by minimills. When the Panel does so, it will recognize that there was a substantially smaller volume of shipments of CCFRS for minimills than for imports during each year of the period of investigation, thus making clear that imports were more likely to have a serious and adverse impact on domestic pricing during the period than minimills.²⁸¹⁰

7.1162 In counter-response, Korea notes that in the second substantive meeting the United States conceded that the mini-mill data cited by Korea in its first written submission is accurate. It limited its objections to whether it was proper to compare import volumes to mini-mill shipments that included both commercial and internal shipments (the so-called "double count"). As Korea noted in its response, the mini-mill shipments reported by Korea in paragraphs 170 and 171 are stated on the same basis that those shipments were included in the total US shipments in USITC Memorandum No. INV-Y-209, Table FLAT-ALT-7.²⁸¹¹ It is apparent that imports are being compared to total US shipments reported in Table FLAT-ALT-7, so it is equally apparent that imports are properly compared to the mini-mill component of that figure.²⁸¹²

7.1163 In counter-response, New Zealand notes that the United States seeks to retrospectively justify the USITC's conclusions by relying on evidence that was deleted from its report, in particular price information that allegedly suggested imports were underselling minimill production²⁸¹³ and that import volumes exceeded minimill production.²⁸¹⁴ This data can form no part of the record for the purposes of this case. The United States had to demonstrate non-attribution "explicitly, through a reasoned and adequate explanation" before applying the safeguard measure. As New Zealand has pointed out, the data does not appear anywhere in the USITC Report and it is too late to try to justify the USITC finding now, by reference to data not included in the USITC Report.²⁸¹⁵

7.1164 Also in counter-response, Japan argues that the USITC ignored evidence that Nucor, a domestic minimill, was the price leader for hot-rolled and cold-rolled steel products, two of the most important categories of CCFRS steel.²⁸¹⁶ This blind eye says Japan, is quite surprising, since the

²⁸¹⁰ United States' written reply to Panel question No. 40 at the second substantive meeting.

²⁸¹¹ Korea's second written submission, paras. 170-171; Table FLAT-1 (US Exhibit 60), and Public Versions of Supplemental Material Cited in Views of Commissioners in Investigation No. TA-201-73, Steel, Memorandum No. INV-Y-209 (1 May 2002) ("USITC Memorandum No. INV-Y-209") (Exhibit CC-90).

²⁸¹² Korea also points out that, as noted at the Second Substantive Meeting, any "double counting" issue is the direct result of the overly broad definition of the flat-rolled like product. No Respondent at the ITC endorsed the "flatrolled" like product. Respondents clearly argued that slab, hot-rolled, cold-rolled, corrosion-resistant, and plate constituted five separate like products.

²⁸¹³ United States' first written submission, paras. 508, 473-474, relying on Table Flat-1 in the USITC Report Vol. II at Flat-4, which has been blanked out.

²⁸¹⁴ Ibid., para. 512, relying on Table Flat-1 in the USITC Report, Vol. II at Flat-4, which has been blanked out.

²⁸¹⁵ New Zealand's second written submission, para. 3.137.

²⁸¹⁶ Joint Respondents' Post Hearing Brief on Flat-Rolled Steel (1 Oct. 2001) (filed by the Law Firm Willkie Farr & Gallagher) at 94 (Exhibit CC-53) (At the US ITC's hearings in the recent AD investigation of hot-rolled steel, Nucor's CEO testified, "If our order book is weak in the present quarter, we will lower our prices to increase orders. What happened in 2000? A period of very strong demand for hot-rolled. By the end of the first quarter and through the year, our order book for hot-rolled was falling. We responded by reducing our prices." Ibid., citing *Certain Hot-Rolled Steel from Argentina and South Africa*, USITC Pub. 3446, Inv. Nos. 701-TA-404 (Final) and 731-TA-898 and 905 (Final) (Aug. 2001), Transcript at 57-58 (statement of Mr.

USITC had explicitly relied on this evidence in other recent trade proceedings involving cold rolled steel.^{2817 2818}

7.1165 Japan also submits²⁸¹⁹ that the USITC ignored data showing that minimills gained market share with lower prices, particularly in 2000 and 2001:

Table 14: Minimill / Import / Integrated Market Shares²⁸²⁰

Period	Import Share	Minimill Share	Integrated Share
1H00	26.7%	21.8%	51.5%
2H00	22.2%	25.9%	51.9%
1H01	13.1%	31.4%	55.5%

7.1166 According to Japan, not surprisingly, given that in 2001 most import sources were shut out of the market by anti-dumping and countervailing duties orders, minimills were disproportionately the beneficiaries, gaining twice as much market share as integrated firms.

7.1167 Japan submits that the United States again tries to shift the focus to foreign capacity.²⁸²¹ Japan reiterates that this comparison of crude aggregate capacity is incorrect. Since virtually all United States capacity stays in the United States market, minimill capacity remains almost exclusively in the United States market. Moreover, the USITC knows that minimills historically have priced to fill their mills, and try to maintain high rates of capacity utilization.²⁸²² With such a business model, new minimill capacity is much more likely to affect domestic price levels than foreign capacity.²⁸²³

7.1168 Japan also submits that the United States also tries to shift the focus to aggregate shipment levels.²⁸²⁴ However, in doing so, the United States fails to acknowledge that minimills produce predominately plate, hot-rolled, and cold rolled steel, and produce only limited galvanized steel and no slab.²⁸²⁵ The United States also considers only the level of shipments, not the trends over time. From 1999 to 2001, when the domestic industry began to experience problems, import shipments were falling and minimill shipments were increasing.²⁸²⁶

DiMicco). He also stated, "Based on our previous experience, we believe as a low-cost producer worldwide it certainly better to run at high capacity utilization with low prices than at low capacity utilization with low prices.").

²⁸¹⁷ See Exhibit CC-34, *Certain Cold-Rolled Steel Products from Argentina, Brazil, Japan, Russia, South Africa and Thailand*, Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-8324, 836, and 838 (Final) USITC Pub. 3283 (Mar. 2000) at 22-23.

²⁸¹⁸ Japan's second written submission, para. 145.

²⁸¹⁹ Japan's second written submission, para. 146.

²⁸²⁰ United States' first written submission, Exhibit US-60.

²⁸²¹ United States' first written submission, para. 511.

²⁸²² Joint Respondents' Prehearing Brief on Cold Rolled Steel (11 Sept. 2001) (filed by the Law Firm of Willkie Farr & Gallagher) (discussing how the United States domestic industry has consistently created and fully utilized its production facilities as evidenced by increasing shipments throughout the period) at 20-23 (Exhibit CC-53).

²⁸²³ Japan's second written submission, para. 147.

²⁸²⁴ United States' first written submission, para. 512.

²⁸²⁵ USITC Report at 65 ("Hot rolled steel is the primary commercial product for minimills.").

²⁸²⁶ Japan's second written submission, para. 148.

Legacy costs

7.1169 Korea argues that there is no question that legacy costs were a significant factor explaining the poor condition of the industry. Korea, China, New Zealand and Brazil argue that the USITC acknowledged that legacy costs were causing injury to the domestic industry at the same time as imports.²⁸²⁷

7.1170 Korea and Brazil assert that, without question, the USITC appreciated the severity of the legacy cost situation. Even with import relief, the USITC admitted that the future viability and health of the industry could only be ensured by addressing these costs.²⁸²⁸ New Zealand further notes that the USITC found that the funding of legacy costs is a "vexing problem for the domestic industry"; that these costs "have prevented needed consolidation within the domestic industry"; pointed to "[t]he difficulties in meeting these obligations"; described them as a "longstanding problem"; and concluded they "may have left certain members of the domestic industry less able to compete with low-priced imports".²⁸²⁹

7.1171 However, according to Korea and Brazil, the USITC then rejected the importance of legacy costs claiming that "respondents have offered no reason why the industry's longstanding problems would cause no injury in 1996 or 1997 but then begin to depress prices and strangle revenue in 1998-2000". Brazil argues that this statement defies the record and ignores the dramatic distinctions between different segments of the industry on this issue.²⁸³⁰ Korea argues clearly, legacy costs continued to significantly impact the health of the industry and legacy costs were the reason that the integrated sector performed more poorly than the minimill sector of the industry. Therefore, according to Korea, the USITC should have identified, distinguished, and separated those injurious effects of legacy costs, which they so clearly understood, before concluding that there was a substantial relationship between imports and the serious injury to the industry.²⁸³¹

7.1172 Brazil argues that the USITC's cursory examination and explanation of the legacy cost issue did not match what the USITC clearly saw as a significant problem for the industry. According to Brazil, implicit in its statements was the reality that legacy costs were affecting the domestic industry at the same time as imports. However, Brazil argues that the USITC did not ensure that it was not imputing to imports injury caused by this other admittedly important factor and that, therefore, the USITC's analysis was not sufficient to meet the standard of Article 4.2(b).²⁸³²

7.1173 In response, the United States notes that in its analysis, the USITC acknowledged that the legacy costs had been, and continued to be, a long term obstacle to the prospects of consolidation in the industry.²⁸³³ It noted, however, the issue of the industry's legacy costs had predated the period of investigation and that these costs had not prevented the industry from earning a reasonable rate of return in 1996 and 1997, before the surge of imports in 1998.²⁸³⁴ Moreover, although the USITC explicitly recognized that the burden of legacy costs varied between producers and had left certain producers more vulnerable to injury from imports, it found that there was no record evidence linking

²⁸²⁷ Korea's second written submission, para. 177; China's first written submission, paras. 359 and 362; New Zealand's first written submission, para. 4.163; Brazil's first written submission, para. 204.

²⁸²⁸ Korea's first written submission, para. 129; Brazil's first written submission, para. 207.

²⁸²⁹ New Zealand's second written submission, para. 3.130.

²⁸³⁰ Korea's second written submission, para. 177; Brazil's first written submission, para. 204.

²⁸³¹ Korea's first written submission, para. 131.

²⁸³² Brazil's first written submission, para. 207.

²⁸³³ USITC Report, p. 64. Indeed, the USITC's factual report sets forth a lengthy discussion of the impact these costs have had on the industry's condition. USITC Report, p. OVERVIEW-31-35.

²⁸³⁴ USITC Report, p. 64.

legacy costs to the price declines that caused serious injury to the industry during the latter part of the period of investigation.²⁸³⁵ Accordingly, the USITC reasonably discounted these costs as another factor causing injury to the industry during the period of investigation.²⁸³⁶

7.1174 In counter-response, New Zealand argues²⁸³⁷ that despite the fact that the USITC clearly appreciated the severity of the legacy cost situation, the USITC still managed to conclude, against the weight of its own reasoning and the evidence, that legacy costs,

"[A]re not responsible for the low prices that have injured the industry. We therefore find that legacy costs are not a source of injury to the domestic industry equal to or greater than increased imports."²⁸³⁸

7.1175 New Zealand argues that there is an obvious *non-sequitur* here – why was the USITC only prepared to take legacy costs seriously if they depressed domestic prices, having just listed a range of other negative impacts?²⁸³⁹

7.1176 The United States argues further that the US ITC's finding that legacy costs had not contributed to the declines in the industry's condition during the period is fully supported by the record evidence. In this regard, the USITC prepared an analysis of the financial impact these costs had on the financial results of the industry in its Report.²⁸⁴⁰ That analysis shows not only that legacy costs did not contribute to the declines in the industry's financial condition during the period from 1996 to 2000 but that the change in these "costs" actually benefitted the industry with respect to its operating results during this period.²⁸⁴¹ In this regard, that analysis shows that the aggregate net period cost for steel producers who had either defined benefit or defined contribution plans actually declined over the period; more specifically, the aggregate net periodic cost of the post-employment pension and non-pension benefits for both defined benefit and defined contribution employers fell by US\$447 million during the period from 1996 to 2000.²⁸⁴² Since these are the costs that are reflected in the operating results of the industry²⁸⁴³, the industry's "legacy costs" did not increase the industry's costs over the period, as complainants suggest; instead, the industry's legacy "costs" actually reduced the industry's aggregate COGS over the period, thus increasing the industry's operating income levels somewhat during the period of investigation.²⁸⁴⁴

²⁸³⁵ USITC Report, p. 64.

²⁸³⁶ United States' first written submission, para. 503.

²⁸³⁷ New Zealand's second written submission, para. 3.130.

²⁸³⁸ USITC Report Vol. 1, p 64.

²⁸³⁹ New Zealand's second written submission, para. 3.131.

²⁸⁴⁰ USITC Report, Table OVERVIEW-9.

²⁸⁴¹ USITC Report, Table OVERVIEW-9.

²⁸⁴² USITC Report, Table OVERVIEW-9. In this regard, the aggregate net periodic cost for these firms for legacy costs consistently declined during the period, from 1.123 billion dollars in 1996 to 834 million dollars in 1998 to 676 million dollars in 2000. Ibid. The aggregate net periodic cost of these expenses is calculated by adding the net periodic costs (or benefits) of post-employment pension and non-pension benefits for defined benefit plan employers to the net pension plan expense and other post-employment benefits for defined contribution plan employers. Ibid. These are the amounts recognized in a company's operating income statements. Ibid.

²⁸⁴³ It is important to note that the items marked "amounts recognized in financial statements" in Table OVERVIEW-9 reflect liability or asset amounts that are included in a company's balance sheet, not its statements of operating results. USITC Report, pp. 33 and 35.

²⁸⁴⁴ United States' first written submission, para. 504.

7.1177 The United States argues that the US ITC was therefore correct when it found that the industry's legacy costs had not contributed to the serious injury being experienced by the industry during the period of investigation. Although the complainants correctly note that the USITC recognized that legacy costs represented a "vexing problem" for the industry, they ignore the fact that the USITC clearly stated that the legacy cost issue was a problem predating the period of investigation that would hinder the industry's future efforts to adjust, but did not contribute significantly to the pricing or cost issues that caused the industry's injury during the period of investigation.²⁸⁴⁵

7.1178 In counter-response, New Zealand submits that the USITC Report actually concluded the opposite. It conceded a range of injurious effects caused by legacy costs, but then sidelined them. As a result, it made no attempt whatsoever to assess their nature and extent and their injurious effect as separated and distinguished from increased imports.²⁸⁴⁶

7.1179 Brazil argues that despite the fact that the USITC notes that "the issue of legacy costs varies tremendously among domestic producers", no effort was made by the USITC to distinguish between producers with massive legacy cost burdens and producers with no such burdens. In the CCFRS industry, it would have discovered that the distinction falls along the type of technology used to produce steel. Integrated mills shoulder an overwhelmingly disproportionate share of the legacy costs within the industry. Yet, according to Brazil, the USITC's analysis was oblivious to the distinction, including what it meant for the integrated industry as massive increases in minimill capacity were being ramped up well into 2000.²⁸⁴⁷ In this regard, New Zealand argues that the fact that "the burden of legacy costs varies tremendously among domestic producers" is not a reason to dismiss legacy costs as a cause of injury. In fact, according to New Zealand, it confirms the conclusion already reached that this simply served to intensify the already severe effects on integrated mills of domestic intra-industry competition.²⁸⁴⁸

7.1180 In New Zealand's view, the fact that the problem of legacy costs may have predated the period of investigation and did not comprise a new issue for the industry, is irrelevant if, as they did, those costs continued to erode competitiveness and profit during that period. New Zealand submits that in terms of Article 4.2(b), they "are causing injury to the domestic industry at the same time [as increased imports]". New Zealand also argues that the fact that certain parts of the industry were able to operate profitably at one point in the period of investigation is also, by itself, irrelevant: The question is whether legacy costs nevertheless caused injury, at this or at other points.²⁸⁴⁹ New Zealand submits that clearly, the fact that legacy costs have been present for some time is irrelevant so long as legacy costs are still "causing injury to the domestic industry at the same time as [increased imports]", in terms of Article 4.2(b).^{2850 2851}

7.1181 New Zealand notes costs of between US\$30 and US\$65 per ton of steel produced by integrated mills existed, totalling across the industry between US\$1.7 and US\$3.6 billion. In terms of current costs, integrated producers surveyed by the USITC had to cover US\$742 million in post

²⁸⁴⁵ United States' first written submission, para. 505.

²⁸⁴⁶ New Zealand's second written submission, para. 3.133.

²⁸⁴⁷ Brazil's first written submission, para. 206.

²⁸⁴⁸ New Zealand's first written submission, para. 4.167.

²⁸⁴⁹ New Zealand's first written submission, para. 4.166.

²⁸⁵⁰ New Zealand's first written submission, para 4.166.

²⁸⁵¹ New Zealand's second written submission, para. 3.134.

employment benefits in 2000. Further, during the same year, the benefit obligations of steel producers surveyed by the USITC exceeded fund assets by US\$6.6 billion.²⁸⁵²

7.1182 Korea notes²⁸⁵³ that the United States now cites tables in the Staff Report and data to suggest that the short-term portion of legacy costs, which, says Korea, were enormous, declined somewhat during the period.²⁸⁵⁴ Korea submits that whether or not they declined, the absolute weight of such legacy costs on the performance of the integrated producers in the industry is undeniable²⁸⁵⁵ and was reaffirmed by the USITC in its remedy recommendation to the President. As Commissioner Okun observed:

"[W]hile the Commission did not find these alternative causes [pension costs, healthcare costs, environmental clean-up costs, and certain labor-related issues] to be a more important cause of injury...than imports, *this does* not mean that these issues should not be addressed as part of a remedy that will facilitate positive adjustment to import competition by lowering costs and allowing the industry to restructure."²⁸⁵⁶

7.1183 China and New Zealand argue that the USITC's analysis of legacy costs fails to identify and explain the nature and extent of the injurious effects of legacy costs as distinguished from the alleged injurious effects of increased imports, and to establish explicitly through a reasoned and adequate explanation, that injury caused by this factor is not attributed to increased imports.²⁸⁵⁷ In particular, China argues that the USITC failed to explain why legacy costs were a problem, how this problem impacted on the situation of the industry, how legacy costs had prevented needed consolidation and the result that this had on the industry.²⁸⁵⁸

Buyer consolidation

7.1184 China argues that the USITC acknowledged buyer consolidation as a cause of injury.²⁸⁵⁹ China further argues that the USITC failed to explain the nature and extent of that impact. According to China, it is not enough to merely state that a factor cannot, on its own, explain a substantial decline in prices. Rather, the requirements of the Agreement on Safeguards dictate that the injurious effects of all factors be identified.²⁸⁶⁰

7.1185 In defence, the United States argues that the USITC addressed the argument made by foreign respondents that buyer consolidation had impacted the bargaining power and profits of the industry.²⁸⁶¹ After recognizing that there had been some consolidation of buying operations by automotive manufacturers and other steel purchasing sectors, the USITC discounted this factor as a cause of injury, noting that it had been on-going for a number of years and that it pre-dated 1998, the

²⁸⁵² New Zealand's first written submission, paras. 4.164-4.165; New Zealand's second written submission, para. 3.133.

