the USITC determination or the supplementary report to support this conclusion. It was simply a blanket conclusion that was applied to every product subject to a safeguard measure.[4797]

7.2020 Korea asserts that the President ignored the findings of the USITC with respect to Mexico and Canada and rendered a conclusion that imports from Canada and Mexico do not account for a substantial share of total imports nor contribute importantly to the serious injury.[4798] However, the United States failed to provide any explanation of how it reached this directly contrary conclusion on this important and pertinent issue of fact and law. Thus the determination is in violation of Articles 3 and 4.2(c) of the Agreement on Safeguards.[4799]

7.2021 In response, the United States argues that Korea fails to recognize that findings related to the NAFTA, unlike findings under the Agreement on Safeguards, are not "pertinent" issues within the meaning of Article 3.1 or part of the "case under analysis" within the meaning of Article 4.2(c).[4800]

VIII. ARGUMENTS OF THE THIRD PARTIES

A. CANADA

8.1 The only question Canada addresses is whether the exclusion of imports originating in Canada from the scope of application of the challenged safeguard measures conforms to WTO law. Canada fully supports the United States' submission on parallelism and on Article XXIV of the GATT 1994.[4801]

8.2 With regard to parallelism, Canada asserts that: (i) there is no requirement to use a particular structure or format or a particular analysis for the report of the competent authority; (ii) the USITC Report, when viewed in its entirety, contains an analysis of non-NAFTA imports; and (iii) there is no requirement to conduct a separate analysis of injury caused by NAFTA imports as an "other" cause of injury.[4802]

8.3 With regard to Article XXIV of the GATT 1994, Canada asserts that this provision creates an exception to the most-favoured-nation treatment obligation, allowing parties to a free-trade agreement to terminate duties and other restrictive regulations of commerce, including safeguard measures. NAFTA meets the requirements of Article XXIV, and Article XXIV:5 in principle authorizes the exclusion of imports from within free-trade areas from Safeguard measures. Given that Article XIX is not enumerated in Article XXIV:8(b), safeguard measures must generally be eliminated in a free-trade area.[4803]

8.4 Canada submits that the last sentence of footnote 1 to Article 2 of the Agreement on Safeguards confirms the availability of Article XXIV of the GATT 1994 against claims under Article 2.2 of the Agreement on Safeguards. The President's decision to exclude imports from Canada (and Mexico) because of the requirements of Article 802 of NAFTA is not within the

[4797] Korea's first written submission, paras. 178