²⁸⁵³ Korea's second written submission, para. 179.

²⁸⁵⁴ United States' first written submission, para. 504.

²⁸⁵⁵ The Chairman of Bethlehem Steel specifically testified as to the magnitude of these costs, as Commissioner Okun noted: "We now have 13,000 active workers trying to support 74,000 dependent families which is over a hundred thousand actual people that small work base is trying to support." USITC Report, Vol. I, p. 442, n. 70 (Exhibit CC-6).

²⁸⁵⁶ USITC Report, Vol. I, p. 442, n. 69 (emphasis added) (Exhibit CC-6).

²⁸⁵⁷ China's first written submission, para. 368; New Zealand's first written submission, para. 4.162.

²⁸⁵⁸ China's first written submission, para. 368.

²⁸⁵⁹ China's first written submission, paras. 359 and 364.

²⁸⁶⁰ China's first written submission, para. 370.

²⁸⁶¹ USITC Report, p. 65.

year of the import surge.²⁸⁶² Moreover, it stated that it found no evidence indicating that this consolidation had an impact on domestic pricing or that it had been a cause of serious injury to the industry.²⁸⁶³

7.1186 The United States argues that given that China has not offered any substance to support its arguments, it is clear that the USITC's findings in this regard are reasonable and that the USITC properly discounted the argument that purchaser consolidation was a source of injury to the industry.²⁸⁶⁴

7.1187 China argues that purchaser consolidations are an on-going process covering the whole period of investigation. As they are able to reduce the bargaining power and the profit margins of domestic producers, the USITC should have distinguished these effects from the impact of imports and nourish its findings with 'substance'. China submits that the USITC failed to do so.²⁸⁶⁵

Poor management

7.1188 China notes that the respondents argued before the USITC that bad corporate decisions increased companies' debt load and were responsible for poor financial performance and bankruptcies. According to China, the USITC, in response, merely stated that since the financial position of the industry "weakened after imports surged", it resulted from injury caused by increased imports and, thus, poor financial decisions cannot be a cause of injury, especially since increased debt load cannot explain the price declines. China argues that this is not an answer. When the USITC states that a factor is not a cause because another factor is the cause, it does not give the reasons why the former is not a cause. In China's view no explanation whatsoever was provided.²⁸⁶⁶

7.1189 In response, the United States notes that the USITC addressed the argument made by importers and foreign producers that bad management decisions, such as the industry's capital investment decisions, had caused injury to the industry.²⁸⁶⁷ The USITC found this argument "unpersuasive", noting that the increased debt load and other management decisions of the industry did not explain the decline in prices that occurred during the period.²⁸⁶⁸ Moreover, the USITC stated that the record showed that substantial declines in the industry's performance first began in 1998, when imports surged into the market and began driving prices downward.²⁸⁶⁹ It noted that these imports prevented the industry from maintaining or achieving high levels of profitability and that the industry's degree of debt was a result of that import competition, rather than being a cause of injury.²⁸⁷⁰ In sum, the USITC properly identified the nature and extent of the injury caused by this other factor, found that there was no evidence that bad management decisions caused injury to the industry, and reasonably dismissed this alleged "injury" factor as a possible source of injury.²⁸⁷¹

²⁸⁶² USITC Report, p. 65.

²⁸⁶³ USITC Report, p. 65.

²⁸⁶⁴ United States' first written submission, para. 517.

²⁸⁶⁵ China's second written submission, para. 222.

²⁸⁶⁶ China's first written submission, para. 375.

²⁸⁶⁷ USITC Report, p. 64.

²⁸⁶⁸ Ibid.

²⁸⁶⁹ Ibid.

²⁸⁷⁰ Ibid.

²⁸⁷¹ United States' first written submission, paras. 515-517.

7.1190 The United States argues that given that China has not offered any substance to support its arguments, it is clear that the USITC's findings in this regard are reasonable and that the USITC properly discounted the argument that poor management was a source of injury to the industry.²⁸⁷²

NAFTA imports

7.1191 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic certain flat steel industry, which is found in the USITC Report was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports" only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).²⁸⁷³

7.1192 China further argues that in the Supplementary Report, the USITC was required to assess the injury caused by imports from Mexico and Canada and to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. China argues that it did not do so. China further argues that the USITC provided no explanation whatsoever that injury caused by imports from Mexico and Canada was not attributed to increased imports and there is no reason to believe that injury caused by imports from Mexico and Canada were not in fact attributed to increased imports.²⁸⁷⁴

7.1193 In this regard, the European Communities notes that the USITC concluded that imports from Mexico accounted for a substantial share of total imports and "contributed importantly" to injury. The European Communities notes that the President later decided to exclude imports from Mexico from the scope of the measure.²⁸⁷⁵ China notes that Canada and Mexico belonged to the five top suppliers of CCFRS products during the period of investigation. The rate of increase in imports from Mexico was higher than the rate of increase in total imports, and the AUV for imports of the product concerned from Mexico were consistently below average unit value of imports from other sources²⁸⁷⁶ - able to undersell United States producers.²⁸⁷⁷

7.1194 In light of the foregoing, the European Communities, China, New Zealand and Brazil submit that, clearly, the NAFTA imports that were excluded from the measure were an "other" factor for the purposes of non-attribution. However, the United States failed to analyse this factor and to establish explicitly that its effects were not attributed to non-NAFTA imports.²⁸⁷⁸ More particularly, the European Communities argues that despite finding that Canada was one of the top five importers and that Mexican imports contributed importantly to the serious injury suffered by the domestic industry, the USITC did not undertake a non-attribution analysis for the injurious effects of these excluded imports.

²⁸⁷² United States' first written submission, paras. 515-516.

²⁸⁷³ China's first written submission, para. 380.

²⁸⁷⁴ China's first written submission, para. 383.

²⁸⁷⁵ European Communities' first written submission, para. 469.

²⁸⁷⁶ USITC Report, Vol. I, p.66.

²⁸⁷⁷ China's second written submission, para. 224.

²⁸⁷⁸ European Communities' second written submission, para. 376; China's second written submission, para. 224; New Zealand's written reply to Panel question No. 82 at the first substantive meeting; Brazil's first written submission, para. 230;

7.1195 The United States simply insists that it is not required to undertake such an analysis. For the United States' response, see paragraph 7.1066 *et seq.*²⁸⁷⁹

7.1196 Brazil argues that the USITC's treatment of injury and causation was perfunctory and inadequate with regard to NAFTA imports. The USITC only noted that "...we would have reached the same result had we excluded imports from Canada from our injury analysis." Yet, according to Brazil, the general discussion of causation and the role of alternative causes by the USITC never once mentioned the role of non-NAFTA imports as distinguished from all imports. Brazil argues that no attempt at factual analysis for non-NAFTA imports was ever attempted.²⁸⁸⁰ Brazil argues that the USITC's response to the USTR with regard to NAFTA imports was no better than its original analysis. In Brazil's view, there was no factual analysis and only the simple statement that "the same considerations that led us to conclude that increased imports of CCFRS are a substantial cause of serious injury to the domestic industry are also applicable to increased imports of CCFRS from all sources other than Canada and Mexico."²⁸⁸¹

7.1197 Relying upon the Appellate Body decisions in *US – Wheat Gluten* and *US – Line Pipe*, Brazil argues that a cursory USITC analysis of non-NAFTA imports does not meet the parallelism requirement under the Agreement on Safeguards. In the instant case, Brazil argues that the USITC did not conduct any specific evaluation of non-NAFTA imports as required by parallelism. 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. Brazil submits that in doing so, it repeated the very same mistakes previously highlighted by the Appellate Body.²⁸⁸² Brazil argues that the USITC's unsupported conclusion that it "would have reached the same result" in justifying the exclusion of NAFTA countries from the recommended measure was the very same language the Appellate Body found to fail the parallelism requirement in *US – Line Pipe*. Brazil asserts that the statement 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.²⁸⁸³

7.1198 Brazil further argues that the USITC failed to fulfil its obligation to provide a "reasoned and adequate explanation that establishes explicitly" that imports alone caused serious injury to the domestic industry because it failed to establish that non-NAFTA imports alone caused serious injury; its conclusions about the causal link between non-NAFTA imports and serious injury were vague and merely implied or suggested why non-NAFTA imports alone caused serious injury. The USITC's analysis therefore did not satisfy the parallelism requirement.²⁸⁸⁴

Existing anti-dumping and countervailing duty proceedings and orders

7.1199 Korea and Brazil note that the USITC admitted that anti-dumping and countervailing duties orders "to some extent stanching the flow of imports after 1998".²⁸⁸⁵ However, Korea argues that the USITC failed to properly consider the effect of anti-dumping and countervailing duties, which substantially limited import volumes and repaired injury caused by unfairly traded imports. The vast

²⁸⁷⁹ European Communities' second written submission, para. 376.

²⁸⁸⁰ Brazil's first written submission, para. 230.

²⁸⁸¹ Brazil's first written submission, para. 230.

²⁸⁸² Brazil's first written submission, para. 231.

²⁸⁸³ Brazil's first written submission, para. 232.

²⁸⁸⁴ Brazil's first written submission, para. 233.

²⁸⁸⁵ Korea's first written submission, para. 139; Brazil's first written submission, para. 208.

majority of imports which had increased in the 1997-1998 period were hot-rolled products which were subject to significant restrictions in the form of anti-dumping and countervailing duties.²⁸⁸⁶

7.1200 Brazil argues that, in fact, overall, imports were down significantly from 1998 levels, and flat in 1999 and 2000. Individual imports subject to anti-dumping and countervailing duties orders and investigations were down sharply. For finished CCFRS products, the trend was also down sharply. According to Brazil, only slab imports increased, driven by the domestic industry's own demand for that product.²⁸⁸⁷

7.1201 Korea argues that the scope of the injury caused by unfairly traded imports and repaired by the anti-dumping and countervailing duties orders should have been separately identified and separated. Such an analysis, if performed, would have shown that the injury remaining was that caused by the other factors discussed above.²⁸⁸⁸

7.1202 In response, the United States argues that, as a legal matter, there is no provision in the Agreement on Safeguards that requires a competent authority to exclude imports subject to anti-dumping or countervailing duty orders from its calculus of assessing the contribution of imports to injury. On the contrary, the basic provisions of the Agreement on Safeguards require a competent authority to assess serious injury and causation by examining whether "imports" – that is, all imports, not only "fairly traded" imports – have caused serious injury to the domestic industry producing the like or directly competitive article. Indeed, unless a particular exception in the Agreement applies, the remedy imposed must apply to all imports of the product concerned "irrespective of its source", without regard to whether some imports are subject to anti-dumping or countervailing duty orders. The Agreement does not suggest that a competent authority should treat imports subject to anti-dumping or countervailing duty orders as though they were a "non-import" injury factor.²⁸⁸⁹

7.1203 The United States also submits that the premise of Brazil's and Korea's argument is that the imposition of anti-dumping or countervailing duties on imports from a particular country eliminates all of the injurious effects these imports have had, or could have, on an industry. Under the AD and SCM Agreements, an investigating authority may impose duties on imports if dumped or subsidized imports are causing "material" injury to a domestic industry producing the like product. As the Appellate Body has stated, the "material" injury standard contained in these Agreements requires a lower amount of injury than does the "serious injury" standard of the Agreement on Safeguards. Thus, an investigating authority need only determine in an anti-dumping or countervailing duty investigation whether there is the requisite amount of injury – i.e., "material" injury – needed to satisfy the requirements of the AD and SCM Agreements;²⁸⁹⁰ the authority has no need to assess whether the industry is suffering a higher – i.e., "serious" – level of injury than the "material" level required under the AD and SCM Agreements. Accordingly, although anti-dumping duties and countervailing duties are remedial duties intended to offset the level of subsidies or the amount of "dumping" found for imports from a country and, by doing so, to remedy the "material" injury caused by these dumped or subsidized imports, they do not, and indeed may not, offset all of the injury that an industry can suffer as a result of those imports. Indeed, oftentimes, the orders do not offset all of the material injury caused by unfairly traded imports even after their imposition. In other words, even with the imposition of duties to offset these "unfair" trade practices, imports subject to anti-dumping

²⁸⁸⁶ Korea's first written submission, para. 139.

²⁸⁸⁷ Brazil's first written submission, para. 209.

²⁸⁸⁸ Korea's first written submission, para. 140.

²⁸⁸⁹ United States' first written submission, para. 524.

²⁸⁹⁰ United States' first written submission, para. 525.

an countervailing duty orders can still cause additional injury to the industry that would qualify as serious injury under the Agreement on Safeguards.²⁸⁹¹

7.1204 The United States argues that indeed, the record did not show that the orders imposed on CCFRS products during the period of investigation had eliminated the injurious effects of these imports. The United States submits that, as the USITC correctly noted in its decision, although imposition of orders on hot-rolled carbon steel and plate stemmed the flow of these imports to some extent, the record data showed that reasonably substantial volumes of imports from the countries covered by the orders still continued to enter the United States, as did much more substantial volumes of imports from countries not covered by the orders. For example, despite the fact that anti-dumping duty orders were imposed on carbon steel plate imports from China, Russia and the Ukraine in October 1997, China, Russia and the Ukraine remained the third, fourth and ninth largest exporters of plate to the United States in the year 2000.²⁸⁹² Moreover, even with the imposition of anti-dumping duty orders on hot-rolled steel from Russia, Japan, and Brazil, prices for hot-rolled steel continued to be depressed in the market after imposition of the orders. Although anti-dumping orders were imposed on these imports in June and July 1999, the USITC correctly noted, the "corrosive effects" of these low-priced imports still continued to impact the industry's pricing levels, as evidenced by the fact that the pricing levels for hot-rolled did not come close to recovering to their 1997 levels, even after imposition of the orders. On the contrary, after imposition of these orders, the record indicated that hot-rolled prices continued declining through the end of June 2001, after a small initial boost in the first two quarters of 2000.²⁸⁹³

7.1205 In counter-response, Korea argues that the United States mischaracterizes Korea's argument regarding the required non-attribution analysis with respect to unfair trade practices remedied by anti-dumping and countervailing duties orders.²⁸⁹⁴ Korea is not maintaining that the imposition of these duties on imports automatically eliminated "all of the injurious effects". Rather, Korea's position is that the United States had to examine the extent to which the orders and duties had eliminated some or all of the injurious effects of imports. Clearly, the orders could have remedied the injury caused by unfairly traded imports entirely or to some extent.²⁸⁹⁵ According to Korea, the USITC did not investigate this and merely concluded that "the orders had not fully eliminated the injurious effects".²⁸⁹⁶ In Korea's view, this "analysis" does not establish the extent of injury caused by those unfairly traded imports and accordingly remedied by such orders, if any, and therefore, the United States has not complied with its obligations under Article 4.2(b) of the Agreement on Safeguards.²⁸⁹⁷

7.1206 Korea submits, however, that the United States failed to examine the anti-dumping and countervailing duties orders and its remedial effects on the injury caused by unfairly traded imports to the industry concerned in the current case.²⁸⁹⁸

²⁸⁹¹ United States' first written submission, para. 526.

²⁸⁹² United States' first written submission, para. 528.

²⁸⁹³ United States' first written submission, para. 529.

²⁸⁹⁴ United States' first written submission, para. 525.

²⁸⁹⁵ Korea's second written submission, para. 182.

²⁸⁹⁶ United States' first written submission, para. 528. It is interesting that the United States suggests that imports of plate continued to enter at injurious levels when imports of plate had declined so low as the result of anti-dumping and countervailing duties orders that even the domestic industry conceded that imports of plate were not causing injury to plate producers. See Korea's first written submission, para. 88 and footnote 131.

²⁸⁹⁷ Korea's second written submission, para. 183.

²⁸⁹⁸ Korea's second written submission, para. 184.

Economic analyses submitted to the USITC

7.1207 For a broader discussion on this issue see paragraph 7.997 *et seq.* In addition, Japan and Brazil argue that instead of attempting to separate and distinguish alternative causes as required by the Agreement, the USITC held steadfast to rudimentary (and often wrong) trends analysis as the sole means of assessing the effect of alternative causes on the performance of the domestic industry. The USITC had at its disposal econometric studies containing evidence of the relative role of different causes, which demonstrated qualitatively and quantitatively that several of these causes were dramatically more important than imports and that one could separate and distinguish the various economic factors. However, the USITC dismissed these studies that had been prepared by respondents with respect to the three most important CCFRS products – hot-rolled steel, cold-rolled steel, and corrosion resistant steel.²⁸⁹⁹

7.1208 Japan and Brazil argue that the USITC ignored these studies, although they were a prominent part of the respondents' written briefs and oral presentations at the hearing. In the final decision, the USITC made little mention of them, relegating a reference to them to a footnote and, thus, provided scant recognition of what could have been the most relevant evidence for meeting the obligation to separate and distinguish the role of alternative causes.²⁹⁰⁰

7.1209 Japan and Brazil further argue that the USITC also seems to have ignored its own staff assessment of the studies. In a memo requested by Commissioner Bragg, USITC staff reported that both the respondents' and the petitioners' econometric studies demonstrated that the imports of cold-rolled steel and corrosion resistant steel had no discernible impact on domestic price levels. The only point of disagreement was with respect to hot-rolled steel. Brazil and Japan argue that this consensus evidence by all of the economists that cold-rolled and corrosion resistant imports had no effect on domestic price levels was simply ignored by the USITC.²⁹⁰¹

7.1210 Japan and Brazil also argue that whereas the studies provided product-specific data, the USITC seemed content to discard the more specific evidence in light of its single like product that combined all CCFRS products. Brazil and Japan submit that the USITC did have to consider specific product pricing evidence as it was impossible to generate prices for "CCFRS steel". However, Brazil argues that when it came to considering product-specific economic studies which led to conclusions it did not like, the USITC "placed little weight" on them, opting instead to rely on aggregate information for its super generic – like product.²⁹⁰²

7.1211 In response, the United States argues that the USITC properly dismissed the conclusions in the econometric study and those in a similar study submitted by the domestic industry because both studies had "serious" methodological limitations. The two studies in question both purported to be comprehensive economic studies establishing the extent to which imports impacted pricing in the CCFRS market. Not surprisingly, the study submitted by the domestic industry purported to show that "imports were the most important determinant of the decline in domestic hot- and cold-rolled steel products", while the study submitted by foreign respondents purported to show that imports were

²⁸⁹⁹ Japan's first written submission, para. 276; Brazil's first written submission, para. 212.

²⁹⁰⁰ Japan's first written submission, para. 278; Brazil's first written submission, para. 213.

²⁹⁰¹ Japan's first written submission, para. 280; Brazil's first written submission, para. 214.

²⁹⁰² Japan's first written submission, para. 279; Brazil's first written submission, para. 215.

not a particularly important factor in price declines for hot-rolled, cold-rolled and galvanized (i.e., corrosion-resistant) steel.²⁹⁰³

7.1212 The United States submits that, as can be seen from the staff memorandum analyzing the studies, the USITC's economic staff found that the economic "models" in both studies contained substantial analytical flaws. The USITC staff found that the domestic industry's study was flawed because it assumed, without laying an evidentiary foundation, that integrated producers would make changes in their production patterns due to changes in profitability levels. Moreover, the staff noted that the domestic industry's study failed to make the necessary distinctions between factors reflecting demand variations and variations in domestic and foreign competition in the market. As a result, the staff concluded, the domestic study simply did not provide sufficient statistical evidence of its conclusions, that is, that the "effect of import competition was significantly greater than the effect of other factors". In other words, the USITC staff found that the author of the study had not proved his thesis.²⁹⁰⁴

7.1213 According to the United States, the USITC staff found that the study submitted by the foreign respondents had serious methodological flaws as well. Its most significant flaw, they noted, was that the study was not actually a "formal" economic model but simply reflected an "informal" argument that "'massive' increases in domestic capacity, primarily by low-cost mills, [had] driven down prices". The staff noted, the study's "main argument [,] that domestic competition was the biggest source of domestic price decline[,] is only weakly supported by the empirical results". In their final word on the matter, the USITC economic staff stated that the author of the study "did not provide evidence that the effect of import prices and volumes was significantly less than the other factors". In other words, the USITC staff found that the author of this study had not provided support for his basic argument.²⁹⁰⁵ In sum, the USITC reasonably chose to discount these studies because the USITC and staff both found the two studies to be deeply flawed.²⁹⁰⁶

7.1214 In counter-response, Japan argues that the Panel should read the main body of the USITC staff memorandum, not just the summary conclusions to which the United States tries to direct attention. The main body makes clear two key points. First, the criticism of how the interested parties' study modeled intra-industry competition applies only to that factor – not to the other factors that were studied. Thus, the USITC's own staff economists implicitly embraced the findings about the relative roles of demand and imports, changing raw material prices and imports, and domestic capacity and imports. Even if one were to discount interested parties' arguments about minimum competition, the other factors overwhelmingly matter more than imports in explaining price declines. There is simply no basis in the body of the memorandum to support the overbroad conclusion that the interested parties' studies should be rejected.²⁹⁰⁷ Japan submits that, the USITC staff memorandum notes that the domestic industry study and the interested parties' study reached essentially identical conclusions on cold rolled steel and galvanized steel. Both studies found that imports of those two key CCFRS products had no meaningful effect on price levels.²⁹⁰⁸ In Japan's view, the USITC ignored this finding because it substantially undercut its decision to bundle various CCFRS products into one like product. Having decided on such an over-broad like product grouping, the USITC

²⁹⁰³ United States' first written submission, para. 519; United States' second written submission, para. 132.

²⁹⁰⁴ United States' first written submission, para. 520.

²⁹⁰⁵ United States' first written submission, para. 521.

²⁹⁰⁶ United States' first written submission, para. 522.

²⁹⁰⁷ Japan's second written submission, para. 153.

²⁹⁰⁸ USITC Staff Memorandum (EC-Y-042) to Commissioner Bragg, Inv. No. TA-201-73 Steel (22 October 2001) (Exhibit CC-10).

proceeded to ignore any inconvenient evidence about the individual steel products that made up that grouping. In the end, a single Commissioner requested an analysis from a staff economist to justify ignoring the studies.²⁹⁰⁹ The resulting perfunctory memorandum contained a conclusion that only loosely connected to the discussion in the main body of the memorandum. The Commission then largely ignored the studies, rather than giving them the careful attention they deserved.²⁹¹⁰

7.1215 The United States responds by noting that the models submitted by both the respondent and domestic parties during the steel investigation did not indicate that imports of carbon flat-rolled merchandise had a minimal impact on domestic cold-rolled and corrosion-resistant prices during the period of investigation. As Brazil should be aware, the econometric model provided by the domestic steel industry to the USITC was intended to show that imports of carbon flat-rolled steel "were the most important factor for determining the price of flat steel products" in the US market. In addition to claiming that imports of plate and hot-rolled steel had important price effects on the domestic price of plate and hot-rolled steel products, the model also showed that imports of cold-rolled steel had important "own price" effects on domestic cold-rolled prices in the US market, while the price of all carbon flat-rolled imports had important price effects on the price of galvanized (corrosion-resistant) products. Further, as the economic consultant for the domestic industry testified during the hearing, the domestic industry's model also showed that demand and the price of factor inputs had only a "secondary impact" on domestic prices, while capacity utilization was not statistically significant and had a small effect on domestic prices.²⁹¹¹

7.1216 The United States also submits that the foreign respondents' economic model did not quantify the overall level of injury caused by imports. As both Japan and Brazil concede²⁹¹², the model only purported to estimate the effects of imports on domestic prices, which is only one of several factors that should be considered by a competent authority under the Agreement on Safeguards. The model did not "quantify" the effects of imports and other injury factors on the industry's production, shipment, or sales revenue levels, its productivity and employment levels, its capacity utilization rates, its profitability levels, or its capital investment levels.²⁹¹³ In other words, neither Japan nor Brazil has come close to describing a model that addresses all of the factors set forth in the Agreement on Safeguards.

7.1217 The United States notes that although Japan and Brazil explicitly concede that the Agreement on Safeguards does not require the use of econometric models, Japan and Brazil assert that a competent authority must, in fact, use an econometric analysis in its analysis if such an analysis is submitted by a party to the investigation and the data is available.²⁹¹⁴ The Agreement on Safeguards simply does not contain language suggesting that parties have a right to dictate the analytical methodology that should be used by a competent authority in its causation analysis, nor have Japan and Brazil pointed to any such language in the Agreement.²⁹¹⁵ While parties are clearly free to suggest possible analytical approaches during the course of an investigation, the Agreement does not require the competent authority to respond to these suggestions by conducting a full-blown causation analysis to account for every methodology offered by the parties. Moreover, as long as the United States complies with its obligation to adequately and clearly explain why there is a "genuine and

²⁹⁰⁹ Ibid.

²⁹¹⁰ Japan's second written submission, para. 154.

²⁹¹¹ United States' written reply to Panel question No. 38 at the second substantive meeting.

²⁹¹² 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.

²⁹¹³ United States' second written submission, para. 133.

²⁹¹⁴ 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.

²⁹¹⁵ See Agreement on Safeguards, Article 3.1.

substantial" causal link between imports and the serious injury being suffered by the industry, there is nothing in the Agreement that suggests that United States must "test" its conclusions by performing a series of economic modelling exercises.²⁹¹⁶

Failure to provide a reasoned and adequate explanation

7.1218 The European Communities, Japan and Brazil argue that the USITC Report fails to meet the standard of "an adequate explanation" which "addresses fully the nature and complexities of the data".²⁹¹⁷ In particular, Brazil notes that the USITC identifies in its report six "alternate sources of injury" that were the source of exhaustive discussion during the USITC investigation. Japan and Brazil argue that the USITC failed to meet its obligation in explaining the effects of these other factors. Japan argues in particular that with respect to the USITC's explanation of how it met the non-attribution obligation, the USITC discussion is disappointingly sparse. Although there had been extensive argumentation and data on each of the alternative causes, the USITC devotes only a paragraph or two to summarily dismissing these alternative causes.²⁹¹⁸ The European Communities, Japan and New Zealand and Brazil argue that what little explanation was offered did not meet the requirement to "establish explicitly, with a reasoned and adequate explanation" that injury caused by these factors was not attributed to increased imports as most recently reiterated by the Appellate Body in *US – Line Pipe*.²⁹¹⁹

7.1219 Japan argues that each of the factors discussed above was important and collectively they severed any credible connection between imports and the condition of the domestic industry. If one combines the impact of the other factors, and compares them to imports, a reasonable authority simply could not conclude that imports caused the problems.²⁹²⁰ Japan further argues that the effects of these various factors are interrelated and mutually reinforcing, particularly at the end of the period of investigation, when the United States industry encountered its only significant decline in operating results.²⁹²¹ Yet, Japan argues that the USITC analysis provides no discussion of these interactions. Instead, the USITC superficially evaluated the importance of each other factor in isolation relative to increased imports, and did not either separate or distinguish the injury attributable to such other factors, thus failing to meet its obligation to address fully the complexities of the data.²⁹²²

7.1220 In response, the United States submits that like Japan, the United States agrees that the effects of most injury factors, including increased imports, are often times "interrelated and mutually reinforcing" and are therefore difficult to disentangle. Similarly, the United States agrees that, when one of these factors intensifies its injurious effect over time, it is likely that it will also intensify the injury experienced by the industry due to the interplay of that factor with other factors causing injury, such as increased imports. In fact, it is precisely for these reasons that the United States has consistently taken the position in WTO disputes that it is not realistic as an economic matter to expect a competent authority to precisely identify and separate the injury effects of individual factors in complex and sophisticated markets, such as the steel market.²⁹²³ Nonetheless, Japan is clearly mistaken in asserting that a competent authority must assess whether imports are a more important

²⁹¹⁶ United States' second written submission, para. 134.

²⁹¹⁷ European Communities' first written submission, para. 468; Japan's first written submission, para. 251; Brazil's first written submission, para. 160.

²⁹¹⁸ Japan's first written submission, para. 251; Brazil's first written submission, para. 178.

²⁹¹⁹ European Communities' first written submission, para. 476; Japan's first written submission, para. 251, New Zealand's first written submission, para. 4.138; Brazil's first written submission, para. 178.

²⁹²⁰ Japan's first written submission, para. 282.

²⁹²¹ Japan's first written submission, para. 283.

²⁹²² Japan's first written submission, para. 285.

²⁹²³ United States' first written submission, para. 532.

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, nor has Japan pointed to such a requirement in its argument. 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.²⁹²⁴

7.1221 The United States argues that accordingly, 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.²⁹²⁵

7.1222 The United States argues that the USITC's causation analysis with respect to CCFRS is a well-reasoned and cogent analytical discussion that takes into account the complexities of a large and sophisticated market for a raw material critical to any large economy. In its analysis, the USITC performed a thorough and objective analysis of the record. It established that there was a genuine and substantial causal link between trends in the volume and market share of imports of CCFRS and the significant declines in the condition of the CCFRS industry during the latter half of the period of investigation. Moreover, the USITC analyzed a number of other factors alleged to be causing injury to the industry (such as demand declines, increased domestic capacity, and intra-industry competition), identified the nature and scope of the injury caused by these factors, if any, and ensured that it did not attribute the effects of these factors to imports. The USITC's analysis is fully consistent with the requirements of the Agreement on Safeguards.²⁹²⁶

Relevance of like product analysis for CCFRS

7.1223 Japan and Brazil argue that the USITC's discussion of alternative causes illustrates the difficulties, if not the error, in finding a single super-generic like product that combined all CCFRS steel. According to Brazil and Japan, there was simply no means of analyzing such an abstraction. All the pertinent data and underlying factors could only be assessed for specific products, reflecting the vastly different producers, products and markets involved. Japan and Brazil refer in particular to differences in demand²⁹²⁷, excess capacity²⁹²⁸, intra-industry competition.²⁹²⁹ Yet, the USITC seemed

²⁹²⁴ United States' first written submission, para. 533.

²⁹²⁵ United States' first written submission, para. 534.

²⁹²⁶ United States' first written submission, para. 536.

²⁹²⁷ Japan's first written submission, para. 288; Brazil's first written submission, para. 217.

²⁹²⁸ Japan's first written submission, para. 288; Brazil's first written submission, para. 217.

to believe it could measure such indicia as total combined demand or capacity in a coherent manner that could support its causation findings.²⁹³⁰ Japan and Brazil argue that these distinctions and the degree to which the USITC ignored them, demonstrate the failure of the USITC to meet the standards set by Article 4.2(b) by distinguishing and evaluating different injurious effects caused by alternative factors.²⁹³¹ Brazil and Japan also argue that by its use of an overly broad single "like" product, itself a violation of United States WTO obligations, the USITC compounded the depth of its errors by forcing itself into a flawed analytical approach to causation.²⁹³²

7.1224 Japan, Korea and Brazil also argue that the USITC failed to satisfy the non-attribution requirement under the second sentence of Article 4.2(b) of the Agreement on Safeguards because, amongst other things, the USITC's flawed like-product meant that the USITC violated the non-attribution requirement under Article 4.2(b), second sentence, as interpreted by the Appellate Body. Specifically, grouping "unlike" products and industries together makes it impossible to separate and distinguish causal factors, since the "other factors" affecting each like product varied in relevance and scope depending on the like product analysed.²⁹³³

7.1225 According to Korea, by incorrectly defining the like product, the USITC, in essence, attributed causation for all CCFRS products to increased imports of hot-rolled steel alone.²⁹³⁴ The failure to properly define the like product masked the actual effects of other factors on the industry.²⁹³⁵ The European Communities, Korea and Brazil also argue that when the domestic industry is improperly defined, a competent authority cannot identify any distinction in the performance of the merged industries.²⁹³⁶

7.1226 New Zealand argues that an analysis of whether increased imports have caused serious injury to a domestic industry cannot be carried out if that industry is incorrectly identified. Assessing causation in respect of the wrong domestic industry must also lead to a "legal mistake as regards causation itself" because Article 2.1 requires, as a prerequisite to applying a safeguard measure, that increased imports have caused serious injury "to the domestic industry that produces like ... products".²⁹³⁷ The European Communities, Korea and Brazil argue that, likewise, when distinct like products are improperly merged, it is impossible to determine the causal importance of the individual like products on the industry producing the merged products.²⁹³⁸ Korea elaborates that by improperly defining the like product, the causation analysis cannot properly assess the weight and significance to be given to a particular "other factor" of injury since each factor may affect each actual like product differently.²⁹³⁹ The European Communities submit that improperly combining like products and

²⁹²⁹ Japan's first written submission, para. 289; Brazil's first written submission, para. 218.

²⁹³⁰ Japan's first written submission, para. 286; Brazil's first written submission, para. 216.

²⁹³¹ Japan's first written submission, para. 290; Brazil's first written submission, para. 219.

²⁹³² Japan's first written submission, para. 291; Brazil's first written submission, para. 219.

²⁹³³ Japan's written reply to Panel question No. 80 (a) at the first substantive meeting; Korea's first written submission, para. 122; Korea's second written submission, para. 131; Brazil's written reply to Panel question No. 80 (a) at the first substantive meeting.

²⁹³⁴ Korea's first written submission, para. 104.

²⁹³⁵ Korea's second written submission, para. 131.

²⁹³⁶ European Communities' written reply to Panel question No. 80 at the first substantive meeting; Korea's written reply to Panel question No. 80 at the first substantive meeting; Brazil's written reply to Panel question No. 80 at the first substantive meeting.

²⁹³⁷ New Zealand's written reply to Panel question No. 80 at the first substantive meeting.

²⁹³⁸ European Communities' written reply to Panel question No. 80 at the first substantive meeting; Korea's written reply to Panel question No. 80(a) at the first substantive meeting; Brazil's written reply to Panel question No. 80 at the first substantive meeting.

²⁹³⁹ Korea's written reply to Panel question No. 80(a) at the first substantive meeting.

domestic industries creates the possibility that increased imports which are not causing serious injury to the industry producing the like product may be found to have caused serious injury to another industry which has been artificially included in the definition of industry.^{2940 2941}

(ii) *Tin mill products*

Decision-making

7.1227 China and Norway note that the only commissioner who voted in the affirmative concerning tin mill, and who defined tin mill as a separate like product, is Commissioner Miller. Consequently, it is the determination of Commissioner Miller which becomes relevant to examine, for she is the only Commissioner to have made a separate determination for a product on which the President imposed a separate safeguard measure.²⁹⁴² China argues that as the other two Commissioners, Bragg and Devaney, developed their analysis on a different 'like product' definition, their findings do not represent a correct basis for the examination of the tin mill products. If the basis of the findings is erroneous, it is logical that the result of the analysis cannot lead to a correct determination.²⁹⁴³ Similarly, the European Communities argues that it cannot see how the findings of the two Commissioners who found increased imports, serious injury and causation for CCFRS as a whole can purport to provide a reasoned and adequate explanation of a causal link between increased imports and serious injury for a product which they never disaggregated from the whole. While the United States may wish to rely on these determinations, they cannot be regarded under the Agreement on Safeguards as even purporting to provide a reasoned and adequate explanation sufficient to demonstrate the causal link required by Article 2.1 and Article 4.2 of the Agreement on Safeguards. Thus, it is only Commissioner Miller's analysis which can purport to provide such a reasoned and adequate explanation and thus only her analysis which requires examination.²⁹⁴⁴

7.1228 The United States notes that several complainants mistakenly assert in their briefs that the President relied solely on Commissioner Miller's causation findings for tin mill products when determining to impose a safeguard remedy on tin mill steel. Three Commissioners found that tin mill steel was causing serious injury to the domestic tin mill industry: Commissioners Miller, Bragg and Devaney. Commissioner Miller found tin mill steel to be a separate like product and made an affirmative injury finding for that product, while Commissioners Bragg and Devaney found tin mill steel to be part of the same like product as other CCFRS and made an affirmative determination for that like product.²⁹⁴⁵ Under the United States statute, the President cannot decide to treat an affirmative finding of one Commissioner as a basis for imposing a remedy, as the complainants allege. Instead, under the United States statute, the President may only impose a remedy if at least one-half of the Commissioners then in office make an affirmative finding of injury and causation. In this case, the President was only able to impose a remedy on tin mill products because three of the six sitting Commissioners had found that tin mill steel, whether or not treated as a separate like product, had caused serious injury to a domestic industry. In fact, in his official announcement of the imposition of these remedies, the President specifically stated that he considered the "determinations of the groups of Commissioners voting in the affirmative with regard to" tin mill products to be the determination of the USITC. In other words, the President specifically and clearly identified the affirmative

²⁹⁴⁰ European Communities' written reply to Panel question No. 80 at the first substantive meeting.

²⁹⁴¹ Brazil's written reply to Panel question No. 80 at the first substantive meeting.

²⁹⁴² China's first written submission, para. 509; China's second written submission, para. 272; Norway's first written submission, para. 315.

²⁹⁴³ China's second written submission, para. 274.

²⁹⁴⁴ European Communities' second written submission, para. 379.

²⁹⁴⁵ United States' first written submission, para. 538.

determinations of Commissioners Miller, Bragg and Devaney as the decision of the Commission for tin mill steel. Accordingly, even though complainants argue otherwise, the President's remedy finding does not indicate that he adopted the like product decision or injury finding of Commissioner Miller as his own.²⁹⁴⁶

7.1229 On the basis of the foregoing, the United States asserts that it is incorrect both legally and factually for the complainants to assert that the President adopted the injury and causation findings of Commissioner Miller as the sole grounds for his findings. Nonetheless, because the complainants focus their arguments concerning tin mill products almost entirely on Commissioner Miller's causation analysis for tin mill, the United States also focuses its discussion on Commissioner Miller's analysis as well.²⁹⁴⁷ However, the United States does note that complainants have not seriously challenged the affirmative findings of Commissioners Bragg and Devaney with respect to tin mill products and other CCFRS products. Accordingly, the complainants have failed to make a prima facie case showing that Commissioners Bragg and Devaney's analysis with respect to these products violated the causation requirements of the Agreement on Safeguards. The Panel should therefore should find that the causation analysis of these Commissioners has not been placed at issue by complainants in this proceeding and should find that the determinations of these Commissioners are proper under the Agreement.²⁹⁴⁸

7.1230 Further, the United States argues that the complainants' argument ignores the fact that there was, in actuality, a substantial degree of agreement between Commissioner Miller and the other three Commissioners with respect to the basic legal issues in the case. In this regard, Commissioner Miller agreed with and joined the findings of the three other Commissioners that tin mill steel was the appropriate like product, that there had been increased imports of tin mill steel during the period of investigation, and that the industry had suffered serious injury during the period of investigation. Moreover, Commissioner Miller also identified similar conditions of competition as governing the manner in which imports and domestic merchandise competed in the market and even identified the same other factors that might be causing injury to the industry in her analysis. While she disagreed with respect to whether imports were a substantial cause of the serious injury being suffered by the industry, there was, nonetheless, a substantial agreement on the basic issues driving the case.²⁹⁴⁹ The United States argues, further, that the simple fact that three Commissioners disagreed with Commissioner Miller no more makes her decision unreasonable than does Commissioner Miller's disagreement with those three Commissioners make their decision unreasonable. To put it another way, Commissioner Miller and the three other Commissioners all analyzed a complex record, thoroughly discussed the record evidence relating to causation, and issued a decision that is cogent and reasonable. The issue for this Panel, therefore, is whether Commissioner Miller performed an adequate and thorough analysis of the record and established that there was a genuine and substantial causal relationship between increased imports and the declines in the industry's condition.²⁹⁵⁰

7.1231 In counter-response, Korea notes that according to the United States, the USITC relied on the affirmative determinations of Commissioners Bragg and Devaney as well as Miller's.²⁹⁵¹ Nonetheless, the United States only analyzes the causation analysis of Commissioner Miller alone and fails to explain how the affirmative determinations of Commissioners Bragg and Devaney support causation

²⁹⁴⁶ United States' first written submission, para. 539.

²⁹⁴⁷ United States' first written submission, para. 540.

²⁹⁴⁸ United States' first written submission, para. 541.

²⁹⁴⁹ United States' first written submission, para. 569.

²⁹⁵⁰ United States' first written submission, para. 570.

²⁹⁵¹ United States' first written submission, paras. 538-541.

with respect to tin mill products.²⁹⁵² Korea submits that, in fact, the failure by the United States to explain how the affirmative determinations of Commissioners Bragg and Devaney support an affirmative finding of causation with respect to tin mill products is exactly the point. The United States cannot explain it because those Commissioners did not perform that analysis. In the absence of such analysis of increased imports of tin mill or an analysis of the causes of injury to the domestic producers of tin mill products alone, these Commissioners cannot show any coincidence of trends nor causation.²⁹⁵³

Factors considered by the USITC

Declining demand

7.1232 The European Communities points out that Commissioner Miller noted that declining demand "may account in part for the fact that the industry was already in a weakened state in 1996".²⁹⁵⁴ The other Commissioners who examined tin mill products as a separate product concluded that "the decline in consumption of tin mill products is an important cause of the injury suffered by the industry" which, together with purchaser consolidation and the fact that a substantial proportion of imported products were not available domestically, was such as to lead to the conclusion that "increased imports is not a cause that is greater than any other cause".²⁹⁵⁵ The European Communities, China and Norway argue that it is quite clear that Commissioner Miller and the other Commissioners considered that declines in demand were a cause of the serious injury throughout the period of investigation. That the financial performance of the domestic industry worsened when demand increased does not mean that demand declines are not a cause of the industry's injury.²⁹⁵⁶

7.1233 The European Communities, Japan and Brazil submit that Commissioner Miller's conclusion that "declining demand is not a cause of serious injury to the domestic industry that is equal to or greater than increased imports" does not, as the Appellate Body has held in the past, purport to separate and distinguish the injurious effects of other factors from imports, and ensure that such effects are not attributed to increased imports.²⁹⁵⁷ The United States cannot dress up this failure.²⁹⁵⁸ Further, China and Norway argue that there is no information on the role that this factor played and to what extent it was responsible for the serious injury to the industry, although the three other commissioners stated that "the evidence demonstrates that the decline in the consumption of tin mill products is an important cause of the injury suffered by the industry".²⁹⁵⁹

7.1234 According to Japan and Brazil, the other three Commissioners, finding a separate like product, found declining demand to be an important alternative cause.²⁹⁶⁰ In contrast, according to Japan, Korea and Brazil, Commissioner Miller asserted that demand recovered in 1999, but ignored the fact that the increase was modest, only 5%, and short-lived.²⁹⁶¹ In 2000, demand fell lower than 1998, and

²⁹⁵² Korea's second written submission, para. 150.

²⁹⁵³ Korea's second written submission, para. 151.

²⁹⁵⁴ USITC Report, Vol. I, p. 309.

²⁹⁵⁵ USITC Report, Vol. I, p. 76-77.

²⁹⁵⁶ European Communities' second written submission, para. 381; China's first written submission, para. 513; Norway's first written submission, para. 321.

²⁹⁵⁷ USITC Report, Vol. I, p. 309.

²⁹⁵⁸ European Communities' second written submission, para. 381; Japan's first written submission, para. 297; Brazil's first written submission, para. 261.

²⁹⁵⁹ China's first written submission, para. 516; Norway's first written submission, para. 324.

²⁹⁶⁰ Japan's first written submission, para. 297; Brazil's first written submission, para. 261.

²⁹⁶¹ Japan's first written submission, para. 297; Korea's first written submission, para. 145; Brazil's first written submission, para. 261.

in 2001 demand was at record lows for the period. Japan and Brazil assert that such a narrow focus on a single year simply cannot satisfy the demands of Article 4.2(b) for a careful review of the entire period.²⁹⁶²

7.1235 The United States argues that Commissioner Miller thoroughly discussed the nature and the extent of the injury that was attributable to demand declines during the period. She noted that demand had been declining generally in the tin mill market and that it had declined overall during the period. She correctly noted, however, that the industry lost significant market share and suffered its heaviest losses of the period in 1999, despite the fact that demand increased considerably in that year. In other words, as she found, demand declines could not possibly have contributed to the serious declines in the condition of the industry that occurred during 1999, when demand was, in fact, increasing.²⁹⁶³ By performing an analysis that assessed whether imports caused injury to the industry during a period of increasing demand, she was able to distinguish the effects of the demand declines later in the period from those attributable to imports in 1999. As a result, Commissioner Miller was able to ensure that it did not attribute the injury caused by these later demand declines to imports.²⁹⁶⁴

7.1236 The United States also argues that Commissioner Miller recognized that there was not a correlation between changes in demand and changes in the industry's prices and operating margins during the period of investigation itself. Although Commissioner Miller recognized that the long-term decline in demand might have caused the industry to be in a weakened state prior to the period, she also correctly noted that demand changes did not appear to correlate directly to changes in the industry's condition. For example, in 1999, when demand increased to the same levels seen in 1996 and 1997 (the beginning of the period), the industry's unit prices and operating income margins dropped dramatically. As Commissioner Miller reasonably noted, if changes in demand had been a cause of deterioration in the industry's condition during the period of investigation, the domestic industry should have experienced some recovery in 1999 when demand increased considerably. However, the industry's condition did not improve. Instead, due to the massive surge of imports in that year, the industry lost significant market share and experienced its heaviest losses of the entire period of investigation.²⁹⁶⁵

7.1237 China further argues that given that Commissioner Miller identified decline in demand as an alternative source of the injury, decline in demands as an 'other' injurious factor should have been subjected to a non-attribution analysis.²⁹⁶⁶ China submits that for the purpose of the non-attribution analysis, the competent authority is required to identify and separate the effect of the 'other' factor. Instead Commissioner Miller analysed imports only. According to China, moreover, she disregarded the part of the period of investigation when demands were declining and instead, analysed the increased imports in the absence of the "other" factor, i.e. when demands were increasing.²⁹⁶⁷ China argues that this seems to be a very weak argumentation and questions how one could perform identification of nature and extent of a factor if the subject of the identification is not present.²⁹⁶⁸ China submits that it is evident that the United States failed to rebut China's argument. According to China, the injurious effects of this 'other' factor were not properly assessed and it was not established

²⁹⁶² Japan's first written submission, para. 297; Brazil's first written submission, para. 261.

²⁹⁶³ USITC Report, p. 309.

²⁹⁶⁴ United States' first written submission, para. 558.

²⁹⁶⁵ United States' first written submission, para. 557.

²⁹⁶⁶ China's second written submission, para. 277.

²⁹⁶⁷ China's second written submission, para. 279.

²⁹⁶⁸ China's second written submission, para. 280.

in a clear and unambiguous way that the effects of the demand decline were not attributed to increased imports.²⁹⁶⁹

Purchaser consolidation

7.1238 China states that it believes that Commissioner Miller acknowledged that purchaser consolidation was causing injury.²⁹⁷⁰ In particular, China and Norway argue that Commissioner Miller's conclusions regarding purchaser consolidation indicate that she believed that purchaser consolidation was a cause of serious injury, although this factor was not chiefly responsible for the injury.²⁹⁷¹ Similarly, the European Communities notes that Commissioner Miller found that imports were "chiefly responsible" for the decline in industry performance in 1999, without separating and distinguishing the injurious effect of purchaser consolidation, which, must be presumed to be partly responsible for some of the injury suffered.²⁹⁷² China and Norway argue that Commissioner Miller did not give any information on the role of purchaser consolidation.²⁹⁷³ The European Communities argues that there is nothing in the USITC Report which explains why such purchaser consolidation would not, as the United States claims, have any effect in 1999.²⁹⁷⁴ The mere assertion that it may have taken place before 1999 does not prove this fact, nor does it prove that purchaser consolidation was not having continuing effects in 1999.²⁹⁷⁵

7.1239 In response, the United States notes that Commissioner Miller also examined whether purchaser consolidation was an "other" factor that had a negative effect on the tin mill industry during the period of investigation.²⁹⁷⁶ In her analysis of this issue, she explained, in a reasoned and thorough manner, the nature and extent of the injurious effects of purchaser consolidation during the period. After performing her analysis, she reasonably concluded that purchaser consolidation was not a factor that contributed significantly to the decline in the industry's condition during the period of investigation. According to the United States, in her analysis, Commissioner Miller discussed the nature and extent of purchaser consolidation in detail.²⁹⁷⁷ She first noted that the number of large tin mill purchasers declined from 49 in 1990 to 26 in 2000, with four to six manufacturers accounting for 75-80% of all consumption in 2000.²⁹⁷⁸ She also recognized that this consolidation had enhanced the negotiating power of purchasers in the tin mill market during this period.²⁹⁷⁹ However, she also correctly noted that most of this consolidation occurred prior to the period of investigation, and found therefore that purchaser consolidation was not a significant factor in the declines in the condition of the industry during 1999, 2000, and 2001.²⁹⁸⁰ In this regard, she found that price competition in the market was fiercest in 1999 when imports made their largest surge into the market, which showed that imports, not purchaser consolidation, were "chiefly responsible" for industry declines in 1999 and thereafter. Given her analysis of this issue, the United States argues that it is clear that Commissioner Miller thoroughly and adequately discussed the nature and extent of the injury caused by purchaser

²⁹⁶⁹ China's second written submission, para. 281.

²⁹⁷⁰ China's first written submission, para. 512.

²⁹⁷¹ China's first written submission, para. 514; Norway's first written submission, para. 322.

²⁹⁷² USITC Report, Vol. I, p. 309.

²⁹⁷³ China's first written submission, para. 516; Norway's first written submission, para. 322.

²⁹⁷⁴ United States' first written submission, paras. 560-562.

²⁹⁷⁵ European Communities' second written submission, para. 382.

²⁹⁷⁶ USITC Report, p. 309.

²⁹⁷⁷ USITC Report, p. 307.

²⁹⁷⁸ USITC Report, p. 307.

²⁹⁷⁹ USITC Report, p. 307.

²⁹⁸⁰ USITC Report, p. 309. Moreover, she added, that this consolidation process was an indication of the intense pricing competition between domestic producers and imports that existed throughout the period. USITC Report, p. 309.

consolidation. She reasonably found that purchaser consolidation had not been a significant cause of the injury the industry suffered during the latter half of the period of investigation. Commissioner Miller correctly acknowledged that the process of purchaser consolidation had generally predated the period of investigation and did not explain the massive declines in the industry's condition that occurred during 1999, 2000, and 2001. Accordingly, she correctly found that the weight of the record evidence established that imports were chiefly responsible for the declines in the industry's condition in 1999 and properly discounted purchaser consolidation as a source of injury to the industry.²⁹⁸¹

7.1240 In counter-response, China notes that the data in the USITC Report indicates that the consolidation process starting in 1990 resulted in four to six manufacturers accounting for 75-80% of all consumption of tin mill products in the year 2000. China submits that this factor not only predated, but also was present during the entire period of investigation.²⁹⁸² China concludes that the Commissioner wrongly identified the nature and extent of the purchaser consolidations and failed to establish that the injurious effects of this factor were not attributed to increased imports. The United States' counter-argument that the Commissioner addressed this issue adequately has no merit.²⁹⁸³

Domestic overcapacity

7.1241 Korea asserts that Commissioner Miller suggested that overcapacity was not a problem because the industry reduced capacity between 1998-2001 (after increasing capacity between 1996-1998).²⁹⁸⁴ However, in 1996 the industry achieved its highest capacity utilization of 78.3% – and it increased capacity over the following two years.²⁹⁸⁵ Korea argues that in 1996, the industry had 1 million tons of excess unused capacity and in 2000, that figure had grown to 1.2 million tons.²⁹⁸⁶ Korea argues that capacity utilization of 75% and lower simply does not support the proposition that domestic excess capacity was not a more significant problem than imports.²⁹⁸⁷

7.1242 In response, the United States argues that Commissioner Miller explained, in a reasoned and thorough manner, the nature and extent of the effects of "excess" capacity on the condition of the industry. After noting that the industry had "some excess capacity" during the early part of the period, she found that the domestic industry had reduced its capacity in this manner as a means of "taking steps to rationalize their production" in the face of the demand declines in the tin mill market. Having noted that the industry had reduced its capacity levels during the period, Commissioner Miller discounted this "excess" capacity as a significant source of injury to the industry. In particular, she noted that the industry's "excess" capacity levels had not led to the declines in the industry's capacity utilization rates during the latter half of the period, noting that the industry had reduced their aggregate capacity by 3.7 percent between 1996 and 2000, and reduced them even further in 2001.²⁹⁸⁸

Anti-dumping orders

7.1243 Korea argues that Commissioner Miller noted that an anti-dumping order was imposed on imports of tin mill products from Japan in the second half of 2000, but determined that imports from Japan continued to have a significant presence in the United States market. According to Korea, she failed to note, however, that the reason for continued importation from Japan was that the United

²⁹⁸¹ United States' first written submission, paras.560-562.

²⁹⁸² China's second written submission, para. 283.

²⁹⁸³ China's second written submission, para. 286.

²⁹⁸⁴ USITC Report, Vol. I, p. 309 (Exhibit CC-6).

²⁹⁸⁵ USITC Report, Vol. II, Table FLAT-18, p. FLAT-22 (Exhibit CC-6).

²⁹⁸⁶ USITC Report, Vol. II, Table FLAT-18, p. FLAT-22 (Exhibit CC-6).

²⁹⁸⁷ Korea's first written submission, para. 145.

²⁹⁸⁸ United States' first written submission, para. 564.

States industry had explicitly agreed that a number of tin mill products should be excluded from the anti-dumping order because the United States industry did not produce those products.²⁹⁸⁹

NAFTA imports

7.1244 China argues that Commissioner Miller's determination of the existence of a causal link between the increased imports and serious injury to the domestic tin mill industry was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, what had to be determined is in fact whether total increased imports, with the exception of imports from NAFTA-countries, have caused serious injury to the domestic industry. According to China, as a result, since the determination of causality at hand required that "increased imports" only consisted of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "another factor". Thus, in respect of Article 4.2(b) of the Agreement on Safeguards, this new determination also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).²⁹⁹⁰ China argues that such a new determination was not done concerning this product. China argues that this is especially surprising, given that it was acknowledged that "imports of tin mill products from Canada account for a substantial share of total imports and contribute importantly to the serious injury".²⁹⁹¹ Korea argues that since the USITC did not proceed to a new determination of causality between increased imports from non-NAFTA countries and the serious injury to the domestic industry, there was consequently a failure to assess the injury caused by imports from Mexico and Canada and a failure to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. Therefore, the investigating authority did not comply with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.²⁹⁹²

7.1245 Norway notes that Commissioner Miller did consider imports from Canada to "contribute importantly" to the serious injury suffered by the domestic industry. However, according to Norway, she did not single out these imports and recommended that the remedy apply also to these imports, a conclusion that the President did not follow. Here again, Norway argues, there is thus no finding at all that this recognized injury has not been attributed by the President to imports from other sources.²⁹⁹³

7.1246 The European Communities argues that in failing to analyse imports from Canada, Israel, Jordan and Mexico as alternative causes of injury, the USITC also acted inconsistently with Article 4.2(b).²⁹⁹⁴ The European Communities adds that Commissioner Miller found that Mexican imports accounted for a substantial share of imports and contributed importantly to the serious injury, but did not subject the injurious effects of these imports to a non-attribution analysis.²⁹⁹⁵

7.1247 For the United States' general response, see paragraph 7.1066 *et seq.*

²⁹⁸⁹ Korea's first written submission, para. 145.

²⁹⁹⁰ China's first written submission, para. 527.

²⁹⁹¹ China's first written submission, para. 528.

²⁹⁹² China's first written submission, para. 529; China's second written submission, para. 286.

²⁹⁹³ Norway's first written submission, para. 325.

²⁹⁹⁴ European Communities' first written submission, para. 480.

²⁹⁹⁵ European Communities' second written submission, para. 385.

Factors not considered by the USITC

7.1248 The European Communities, Japan, Korea, Norway and Brazil argue that the other three Commissioners who found a separate like product also found that a large portion of purchasers testified that the y imported specific products that the domestic industry simply did not make.²⁹⁹⁶ According to Japan and Brazil, this factual finding argues strongly that imports could not be the cause of serious injury. Yet Commissioner Miller did not address this finding at all.²⁹⁹⁷ The European Communities also argues that Commissioner Miller fails to deal with the extent to which injury was caused by the massive over-capacity in the United States industry.²⁹⁹⁸

7.1249 In response, the United States argues that the complainants mistakenly assert that Commissioner Miller "failed" to take into account that a "substantial portion" of imports consisted of tin mill products that were not available domestically, a fact relied on by three other Commissioners who made a negative determination for tin mill steel. In fact, Commissioner Miller did address this very issue, although in a different manner than the other Commissioners, when she found that purchasers considered imported tin mill steel and domestic merchandise to be substitutable for one another. Because the level of substitutability measures the degree to which products are considered similar to one another for pricing purposes, Commissioner Miller's finding indicates that she concluded that the "substantial" difference in product mix between imports and domestic product did not significantly affect the extent to which imports and domestic merchandise competed in the market.²⁹⁹⁹ The United States submits that, moreover, although the other three Commissioners found the percentage of imports that were not available from the industry to be "substantial", the record showed that this percentage (although confidential) was actually substantially lower than 33% of all imported tin mill steel. As a result, while it was clearly reasonable for the three other Commissioners to consider this percentage to account for a "substantial" percentage of imports, it was just as reasonable for Commissioner Miller to consider that percentage did not significantly reduce the substitutability of the imported and domestic merchandise.³⁰⁰⁰

7.1250 China and Norway argue that given that the industry was already injured before imports increased in 1998 and 1999 and given that the industry did not recover once imports were declining in 2000 and interim 2001, there had to be other existing injury factors besides imports. According to China and Norway, since, without any doubt, other factors existed, Commissioner Miller had the obligation to identify them, in order to ensure that injury would not be wrongly attributed to increased imports. She did not do so.³⁰⁰¹

7.1251 In response, the United States argues that Commissioner Miller performed a thorough and objective analysis of the record. She established that there was a genuine and substantial causal link between trends in the volume and market share of imports of tin mill steel and the significant declines in the condition of the tin mill industry during the last two-and-a-half years of the period of investigation. Moreover, she thoroughly assessed the nature and extent of the injury caused by other

²⁹⁹⁶ European Communities' first written submission, para. 484; Japan's first written submission, para. 298; Korea's first written submission, para. 145; Norway's first written submission, paras. 336 and 337; Brazil's first written submission, para. 262.

²⁹⁹⁷ Japan's first written submission, para. 298; Brazil's first written submission, para. 262, para. 484.

²⁹⁹⁸ European Communities' first written submission, para. 484.

²⁹⁹⁹ United States' first written submission, para. 550.

³⁰⁰⁰ United States' first written submission, para. 551.

³⁰⁰¹ China's first written submission, para. 522; Norway's first written submission, para. 331.

factors in the market and ensured that she did not attribute the effects of these factors, if any, to imports.³⁰⁰²

7.1252 Moreover, the United States adds that the complainants fail to recognize that there was a substantial degree of agreement between Commissioner Miller and the other three Commissioners with respect to the basic legal issues in the case. In this regard, Commissioner Miller agreed with -- and joined -- the findings of the three other Commissioners that tin mill steel was the appropriate like product, that there had been increased imports of tin mill steel during the period of investigation, and that the industry had suffered serious injury during the period of investigation. Moreover, Commissioner Miller also identified similar conditions of competition as governing the manner in which imports and domestic merchandise competed in the market and even identified the same other factors that might be causing injury to the industry in her analysis. While she disagreed with respect to whether imports were a substantial cause of the serious injury being suffered by the industry, there was, nonetheless, a substantial agreement on the basic issues driving the case. Indeed, the United States asserts, the simple fact that three Commissioners disagreed with Commissioner Miller no more makes her decision unreasonable than does Commissioner Miller's disagreement with those three Commissioners make their decision unreasonable.³⁰⁰³

7.1253 The European Communities also argues that Commissioner Miller also failed to take note of the decision of Wierton (one of the major United States producers of tin mill products) to cease production during 1999, forcing consumers of tin mill products to source their requirements from imported products.³⁰⁰⁴ The three Commissioners who found there was no causal link between increased imports and serious injury found that this decision accounted for at least part of the increase in imports, and consequently, the poor performance of the domestic industry in 1999. Commissioner Miller failed both to discuss this situation, and to ensure that the self-inflicted injury caused by this decision was not attributed to increased imports. For these reasons, the USITC did not, and the United States cannot pretend that it did, conduct the non-attribution analysis required by the Agreement on Safeguards.³⁰⁰⁵

Relevance of "like product" analysis

7.1254 The European Communities, Japan and Korea and Norway note that three of the four Commissioners who considered tin mill products as a separate product found that increased imports were not a "substantial cause" of serious injury.³⁰⁰⁶ Japan argues that of the four Commissioners who treated tin mill products as a separate and distinct like product, three specifically found that other causes were more important than imports in explaining the problems in the domestic tin mill industry.³⁰⁰⁷ These Commissioners found that decline in consumption of tin mill products (as consumers turned to plastics), slow rationalisation of domestic capacity, increased consolidation of purchasers and the fact that a "substantial portion" of imports of tin mill products were not produced in the United States, meant that increased imports were not a "substantial cause" of serious injury.³⁰⁰⁸

³⁰⁰² United States' first written submission, para. 572.

³⁰⁰³ United States' first written submission, paras. 569-570.

³⁰⁰⁴ USITC Report, Vol. I, p. 76, footnote 418.

³⁰⁰⁵ European Communities' second written submission, para. 383.

³⁰⁰⁶ European Communities' first written submission, para. 478; Japan's first written submission, para. 293; Korea's first written submission, para. 142; Norway's first written submission, para. 317

³⁰⁰⁷ Japan's first written submission, para. 293.

³⁰⁰⁸ European Communities' first written submission, para. 478; Norway's first written submission, para. 317.

7.1255 Korea argues that the remaining Commissioners, Bragg and Devaney, had lumped tin mill products together in the "CCFRS" like product and found serious injury on that basis. They never even looked at other factors that were responsible for the condition of the tin mill products industry because their like product decision prevented such an analysis.³⁰⁰⁹ According to Korea, the majority of Commissioners who analyzed tin mill products correctly concluded that other causes were responsible for the condition of the United States industry producing tin mill products. The other Commissioners who found serious injury, whose decisions were the basis for the safeguard measure imposed, failed to properly separate and identify the other causes of injury to the United States industry.³⁰¹⁰

7.1256 The European Communities, Korea and Norway note that Commissioner Miller treated tin mill products as a separate like product and yet voted that imports of tin mill products were the substantial cause of serious injury.³⁰¹¹ She considered that the domestic industry suffered its worst results in 1999, which was also the period when imports increased. Commissioner Miller accepted that decreasing demand may "account in part" for the weakened state of the industry. However, it was not a cause of serious injury "equal to or greater than increased imports". Commissioner Miller also concluded "that increased imports, not purchaser consolidation (which existed throughout the period examined), were chiefly responsible for the industry's serious decline in 1999" and that purchaser consolidation was not a cause of injury "equal to or greater than increased imports". According to the European Communities, it is unclear whether the Commissioner also considered excess capacity to have caused serious injury. The Commissioner simply states that domestic over-capacity was not a cause of injury "equal to or greater than" increased imports. The European Communities asserts that it is nevertheless clear that the Commissioner also considered imports from Canada to "contribute importantly" to the serious injury suffered by the domestic industry.³⁰¹²

Failure to provide reasoned and adequate explanation

7.1257 China and Norway state that they believe that the injurious effects of the other factors that have caused the injury at the same time as the increased imports have not been properly assessed. Thus, it is impossible to determine whether the injurious effects of these factors were properly separated from the injurious effects of the increased imports.³⁰¹³ They argue that, as a result, it was not established explicitly, with a reasoned and adequate explanation, that injury caused by other factors was not attributed to increased imports. This conclusion would also remain the same, should the Panel not agree with China that Commissioner Miller acknowledged that other factors are causing injury to the domestic industry at the same time as increased imports.³⁰¹⁴ They further argue that, indeed, if the investigating authority believes that an alleged factor is not causing injury, it must, likewise, explicitly, clearly and unambiguously, state that such a factor is not causing injury and explain the reasons why. The explanation must be straightforward. To proceed otherwise would not ensure that alleged factors have been examined closely enough to establish that they are not contributing to the injury. As a result, there would be no guarantee that injury caused by other factors has not been wrongfully attributed to increased imports.³⁰¹⁵

³⁰⁰⁹ Korea's first written submission, para. 146.

³⁰¹⁰ Korea's first written submission, para. 147.

³⁰¹¹ European Communities' first written submission, para. 479; Korea's first written submission, para. 144; Norway's first written submission, para. 318

³⁰¹² European Communities' first written submission, para. 479.

³⁰¹³ China's first written submission, para. 517; Norway's first written submission, para. 326.

³⁰¹⁴ China's first written submission, para. 518; Norway's first written submission, para. 327.

³⁰¹⁵ China's first written submission, para. 519; Norway's first written submission, para. 328.

7.1258 China and Norway also argue that when Commissioner Miller placed emphasis on the substantial cause methodology, she failed to fulfill the requirements of Article 4.2(b) of the Agreement on Safeguards. Indeed, a conclusion to the effect 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", is not clear, unambiguous nor straightforward, since it is not established that other factors did not cause injury and that injury caused by other factors was not attributed to increased imports. Moreover, they argue that the explanations given by the Commissioner to support this conclusion are not clear, straightforward, unambiguous; they certainly are not reasoned and adequate.³⁰¹⁶ They submit, in particular, Commissioner Miller should have given great consideration to the explanations of the three commissioners who made a negative finding on the "substantial cause of serious injury". Indeed, these three commissioners found that long-term continuing decline in demand, the consolidated market and the fact that a substantial portion of imports were reportedly not domestically available caused serious injury to the domestic industry. Since half of the members of the investigating authority had explicitly recognized that these factors were causing injury, Commissioner Miller had the obligation to explain, in her view, how injury caused by these factors was not attributed to imports.³⁰¹⁷

7.1259 Japan similarly argues that Commissioner Miller failed to separate and distinguish alternative causes and that given that three of her colleagues read the record very differently, one might expect Commissioner Miller to elaborate at some length why she reached a different conclusion. Instead, she provided three short paragraphs. With respect to each alternative cause, she failed to meet the standard required by Article 4.2(b).³⁰¹⁸

7.1260 The European Communities argues that having identified at least three alternative sources of possible serious injury, the USITC (Commissioner Miller) was under an obligation to separate out and distinguish the effects of the different factors and ensure that no such effects were attributed to serious injury allegedly caused by increased imports. The European Communities, Japan and Korea argue that this was not done, and the United States is in breach, therefore, of its obligations under Article 4.2(b).³⁰¹⁹

7.1261 The United States responds by arguing that Commissioner Miller established, through a thorough and objective assessment of the record evidence, a genuine and substantial cause and effect relationship between increased imports and serious injury. Her analysis showed that there was a clear correlation between increases in the volume of increasingly low-priced imports of tin mill steel and the significant declines in the overall condition of the tin mill steel industry that occurred during the latter half of the period of investigation. She conducted a thorough and objective examination of the nature and extent of the effects of other factors and ensured that she did not attribute the effects, if any, of these factors to imports in her analysis.³⁰²⁰

³⁰¹⁶ China's first written submission, para. 520; Norway's first written submission, para. 329.

³⁰¹⁷ China's first written submission, para. 521; Norway's first written submission, para. 330.

³⁰¹⁸ Japan's first written submission, para. 296.

³⁰¹⁹ European Communities' first written submission, para. 480; Japan's first written submission, para. 296; Korea's first written submission, para. 148.

³⁰²⁰ United States' first written submission, para. 537.

(iii) *Hot-rolled bar*

Factors considered by the USITC

Competition among domestic producers

7.1262 China argues that the USITC acknowledged that this factor was causing injury at the same time as increased imports.³⁰²¹ China further argues that concerning competition among domestic producers, the USITC did not explain the nature and extent of the loss of market shares. Nor did it explain on which domestic producers this had an impact. Moreover, although the USITC said that this factor could not provide an explanation for certain indicia of injury, it did not say how it could provide an explanation for the remaining indicia.³⁰²²

7.1263 In response, the United States notes that the USITC found that at this factor provided no explanation for the domestic industry's serious injury. Intra-industry competition could not explain why the domestic industry overall lost market share to imports. Additionally, the pricing data available to the Commission did not indicate that Nucor was a primary source of pricing declines or that its pricing practices otherwise contributed to the industry's difficulties.³⁰²³

7.1264 The United States argues that China's statements to the effect that the USITC recognized that intra-industry competition was an alternative source of injury blatantly misreads the USITC's opinion. As the USITC explained, competition between domestic producers provides utterly no explanation for the industry's overall decline in market share during the period of investigation.³⁰²⁴

Inefficient producers

7.1265 The European Communities argues that with respect to the inefficient producers, the USITC arrives at a contradictory conclusion, stating first that their performance cannot explain the serious injury and then that "the alleged inefficiency of these two firms cannot be a more important cause of injury than increased imports".³⁰²⁵

7.1266 The European Communities and China argue the USITC appears to conclude that inefficient producers were a cause of the domestic industry's injury.³⁰²⁶ More particularly, the European Communities submits that if the USITC concluded that they did not cause injury, it would not have to explain that this factor was not a cause which was less important than increased imports. At the very least, the USITC did not establish explicitly, first, whether this factor was causing injury, and second, as a result, how it ensured that the injurious effects of this factor were not attributed to increased imports.³⁰²⁷

7.1267 China further argues that the USITC did not explain the nature and extent of the injurious effect of this factor. All that had been said by the USITC was that inefficient producers could not

³⁰²¹ China's first written submission, paras. 387 and 388.

³⁰²² China's first written submission, para. 393.

³⁰²³ USITC Report, pp. 97-98; United States' first written submission, para. 578.

³⁰²⁴ United States' first written submission, para. 579.

³⁰²⁵ European Communities' second written submission, para. 387.

³⁰²⁶ European Communities' second written submission, para. 388; China's first written submission, paras. 387 and 389.

³⁰²⁷ European Communities' second written submission, para. 388.

be held accountable for the overall situation of the domestic industry. According to China, this is far from being sufficient.³⁰²⁸

7.1268 In response, the United States argues that the US ITC also found that this factor provided no explanation for the domestic industry's serious injury. The United States producers identified as "inefficient", due to higher cost structures, did not lose market share to other, more "efficient" domestic producers during the period of investigation. Moreover, the performance trends of the so-called "inefficient" firms did not differ from more "efficient" domestic producers.³⁰²⁹

Changes in input costs

7.1269 The European Communities notes that the USITC concludes:

"[B]ecause we cannot attribute the domestic industry's declines in operating performance in 2000 to increased in COGS, we conclude that changes in input costs cannot be as important a cause of serious injury as increased imports."³⁰³⁰

7.1270 The European Communities and China further argue the USITC appears to conclude that increases in input costs were a cause of the domestic industry's injury.³⁰³¹ More particularly, the European Communities submits that if the USITC concluded that they did not cause injury, it would not have to explain that this factor was not a cause which was less important than increased imports. At the very least, the USITC did not establish explicitly, first, whether this factor was causing injury, and second, as a result, how it ensured that the injurious effects of this factor was not attributed to increased imports.³⁰³²

7.1271 China argues that this factor should have received more attention from the investigating authority, since it had to have had an impact on prices. Indeed, although demand was high, capacity also remained high throughout the period of investigation and, thus, there was in no way a shortage of supply which could have prevented prices from declining. Moreover, the market for hot-rolled bar is very open and prices had to decline as costs declined, contrary to a monopoly situation in which prices would have remained high.³⁰³³ China also notes that the USITC states that changes in input costs are in part responsible for price decline. However, according to China, there is no information on the nature and extent of that decline.³⁰³⁴

7.1272 In defence, the United States notes that the USITC found that unit raw materials costs declined throughout the period of investigation and that unit COGS decreased from 1996 to 1999 before increasing from 1999 to 2000. It observed that, generally speaking, declines in input costs cannot be a "cause" of injury in and of themselves. At most, they may be an alternative explanation for price declines. It found that the declines in input costs could not explain the much larger price declines that occurred from 1996 to 1999. Indeed, because demand increased during this period, prices should have declined less than input costs. From 1999 to 2000, unit COGS increased but prices

³⁰²⁸ China's first written submission, para. 394.

³⁰²⁹ USITC Report, p. 98; United States' first written submission, para. 578.

³⁰³⁰ USITC Report, Vol. I, p. 99.

³⁰³¹ European Communities' second written submission, para. 388; China's first written submission, paras. 387 and 390.

³⁰³² European Communities' second written submission, para. 388.

³⁰³³ China's first written submission, para. 400.

³⁰³⁴ China's first written submission, para. 395.

did not. Instead, domestic producers' attempts to increase prices during the first portion of 2000 could not be sustained because of the import surge.³⁰³⁵

7.1273 The United States argues that China's statement that the decline in costs from 1996 to 1999 "should have received more attention from the investigating authority," appears misguided. The USITC's focus was on how cost levels in 2000, not 1999, correlated with price levels in 2000. In any event, the USITC fully explained that declines in prices from 1996 to 1999 were much greater than declines in unit input costs, notwithstanding increasing demand. China appears to posit that this divergence may have been a function of increased domestic supply. This explanation, however, cannot be reconciled with the record. The domestic industry's capacity utilization in 1999 was higher than it was in 1996. If anything, tighter domestic supplies, as reflected by increasing capacity utilization, together with increasing domestic demand, should have resulted in domestic hot-rolled bar prices declining less than input costs did. There was, however, another source of increased supply in the US market that China overlooks: the imports. Because of the increased imports, the decline in prices from 1996 to 1999 was in fact greater than the decline in unit input costs.³⁰³⁶

7.1274 The European Communities submits³⁰³⁷ that the USITC's dismissal of the effect of increased COGS in 2000 is not a reasoned and adequate explanation of its conclusions, supported by the facts. While raw material costs fell in 1999 and 2000, there was a substantial increase in costs associated with direct labour and other factory costs, which negated the increased income the domestic industry could have expected from the fall in raw material costs. The European Communities submits that, indeed, the USITC implicitly noted the diverging development of raw material costs and other costs where it stated:

"[U]nit COGS declined from US\$399 in 1996 to US\$362 in 1999 and then increased to US\$380 in 2000; unit raw material costs declined throughout the period examined."³⁰³⁸

7.1275 The European Communities submits³⁰³⁹ that the USITC thus recognized that the increase in COGS in 2000 was not caused by increases in raw material costs, but rather by increases in other costs forming part of COGS; i.e. direct labour and other factory costs. The USITC, however, never investigated further this factual situation, and slipped into a general assertion that when demand increases producers "normally need not cut their prices to reflect fully declines in COGS".³⁰⁴⁰ This assumes, however, that domestic producers can let other costs increase and still expect to have them covered by their sales prices. In this case, other costs did increase substantially – had they not then the domestic industry would have continued to make a comfortable profit – this is illustrated in the table below.

³⁰³⁵ USITC Report, p. 99; United States' first written submission, para. 578.

³⁰³⁶ United States' first written submission, footnote 302.

³⁰³⁷ European Communities' second written submission, para. 389.

³⁰³⁸ USITC Report, Vol. I, p. 99.

³⁰³⁹ European Communities' second written submission, para. 390.

³⁰⁴⁰ USITC Report, Vol. I, p. 99.

Table 15: Hot-Rolled Bar – Unit Value of Commercial Sales and Costs (1998-2001)³⁰⁴¹

	1998 (actual)	1999 (actual)	1999 (constant)	2000 (actual)	2000 (constant)	2001 (actual)	2001 (constant)
Net. Comm. Sales	431 399		399 399		399 381		381
Raw materials	169 138		138 135		135 122		122
Direct labor	55 52		52 61		52	61	52
Other factory costs	162 172		162	184	162	199	162
COGS Total	387 362		352	380	349	381	336
Gross Profit	44 37		47	19	50	0	45
SG&A	22 22		22	22	22	24	24
Operating Income (loss)	22 15		25	(3)	28	(24)	21

7.1276 According to the European Communities, while admitting this cost development, the USITC does not examine the reasons for it. Thus, even with prices falling between 1998 and 1999 and then remaining stable in 2000, had it not been for increased costs, the domestic industry would have continued to make a comfortable profit. Even in interim 2001, when prices fell from their 1999 levels, given continuing falls in raw material costs, had it not been for increases in other costs, the domestic industry would have had an operating income per unit comparable to the levels of 1998. Consequently, the USITC did not provide a reasoned and adequate explanation of how its conclusions were supported by the factual findings it had made.³⁰⁴²

7.1277 In response, the United States argues that the European Communities and China misread the USITC's opinion concerning the impact of changes in input costs. Because the USITC based its conclusion on serious injury principally on data concerning the domestic industry's condition during and after 2000, the most pertinent part of the USITC's discussion concerns input costs in 2000. Here, the USITC found that while unit COGS increased from US\$362 in 1999 to US\$ 380 in 2000, neither unit sales values nor prices increased during this period. The USITC specifically stated that "[i]f the domestic industry could have increased its average unit sales values in 2000 to reflect increasing COGS – a reasonable expectation during a year of increasing demand – the industry could have maintained positive operating margins of at least the levels of 1999". However, the industry could not raise its prices because of the increased imports during that year. Thus, the USITC expressly analysed the nature and effect of the change in input costs from 1999 to 2000 and demonstrated that it was not increased input costs, but the industry's inability to increase its prices to reflect those increased costs because of increased imports, that caused the industry's difficulties in 2000.³⁰⁴³

NAFTA imports

7.1278 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic hot-rolled bar industry, which is found in the USITC

³⁰⁴¹ European Communities' second written submission, para. 390, based on USITC Report, Vol. II, p. LONG-33, table LONG-2 7. In the columns marked "constant" the data for "other factory costs" and "direct labor" has been kept constant for 1999, 2000 and interim 2001. Figures which have been kept constant have been italicized, and figures which change as a result of the simulation are put in bold.

³⁰⁴² European Communities' second written submission, para. 391.

³⁰⁴³ United States' first written submission, para. 580.

Report, was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports" only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).³⁰⁴⁴

7.1279 China further argues that in the Supplementary Report, the USITC was required to assess the injury caused by imports from Mexico and Canada and to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. China argues that it did not do so. China further argues that the USITC provided no explanation whatsoever that injury caused by imports from Mexico and Canada was not attributed to increased imports and there is no reason to believe that injury caused by imports from Mexico and Canada were not in fact attributed to increased imports. In this regard, the European Communities notes that in its separate findings on NAFTA imports, the USITC concluded that the sheer volume of the Canadian increase supported its finding that imports from Canada contributed importantly to the serious injury caused by imports.³⁰⁴⁵

7.1280 The European Communities notes that the United States has not tried to explain how it ensured that the injurious effects of excluded imports were not attributed to non-excluded imports, despite the fact that in 2000 imports from Canada and Mexico alone accounted for 52% of all imports.^{3046 3047} The European Communities argues that the USITC failed to even consider Canadian imports as an alternative cause of injury and, thus, did not separate and distinguish the effects of Canadian imports nor did it ensure that such effects were not attributed to increased imports from non-NAFTA sources.³⁰⁴⁸ On the basis of the foregoing, in the view of the European Communities and China, the USITC failed to comply with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.³⁰⁴⁹

7.1281 For the United States' response, see paragraph 7.1066 *et seq.*

Factors not considered by the USITC

7.1282 The European Communities argues that there are a number of factors apparent in the data before the USITC which the USITC did not examine and which would tend to bring its conclusion that imports were the cause of serious injury into doubt.³⁰⁵⁰ In particular, the European Communities notes that the domestic industry's "interest expenses" and "other expenses" leapt between 1998 and 1999.³⁰⁵¹ The European Communities argues that these quite noticeable developments occurred precisely when the USITC notes operating margins and net incomes start to decline. Yet there is no explanation of these developments.³⁰⁵²

³⁰⁴⁴ China's first written submission, para. 407.

³⁰⁴⁵ European Communities' first written submission, para. 488.

³⁰⁴⁶ USITC Report, Vol. II, p. LONG-9, table LONG-5.

³⁰⁴⁷ European Communities' second written submission, para. 393.

³⁰⁴⁸ European Communities' first written submission, paras. 489 and 491.

³⁰⁴⁹ China's first written submission, para. 410; China's second written submission, para. 230.

³⁰⁵⁰ European Communities' first written submission, para. 494.

³⁰⁵¹ European Communities' first written submission, para. 495.

³⁰⁵² European Communities' first written submission, para. 496.

7.1283 The European Communities also argues that there was a substantial drop in domestic prices between 1998 and 1999, a period in which imports decreased, and in 1999 demand fell away to 1996 levels. According to the European Communities, the decrease in domestic prices coincided with a substantial decrease in raw material costs in 1999. However, also between 1998 and 1999, there was a sharp increase in "other factory costs" which continued into 2000. Further, between 1999 and 2000 there was a sharp increase in direct labour costs (these trends continued into interim 2001). According to the European Communities, no explanation was provided in the USITC Report of the effect of these substantial changes on the financial performance of the industry.³⁰⁵³

7.1284 In response, the United States submits that the European Communities fails to recognize that the USITC's analysis of the poor financial condition of the domestic hot-rolled bar industry was based on operating income and operating margin data. Interest expenses and "other" expenses were not a component of operating income, as computed by the USITC. Instead, the USITC deducted interest expenses and "other" expenses from operating income to derive net income.³⁰⁵⁴ It argues that, therefore, increases in interest expenses and "other" expenses could not provide any explanation for the 2000 operating losses cited by the USITC. Consequently, there was no requirement under Article 4.2 for the USITC to have engaged in a further non-attribution analysis concerning these expenses.³⁰⁵⁵

Failure to provide a reasoned and adequate explanation

7.1285 The European Communities and China argue that the USITC failed to adequately evaluate the complexity of the alleged injury factors. It also failed to provide a sound, clear and straightforward explanation of how it ensured that injury caused by other factors was not attributed to increased imports.³⁰⁵⁶ China argues that the USITC did not explain the nature of the "large extent" of the decline in operating performance in 1999 due to the decline in demand. Moreover, the USITC stated that "prices for cold finished bar have historically tracked demand and conditions", but it did not explain the impact of demand on the overall situation of the industry.³⁰⁵⁷

7.1286 In response, the United States argues that the USITC conducted a reasoned and adequate examination of the injury purportedly caused by factors other than increased imports and ensured that any injury caused by these other factors was not attributed to imports. It notes that the USITC examined four asserted causes of injury to the domestic hot-rolled bar industry other than increased imports and concluded that the "alternative causes cannot individually or collectively explain the serious injury to the domestic industry, particularly the declining market share over the course of the period examined, and the deteriorating operating performance leading to negative operating margins for the domestic industry in 2000". Moreover, the USITC did consider demand conditions in the market, finding that US apparent consumption of hot-rolled bar increased by 11.7 percent from 1996 to 2000, and that it increased on a year-to-year basis for every available comparison except that for 1998 to 1999. The USITC observed that apparent U.S. consumption increased from 1999 to 2000, the year that domestic industry performance reached injurious levels. Consequently, it concluded that changes in demand could not explain the industry's condition in 2000.³⁰⁵⁸

³⁰⁵³ European Communities' first written submission, para. 497.

³⁰⁵⁴ United States' first written submission, para. 581.

³⁰⁵⁵ United States' first written submission, para. 582.

³⁰⁵⁶ European Communities' first written submission, para. 498; China's first written submission, para. 401.

³⁰⁵⁷ China's first written submission, para. 415.

³⁰⁵⁸ United States' first written submission, para. 578.

(iv) *Cold-finished bar*

Factors considered by the USITC

Declines in demand

7.1287 The European Communities notes that the USITC found that: "The domestic industry acknowledges that prices for cold-finished bar have historically tracked demand conditions. Indeed, the domestic industry's decline in operating performance in 1999, a year when import volume and market penetration declined, appears to a large extent attributable to the declines in demand during that year".³⁰⁵⁹ China and the European Communities argue that it is thus clear that the USITC considered that changes in demand were a cause of the serious injury.³⁰⁶⁰ China argues that the USITC recognized that declines in domestic demand contributed to cause the injury to the domestic industry.³⁰⁶¹

7.1288 China submits that the USITC firstly focused its analysis on the year 2000 – when declining demand was not an issue. Then it demonstrated that the industry was seriously injured even during this period, and that in this way the USITC fulfilled the requirements of the Article 4.2(b) of the Agreement on Safeguards.³⁰⁶² According to China, such an approach clearly misses the assessment of the nature and extent of the declines in demand. China questions how the USITC could have properly evaluated this factor by focusing on year 2000 when "decline was not an issue". In China's view, as a consequence, the non-attribution analysis of the declines in demand in the domestic market could not have been performed.³⁰⁶³

7.1289 In response, the United States argues that the USITC concluded that the domestic industry's performance in 1999, a year when import volume and market penetration declined, appeared largely attributable to declines in demand that year. The USITC emphasized, however, that US demand for cold-finished bar was higher in 2000 than it was in 1999. Nevertheless, prices were lower in 2000 than in 1999, and the per unit difference between average unit values and COGS was lower in 2000 than in any full year of the period of investigation other than 1999. Notwithstanding that 2000 was a year in which demand increased, the industry's operating margin that year was less than half the levels of 1997 and 1998.³⁰⁶⁴ In this regard, the United States argues that the USITC ensured that it did not attribute to imports any injury due to declining demand. It did this by focusing on the domestic industry's condition during a period when declining demand was not an issue – 2000, which was not only the most recent full year of the period of investigation, but one in which United States apparent consumption increased from the level of the prior year. The USITC found that in 2000, the domestic industry suffered from depressed pricing and poor financial performance. By demonstrating that the domestic cold-finished bar industry was in a seriously injured condition even during a period where demand was increasing, the United States submits that the USITC clearly satisfied its obligation under Article 4.2(b) not to attribute to increased imports injury due to declines in demand.³⁰⁶⁵

³⁰⁵⁹ European Communities' first written submission, para. 500.

³⁰⁶⁰ European Communities' first written submission, para. 501; China's first written submission, para. 414.

³⁰⁶¹ China's first written submission, para. 414.

³⁰⁶² China's second written submission, para. 233.

³⁰⁶³ China's second written submission, para. 234.

³⁰⁶⁴ United States' first written submission, para. 594.

³⁰⁶⁵ United States' first written submission, para. 596.

NAFTA imports

7.1290 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic cold-rolled bar industry, which is found in the USITC Report was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports" only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).³⁰⁶⁶

7.1291 China further argues that in the Supplementary Report, the USITC was required to assess the injury caused by imports from Mexico and Canada and to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. China argues that it did not do so. China further argues that the USITC provided no explanation whatsoever that injury caused by imports from Mexico and Canada was not attributed to increased imports and there is no reason to believe that injury caused by imports from Mexico and Canada were not in fact attributed to increased imports.³⁰⁶⁷

7.1292 The European Communities argues that the USITC identified declining demand and imports from Canada as other sources of serious injury to the domestic industry. However, according to the European Communities, it did not attempt to separate and distinguish the effects of these other factors, and thus did not ensure that injury caused by these factors was not attributed to increased imports. The European Communities and China argue that the United States, in imposing measures, has therefore acted inconsistently with Article 4.2(b) of the Agreement on Safeguards. Moreover, the United States has not determined, through the provision of a reasoned and adequate explanation, that increased imports have caused serious injury.³⁰⁶⁸ The European Communities further submits that the United States has not argued that it has ensured the non-attribution of the injurious effects of FTA imports. It has simply claimed that it is not required to. However, the European Communities notes that it has explained why the United States was under an obligation to undertake such a non-attribution analysis.³⁰⁶⁹

7.1293 For the United States' response, see paragraph 7.1066 *et seq.*

Factors not considered by the USITC

7.1294 The European Communities argues that the USITC did not consider in any detail the reasons for the fall in profits in 1999, other than to note that it was "to a large extent attributable to the declines in demand during that year". However, according to the European Communities, a close analysis of the data in the USITC Report suggests a major fall in the price of raw materials in 1999 which was accompanied by a substantial increase in other costs. According to the European Communities, this evolution appears to have combined with developments in demand to explain the

³⁰⁶⁶ China's first written submission, para. 418.

³⁰⁶⁷ China's first written submission, para. 421; China's second written submission, para. 235.

³⁰⁶⁸ European Communities' first written submission, para. 504; China's first written submission, para. 421; China's second written submission, para. 235.

³⁰⁶⁹ European Communities' first written submission, para. 399.

financial performance of the industry in 1999 and 2000. None of these developments are even mentioned in the USITC Report.³⁰⁷⁰

7.1295 In response, the United States submits that the European Communities' argument that price declines for cold-finished bar were the function of declines in unit raw material costs overlooks the fact that the USITC placed particular emphasis on the price declines that occurred between 1999 and 2000. The United States argues that, during this period, unit raw material costs increased.³⁰⁷¹

7.1296 The European Communities argues that, moreover, there were a whole series of expenses which were subject to a substantial leap in 1999 and 2000 which clearly had a significant effect on the industry's financial performance.³⁰⁷² According to the European Communities, the USITC's Report does not even examine these developments, which coincide with the beginning of the serious injury allegedly suffered by the domestic industry. The European Communities states that it is quite clear that the fall in raw material prices must have had an effect on prices on the market, and that the increase in "other factory costs" must have had an effect on the profit margins which the domestic industry could expect to obtain.³⁰⁷³

7.1297 In response, the United States submits that with respect to the European Communities' argument that the declines in domestic industry performance in 1999 and 2000 appeared to be a function of increased interest and "other" expenses and depreciation, and that this fact was overlooked by the USITC, the European Communities fails to recognize that the USITC's analysis of the poor financial condition of the domestic cold-finished bar industry was based on operating income and operating margin data. Interest and "other" expenses and depreciation were not components of operating income, as computed by the USITC. Instead, the USITC deducted interest expenses and "other" expenses from operating income to derive net income. USITC then added depreciation and amortization to net income to derive cash flow.³⁰⁷⁴ The United States argues that, accordingly, increases in interest and "other" expenses and depreciation could not provide any explanation for the poor operating performance in 2000 cited by the USITC. Consequently, there was no requirement under Article 4.2 for the USITC to have engaged in a further non-attribution analysis concerning these factors.³⁰⁷⁵

7.1298 In counter-response, the European Communities argues³⁰⁷⁶ that the United States, like the USITC, ignores an important issue previously raised by the European Communities, which purports to be an alternative explanation of the changed financial performance of the industry in 1999 and 2000. The European Communities submits that this shows that but for massive changes in "other factory costs" in 1999 and 2000 the domestic cold-finished bar industry would have had a more than comfortable operating income in those years, even in the face of allegedly declining prices. This is because huge potential savings brought about by a decrease in raw material costs were nullified by huge increases in other costs. The European Communities submits that this is shown in the table below:

³⁰⁷⁰ European Communities' first written submission, para. 509.

³⁰⁷¹ United States' first written submission, para. 592.

³⁰⁷² European Communities' first written submission, para. 510.

³⁰⁷³ European Communities' first written submission, para. 511.

³⁰⁷⁴ United States' first written submission, para. 597.

³⁰⁷⁵ United States' first written submission, para. 598.

³⁰⁷⁶ European Communities' second written submission, para. 397.

Table 16: Cold-Finished Bar – Unit Value of Commercial Sales and Costs (1998-2001)³⁰⁷⁷

	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

7.1299 According to the European Communities, such as the decline in raw material costs that if the industry had managed to keep "other factory costs" stable, it would have made substantial profits in 1999, 2000 and interim 2001. The European Communities submits that a competent authority, seeing such a development, should first check whether this data was correct and second examine very closely the reasons for such cost developments, in order to make sure that it did not err in attributing the injury seen in 1999 and 2000 to increased imports. Given that between 1998 and 1999 capacity utilization of the industry increased, and the volume of sales declined by only 10,000 tons, the European Communities argues that these cost developments cannot be explained by effects on the domestic industry caused by increased imports. In the absence of any discussion of this factor, the European Communities argues that the USITC cannot be considered to have provided a reasoned and adequate explanation of its determination.^{3078 3079}

(v) *Rebar*

Factors considered by the USITC

Domestic capacity increases

7.1300 China argues that the USITC did not address the question of whether capacity increases could have caused injury at the same time as increased imports.³⁰⁸⁰

7.1301 In response, the United States argues that the USITC did examine increases in domestic capacity. According to the United States, the USITC concluded that this could not be an alternative cause of injury because the 26.6% increase in domestic productive capacity from 1996 to 2000 was

³⁰⁷⁷ European Communities' second written submission, para. 347; 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 italicized, and figures which change as a result of the simulation are put in bold.

³⁰⁷⁸ The United States misinterprets and dismisses this argument of the European Communities; See United States' first written submission, para. 592.

³⁰⁷⁹ European Communities' second written submission, para. 398.

³⁰⁸⁰ China's first written submission, para. 428.

much smaller than the 48.1% increase in United States apparent consumption during that period. Moreover, capacity utilization generally increased during the period of investigation.³⁰⁸¹

7.1302 The United States submits that, therefore, contrary to China's argument, the USITC clearly and unambiguously stated that increased capacity was not a cause of injury. According to the United States, China does not provide any basis for the Panel to conclude that the USITC did not objectively examine the evidence concerning this factor and explain the basis for its conclusion.³⁰⁸²

Changes in input costs

7.1303 China argues that the USITC did not clearly indicate whether this factor contributed in causing injury. Moreover, according to China, the USITC failed to properly examine to what extent this factor could have had an impact on prices. The USITC merely stated that the fall in costs was not as important as the decrease in prices and that, therefore, falling costs were not responsible for falling prices. China argues that this explanation is obviously wrong. Falling costs must have had some effect on falling prices. Indeed, for prices to increase as demand increases, all other factors must remain unchanged. China asserts that this was not the case here. With increases in the United States' production and productivity, supply of rebar also increased. This had suppressed prices. Moreover, if one can assume that falling production costs do not necessarily translate into falling prices in a monopoly or oligopoly market, it would be false to assume the same thing in an open market. Competition in an open market will necessarily put pressure on prices if production costs decrease.³⁰⁸³

7.1304 The European Communities argues that because of the lack of clarity of the USITC Report on alternative causes of injury, the USITC failed to establish explicitly whether increased costs were an alternative cause of injury to the rebar industry. The European Communities argues either that the USITC had found that increased costs were an alternative source of injury or, if the USITC had not made such a finding, that the USITC had ignored and consequently failed to separate and distinguish and ensure non-attribution, of this alternative factor.³⁰⁸⁴

7.1305 The United States argues that the USITC examined changes in input costs in details for the period from 1998 to 2000. The USITC noted that unit COGS fell from 1998 to 1999. It stated that, in light of the large increase in demand during this period, this decline in costs should not necessarily have led to a decline in prices. However, there was a decline in unit sales values that exceeded the decline in unit input values. The USITC thus reasonably concluded that the decline in prices was not merely a function of input cost declines. Instead, it found that the increased imports prevented domestic rebar producers from obtaining the full benefits of declining input costs in a growing market. The USITC also performed a detailed examination of changes in input costs from 1999-2000. During this period, demand increased and per unit COGS increased, yet prices declined. Consequently, the United States argues, there was no possible causal nexus during this period between price declines and changes in input costs.³⁰⁸⁵

7.1306 The United States argues that the USITC's detailed and comprehensive examination of changes in input costs contrasts markedly with the cursory and inconsistent arguments advanced by the European Communities in its submission. In one paragraph, the European Communities asserts that the USITC should have concluded that the price decline from 1999 to 2000 was merely a function

³⁰⁸¹ United States' first written submission, para. 608.

³⁰⁸² United States' first written submission, para. 609.

³⁰⁸³ China's first written submission, para. 429.

³⁰⁸⁴ European Communities' second written submission, para. 402.

³⁰⁸⁵ United States' first written submission, paras. 610-611

of decline in raw material costs.³⁰⁸⁶ Just three paragraphs later, the European Communities states that the USITC should have concluded that the domestic rebar industry's financial problems in 2000 were due to an inability to increase prices commensurately with increases in costs such as other factory costs.³⁰⁸⁷ What the European Communities appears to overlook is that both raw material costs and other factory costs are components of COGS. Changes in input costs from 1999 to 2000 would have either dictated an increase in prices or a decrease in prices in light of changes in other conditions of competition, such as demand. Input cost changes could not, as the European Communities seems to envision, have dictated both price increases and declines simultaneously.³⁰⁸⁸

7.1307 According to the United States, in marked contrast to the European Communities, the USITC used a coherent and objective approach in assessing changes in input costs. The USITC properly examined all components of COGS in determining that input costs rose from 1999 to 2000. It is not disputed that prices did not follow suit.³⁰⁸⁹ This raises the question of why the domestic rebar industry could not recover increasing input costs, as well as the increasing selling, general, and administrative expenses cited by the European Communities, from 1999 to 2000. As the European Communities notes, this period was "when United States production and capacity utilization was at its highest;"³⁰⁹⁰ moreover, demand was rising. In such a market, one would anticipate that prices would follow costs.³⁰⁹¹ The reason that prices for United States-produced rebar did not follow costs in 2000 is the one overlooked by the European Communities: the imports.³⁰⁹²

NAFTA imports

7.1308 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic rebar industry, which is found in the USITC Report, was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports" only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).³⁰⁹³

7.1309 China argues that such a new determination was not done concerning this product. This, it states, is especially surprising, given that the USITC acknowledged that imports from Canada and Mexico were causing injury by stating that "imports from Canada did not contribute importantly to the serious injury" and "imports from Mexico did not contribute importantly to the serious injury". In other words, imports from NAFTA countries contributed in causing the injury, although this contribution was not substantial.³⁰⁹⁴ China argues that since the USITC did not proceed to a new

³⁰⁸⁶ European Communities' first written submission, para. 521.

³⁰⁸⁷ European Communities' first written submission, para. 524.

³⁰⁸⁸ United States' first written submission, para. 612.

³⁰⁸⁹ United States' first written submission, para. 617.

³⁰⁹⁰ European Communities' first written submission, para. 524.

³⁰⁹¹ Indeed, when it attempts to divorce "relatively low prices" from "developments of costs" in para. 524 of its first written submission, the European Communities appears to overlook that absent price suppression or depression there normally will be a direct relationship between a company's costs and its prices.

³⁰⁹² United States' first written submission, para. 614.

³⁰⁹³ China's first written submission, para. 437; China's second written submission, para. 245.

³⁰⁹⁴ China's first written submission, para. 438.

determination of causality between increased imports from non-NAFTA countries and the serious injury to the domestic industry, it failed to assess the injury caused by imports from Mexico and Canada and it failed to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. Therefore, China argues that the USITC did not comply with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.³⁰⁹⁵

7.1310 Similarly, the European Communities argues that, in failing to analyse imports from Canada, Mexico, Israel and Jordan as alternative causes of injury the USITC also acted inconsistently with Article 4.2(b).³⁰⁹⁶

7.1311 For the United States' response, see paragraph 7.1066 *et seq.*

Factors not considered by the USITC

7.1312 The European Communities notes that the USITC considered that price declines in 1999, which continued into 2000 allegedly led by imports, were responsible for the poor performance of the domestic industry in 2000.³⁰⁹⁷ According to the European Communities, it is far from clear that imports can be regarded as price setters in what the USITC admitted is a commodity market. Imports achieved their highest level of market share in 1999 with 22% of the market. According to the European Communities, it had not been demonstrated that price would be set by 22% of the market taken up by imports, rather than the 78% taken up by domestic production. The USITC's purported justification of the price leadership of imports does not survive detailed examination.³⁰⁹⁸

7.1313 With regard to the argument that it is "far from clear that imports can be regarded as price setters in what the USITC has admitted is a commodity market", the United States submits that this argument ignores two uncontested USITC findings. First, the USITC found that rebar was a commodity product sold on the basis of price – a proposition no party has disputed. Second, the USITC found that the imports undersold domestically produced rebar by margins over 20% since 1998.³⁰⁹⁹ The United States further argues that in a commodity market where purchasing decisions are made on the basis of price, significant volumes of a low-priced product will drive all prices down. The increased quantities of rebar imports were priced much lower than the domestically produced product. The United States submits that, as the USITC found, to meet this competition the domestic industry was forced to cut prices to avoid losing even more market share to the imports than it actually did.³¹⁰⁰

7.1314 The European Communities argues that it would appear that the price declines in 1999 and 2000 were closely linked to declines in the cost of raw materials. The declines in those two years closely followed declines in raw material prices. However, as noted, in 1999 the domestic industry continued to make a comfortable operating income while in 2000 a substantial loss was suffered. Close analysis of the data in the report shows substantial increases in both "other factory costs" and SG&A expenses.³¹⁰¹ According to the European Communities, it was not the relatively low price obtaining on the United States domestic market which led the domestic industry to suffer injury, but it was the developments of costs, in particular "other factory costs" and SG&A expenses, which led to the alleged serious injury. The European Communities argues that these costs increased when

³⁰⁹⁵ China's first written submission, para. 439.

³⁰⁹⁶ European Communities' first written submission, para. 517.

³⁰⁹⁷ European Communities' first written submission, para. 519.

³⁰⁹⁸ European Communities' first written submission, para. 520.

³⁰⁹⁹ United States' first written submission, para. 604.

³¹⁰⁰ United States' first written submission, para. 605.

³¹⁰¹ European Communities' first written submission, para. 521.

United States production and capacity utilization was at its highest. However, the European Communities asserts that the USITC Report does not even mention these developments, nor assess their effect on the situation of the domestic industry.³¹⁰² The European Communities argues that the USITC does not attempt to explain the striking fact that in 1996 the domestic industry made an operating loss of US\$72,000, which was the year in which the domestic industry had its highest market share and was characterized by relatively high prices and a low level of imports. Demand, however, was lower in 1996 than in any other year during the investigation period. According to the European Communities, evidently, this loss could not have been caused by increased imports. This fact, which is immediately obvious is never explained. This is probably because it suggests that something other than imports is responsible for the problems of the domestic industry.³¹⁰³

7.1315 In response, the United States argues that the USITC's detailed and comprehensive examination of changes in input costs contrasts markedly with the cursory and inconsistent arguments advanced by the European Communities in its submission. In one paragraph, the European Communities asserts that the USITC should have concluded that the price decline from 1999 to 2000 was merely a function of decline in raw material costs. Later, the European Communities states that the USITC should have concluded that the domestic rebar industry's financial problems in 2000 were due to an inability to increase prices commensurately with increases in costs such as other factory costs. What the European Communities appears to overlook is that both raw material costs and other factory costs are components of COGS. Changes in input costs from 1999 to 2000 would have either dictated an increase in prices or a decrease in prices in light of changes in other conditions of competition, such as demand. Input cost changes could not, as the European Communities seems to envision, have dictated both price increases and declines simultaneously.³¹⁰⁴ The United States submits that in marked contrast to the European Communities, the USITC used a coherent and objective approach in assessing changes in input costs. The USITC properly examined all components of COGS in determining that input costs rose from 1999 to 2000. It is not disputed that prices did not follow suit.³¹⁰⁵ This raises the question of why the domestic rebar industry could not recover increasing input costs, as well as the increasing selling, general, and administrative expenses cited by the European Communities, from 1999 to 2000. As the European Communities notes, this period was "when United States production and capacity utilization was at its highest"; moreover, demand was rising. In such a market, one would anticipate that prices would follow costs. The reason that prices for United States-produced rebar did not follow costs in 2000 is the one overlooked by the European Communities: the imports.³¹⁰⁶

7.1316 In counter-response, the European Communities argues that the USITC's discussion of input costs is entirely phrased in terms of whether they caused prices to fall. According to the European Communities, the USITC recognized that declines in the COGS in 1999 could not explain the magnitude of price declines observed in that year (although such declines must have had an effect). However, the European Communities' argument was that increases in other factory costs and SG&A expenses in 2000 (which form part of COGS), the year in which operating income declined and thus serious injury was allegedly found³¹⁰⁷, are a more probable cause of injury than price declines caused by increased imports.³¹⁰⁸ Indeed, absent the increased costs, the domestic rebar industry would have

³¹⁰² European Communities' first written submission, para. 524.

³¹⁰³ European Communities' first written submission, para. 514.

³¹⁰⁴ United States' first written submission, para. 612.

³¹⁰⁵ United States' first written submission, para. 613.

³¹⁰⁶ United States' first written submission, para. 614.

³¹⁰⁷ There was only a marginal decline in operating income in 1999, with operating income above 1996 and 1997 levels.

³¹⁰⁸ European Communities' first written submission, paras. 521-525.

had an operating income of US\$68,368,692 rather than a loss of US\$24,669,000, a respectable level given operating income in 1999 of US\$74,412,000.³¹⁰⁹ The USITC Report contains no discussion of this increase in costs, nor of the reasons behind it. The European Communities notes that the domestic industry increased its capacity utilization and its volume of sales in 2000. Increased costs do not result from such developments. That it did not, suggests that other developments, which the USITC did not explore but which it clearly should have explored, were a more probable cause of injury than increased imports. The European Communities asserts that the United States has not addressed this issue. The European Communities argues that, consequently, the USITC's report does not provide a reasoned and adequate explanation of its findings.³¹¹⁰

Failure to provide reasoned and adequate explanation

7.1317 China argues that the USITC neither assessed injury caused by other factors nor did it clearly state that other factors were not causing injury and explained the reasons why.³¹¹¹ China argues that the USITC failed to adequately evaluate the complexity of the alleged injury factors. It also failed to provide a sound, clear and straightforward explanation of how it ensured that injury caused by other factors was not attributed to increased imports. Therefore, China believes that the USITC acted inconsistently with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.³¹¹²

7.1318 The United States argues that the USITC conducted a reasoned and adequate examination of the injury purportedly caused by factors other than increased imports and ensured that any injury caused by these other factors was not attributed to imports. Consequently, the USITC's non-attribution analysis for rebar satisfied the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards. The USITC separated and distinguished from the serious injury caused by increased imports any injury attributable to other factors.³¹¹³

(vi) *Welded pipe*

Factors considered by the USITC

Declines in demand

7.1319 Korea argues that the USITC's failure to properly define the like products in the other welded pipe category prevented the USITC from properly considering declines in demand, an important "other factor" affecting the industry. According to Korea, the declines in demand were most pronounced for other welded pipe (excluding LDLP).³¹¹⁴

7.1320 Korea argues that the USITC's findings in the concurrent anti-dumping investigation of welded pipe are instructive. As noted there, declines in domestic industry performance at the end of the investigation period "occurred in the context of a decline in the overall economy and total

³¹⁰⁹ The figure of US\$ 68,368,692 is calculated by multiplying the operating income per unit which would have been achieved if other factory costs and SG&A expenses are kept constant compared to 1999 (i.e. US\$12 per unit – see Figure 4.3, Rebar; Evolution of costs with 1999 values held constant, European Communities' first written submission, para. 523.) by the volume of commercial sales in 2000 (i.e. 5,697,391 tons – see USITC Report, Vol. II, p. LONG-35, Table LONG-29)).

³¹¹⁰ European Communities' second written submission, para. 403.

³¹¹¹ China's first written submission, para. 427.

³¹¹² China's first written submission, para. 430.

³¹¹³ United States' first written submission, paras. 607 and 616.

³¹¹⁴ Korea's first written submission, para. 151.

apparent domestic consumption of standard pipe".³¹¹⁵ Korea argues that, consequently, the USITC concluded in that investigation that the United States welded pipe industry – during the same period of the investigation as used in the Section 201 investigation – was not materially injured or threatened with material injury by reason of imports of standard pipe from China and that industry declines were due to softening demand.³¹¹⁶ In Korea's view, if there was no "material" injury arising from imports, imports could not be responsible for "serious" injury. In view of these facts, strongly suggesting that serious injury was not due to imports, the USITC should have identified, distinguished, and separated the serious injury arising from declines in demand.³¹¹⁷

7.1321 Korea also argues that, conversely, as the USITC acknowledged, demand for LDLP was increasing towards the end of the period. While the USITC agreed that "rising demand tends to ameliorate the impact of a given volume of imports", it noted that "even with a recent rise in LDLP demand, overall demand for covered welded tubular products has been relatively constant on a full year basis since 1998, as well as between interim periods. Thus, we do not consider the likely increase in demand for LDLP as eliminating the threat to serious injury". However, according to Korea, the true trends were masked by considering the two separate like products together so that demand appeared "stable".³¹¹⁸

7.1322 Korea further argues that, irrespective of the analytical flaws caused by the improper definition of like product, the USITC did not separate and distinguish the effects of this other factor affecting the United States industry's performance as required by Article 4.2 of the Agreement on Safeguards.³¹¹⁹

7.1323 In response, the United States submits that the USITC noted that several parties had argued that the welded pipe industry was not threatened with serious injury because of increasing demand in the LDLP sector of the market but rejected this argument. The USITC stated that the record evidence did, in fact, indicate that there had been a growth in demand for LDLP in the market and that the growth in demand for that product, which was expected to continue, might ameliorate the impact of these imports on the welded pipe industry. However, it also noted that LDLP only accounted for 20 to 30% of market demand for the overall welded pipe product category and that demand in the overall welded pipe market had been constant between 1998 and interim 2001, even with the substantial growth in demand for LDLP. Accordingly, the USITC reasonably rejected this factor as indicating that the industry would not continue to deteriorate or that imports would not continue to increase their presence in the market.³¹²⁰

7.1324 The United States argues further that the USITC clearly did discuss this issue and properly considered it in the appropriate legal context, that is, in the context of how demand trends affected competition in the market for welded pipe, the relevant like product in this proceeding. The United States submits that Korea's argument is simply wrong-headed because it suggests that the USITC should have placed greater weight on demand trends for a sub-segment of the like product, LDLP, than on demand trends for the like product, all certain welded pipe. For this reason, its argument should be rejected.³¹²¹

³¹¹⁵ Korea's first written submission, para. 151.

³¹¹⁶ Korea's first written submission, para. 152.

³¹¹⁷ Korea's first written submission, para. 153.

³¹¹⁸ Korea's first written submission, para. 154.

³¹¹⁹ Korea's first written submission, para. 155.

³¹²⁰ United States' first written submission, para. 637.

³¹²¹ United States' first written submission, para. 638.

7.1325 In counter-response, Korea notes that the United States countered that demand in the overall welded pipe market had been constant even with the substantial growth in demand for LDLP. Korea submits that this is exactly the complainants' point. The only reason that the overall growth in demand for other welded pipe between 1998 and interim 2001 was able to remain constant was due to the substantial growth in demand for LDLP, which stabilized the declining demand for other welded pipe. Thus, the USITC failed to take into account and distinguish demand changes which affected the performance of the other welded pipe producers.³¹²²

Domestic industry overcapacity

7.1326 China and Switzerland note that the USITC stated in its report that increased domestic capacity was not contributing in a more than minor way to the condition of the industry, yet it did not explain the nature and extent of this contribution.³¹²³ The European Communities argues that it is clear from the USITC's statements that it considered that increased capacity had some effect on the situation of the domestic industry.³¹²⁴

7.1327 China, the European Communities and Switzerland argue that the increase in capacity was not looked at closely enough and given sufficient importance. The increase in domestic capacity over the period of investigation was 1.5 million short tons and the increase in consumption was 1.2 million short tons. The USITC states that domestic capacity did not increase much more than consumption and thus it did not have an important impact on prices. The complainants argue that this is wrong. According to the European Communities, China and Switzerland, such a significant increase in capacity must have had a greater impact on prices than the USITC recognized.³¹²⁵ The European Communities argues that it is insufficient just to compare capacity and consumption on an end-to-end basis. There is a clear trend of increasing capacity while United States' apparent consumption flattens off. The effects of increases in over-capacity would have had a more serious effect in 1999 and 2000, driving prices down, yet were not subjected to detailed examination.³¹²⁶

7.1328 Korea further argues that the record demonstrates that domestic capacity exceeded apparent United States consumption as early as 1996 and that the evidence demonstrates that the low capacity utilization was the direct result of capacity expansion beyond even the most favorable projections of market demand.³¹²⁷ Korea argues that these capacity increases and low capacity utilization rates raised costs and intensified competition among domestic producers which, in turn, reduced prices.³¹²⁸ Korea argues that irrespective of such a clear decline in the already low capacity utilization rate and its impact on the condition of the industry, the USITC failed to consider separately the effect of excess capacity and low capacity utilization on the industry's performance at the end of the period to assure that such effects were not attributed to imports.³¹²⁹

7.1329 In response, the United States submits that the USITC clearly did pay close attention to the record evidence concerning capacity increases and discussed in some detail whether the increases had an impact on domestic prices.³¹³⁰ The United States submits that the USITC correctly noted that

³¹²² Korea's second written submission, para. 192.

³¹²³ China's first written submission, para. 444; Switzerland's first written submission, para. 302.

³¹²⁴ European Communities' first written submission, para. 527.

³¹²⁵ European Communities' first written submission, para. 527; China's first written submission, para. 448; Switzerland's first written submission, para. 306.

³¹²⁶ European Communities' first written submission, para. 533.

³¹²⁷ Korea's first written submission, para. 158.

³¹²⁸ Korea's first written submission, para. 159.

³¹²⁹ Korea's first written submission, para. 160.

³¹³⁰ United States' first written submission, paras. 630-632.

domestic capacity had increased during the period but also noted that this increase had tracked the growth in demand during the period of investigation to a substantial degree so that capacity increases had only a minimal impact on price levels in the market. Moreover, the USITC also correctly found that, even with this increase in capacity, the domestic industry's production levels had actually declined during the last years of the period, which showed that the industry had not been able to take advantage of its increased capacity as a result of import increases during these years.³¹³¹ The United States concludes that since the production levels of the industry declined in 1999 and 2000, this additional capacity could have, at best, only a minimal and indirect effect on market prices during those two years. Instead, the addition of more than 360 thousand tons of import merchandise to the market on 1999 and 2000 – sold at consistently lower prices than domestic merchandise – clearly had a much more substantial and direct impact on prices during that period, as the USITC reasonably found.³¹³² The United States submits that, given these facts, it is clear that the USITC examined the record evidence concerning capacity in detail and correctly rejected the argument that this increased capacity had had a significant impact on prices during the last two years of the period of investigation.³¹³³

7.1330 In counter-response, China submits that with respect to domestic capacity increases, the USITC qualitatively evaluated effects of increased imports and the effects of capacity increases on the situation of the industry. As a result of this approach, in China's view, the USITC neither could provide an analysis which would properly identify the nature and extent of these factors nor could it establish explicitly that the effects were distinguished from increased imports.³¹³⁴ China submits that an extensive, and often speculative interpretation of the Commissioners' findings by the United States in its submissions cannot replace the lack of an explicit, reasoned and adequate explanation that the effects of 'other' factors were not attributed to imports, and the lack of an appropriate assessment of the injurious effects of other factors in the USITC Report.³¹³⁵

7.1331 Also in counter-response, the European Communities argues that the mere finding that increased capacity contributed in a "minor way" does not establish, in an explicit manner, how the USITC separated and distinguished the injurious effects of increased capacity and ensured that those effects, along with the injurious effects of other factors, were not attributed to increased imports. Moreover, the European Communities reiterates that capacity increased substantially in 1999 and 2000 while consumption remained stable thus showing that an end-to-end comparison of the increase in consumption was insufficient to properly examine the interrelationship between changes in capacity and consumption.^{3136 3137}

7.1332 Korea notes that in the case of the welded pipe industry's capacity increases, the USITC ignored the fact that the industry had too much absolute capacity even at the beginning of the period. According to Korea, capacity exceeded total United States demand at the beginning of the period of investigation.³¹³⁸ Yet, the industry kept adding capacity.^{3139 3140} Korea submits that the full effects of

³¹³¹ United States' first written submission, para. 625.

³¹³² United States' first written submission, para. 632.

³¹³³ United States' first written submission, para. 625.

³¹³⁴ China's second written submission, para. 248.

³¹³⁵ China's second written submission, para. 249.

³¹³⁶ European Communities' first written submission, para. 532, 533 and figure 44.

³¹³⁷ European Communities' second written submission, para. 407.

³¹³⁸ See US ITC Report, Vol. II, TUBULAR-15 and Table TUBULAR-43 at TUBULAR-37 (Exhibit CC-6).

³¹³⁹ USITC Report, Vol. II, TUBULAR-15(Exhibit CC-6).

³¹⁴⁰ Korea's second written submission, para. 186.

that overcapacity really surfaced in its most problematic form when demand started to decline.³¹⁴¹ Obviously, such overcapacity in a declining market would have led to severe declines in industry performance, even if imports had been absent from the market. Certainly, such a significant factor causing injury should have been carefully separated by the United States and the injurious effects of those factors should have been examined.³¹⁴² Instead, the United States merely asserts that the USITC properly assessed the effect and concluded that the increased capacity levels of the industry were not responsible in more than a minor way for any declines in the industry's condition.³¹⁴³ According to Korea, such an assertion does not satisfy the non-attribution requirement under Article 4.2(b) of the Agreement on Safeguards. The nature and extent of the impact on the market caused by the increased capacity should have been separated and distinguished from the effect caused by imports.³¹⁴⁴

Aberrational performance of one member of the industry

7.1333 The European Communities argues that the USITC's findings regarding the situation of the significant domestic producer suggest that factors other than imports were responsible for at least some of the decline of the company's financial performance.³¹⁴⁵ However, the USITC does not separate and distinguish the effects of these alternative causes, and thus does not ensure that the effects of these factors are not attributed to increased imports. The United States has, consequently, acted inconsistently with Article 4.2(b) of the Agreement on Safeguards.³¹⁴⁶

7.1334 China and Switzerland argue that as regard "the events pertaining to a significant producer", the USITC merely briefly explained what the main factor for the decline in the financial performance was, but it did not give any hint concerning the role that non-import related events have played. Further, when the USITC concluded that the exclusion of this "significant" producer did not substantially alter the downward trend in industry profitability, it failed to specify the extent to which this downward trend had nevertheless been altered.³¹⁴⁷

7.1335 Korea also argues that the USITC failed to properly segregate and consider the effects on the performance of the United States' industry of one very unprofitable producer whose performance declines were caused by well-documented problems entirely unrelated to other welded pipe imports.³¹⁴⁸ According to Korea, the USITC completely disregarded the evidence on the record that demonstrated that this company's declines were not caused by imports. Moreover, the USITC's conclusion that this company's performance was caused by the drop in unit values (which, in turn, was supposedly caused by increased imports) is equally unreliable as the USITC itself was admittedly "cautious of placing undue weight on average unit value, as it is influenced by issues of product mix".³¹⁴⁹

7.1336 In response, the United States argues that although the details of the producer's problems and its operating results are confidential, the USITC clearly examined the record evidence relating to these issues and discussed the nature and extent of this producer's performance in detail.³¹⁵⁰ It specifically noted the arguments made on this issue by the foreign producers and rejected their assertions that the

³¹⁴¹ USITC Report, Vol. I, p. 148 (Exhibit CC-6).

³¹⁴² Korea's second written submission, para. 187.

³¹⁴³ United States' first written submission, para. 631.

³¹⁴⁴ Korea's second written submission, para. 188.

³¹⁴⁵ European Communities' first written submission, para. 527.

³¹⁴⁶ European Communities' first written submission, para. 528.

³¹⁴⁷ China's first written submission, para. 444; Switzerland's first written submission, para. 302.

³¹⁴⁸ Korea's first written submission, para. 161.

³¹⁴⁹ Korea's first written submission, para. 162.

³¹⁵⁰ USITC Report, p. 165.

industry's operating results had been skewed by the non-import problems of the producer.³¹⁵¹ It concluded that certain costs of the company appeared to have increased but that the main reason for the decline in the industry's financial performance was the "substantial drop in the unit values of the company's sales beginning in 1999", which was due to the substantial increase in imports.³¹⁵² Moreover, the USITC noted, the exclusion of the company from the industry data did not substantially alter the downward trends in the industry's condition in those years.³¹⁵³ By conducting this analysis, the USITC properly distinguished the effects attributable to this producer's operations from the effects of imports and found that the industry's problems were genuinely and substantially the result of increased imports.³¹⁵⁴ According to the United States, the complainants' assertions that the USITC did not conduct such an analysis have no foundation.^{3155 3156}

7.1337 Korea notes that once again, the United States merely asserts that the USITC did assess the extent to which the difficulties experienced by one of the domestic producers caused declines in the industry's performance. The United States concludes by simply saying that the USITC noted that the exclusion of the company from the industry data did not substantially alter the downward trends in the industry's condition in those years.³¹⁵⁷ This statement confirms that the USITC found that this company at issue did alter the downward trends in the industry's condition. Nonetheless, the USITC failed to analyse how and to what extent that was the case. Without such analysis, it cannot be shown that the USITC properly distinguished the effects attributable to this producer's operations from the effects of imports.³¹⁵⁸

NAFTA imports

7.1338 China notes that the determination of the existence of a causal link between the increased imports and the threat of serious injury to the domestic certain tubular products industry, which is found in the USITC Report was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA countries, threatened to cause serious injury to the domestic industry. China argues that, as a result, since the determination of causality required that "increased imports" only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "another factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).³¹⁵⁹

³¹⁵¹ USITC Report, p. 165.

³¹⁵² USITC Report, p. 165.

³¹⁵³ USITC Report, p. 165.

³¹⁵⁴ In this regard, the United States notes that the complainants' argument is, in essence, an assertion that the USITC should conduct its causation assessment for only a portion of the industry producing welded pipe. As the complainants are aware, however, the USITC is required by the Agreement on Safeguards to assess whether imports are causing serious injury to the industry as a whole, not subsegments of it. Thus, even if this producer were affected to some effect by non-import factors, the USITC would nonetheless still need to include this producer in the industry and assess whether the industry as a whole were injured by imports.

³¹⁵⁵ European Communities' first written submission, para. 527; Korea's first written submission, para. 162; China's first written submission, para. 444; Switzerland's first written submission, para. 302.

³¹⁵⁶ United States' first written submission, para. 635.

³¹⁵⁷ United States' first written submission, para. 635.

³¹⁵⁸ Korea's second written submission, para. 189.

³¹⁵⁹ China's first written submission, para. 450. China's second written submission, para. 250.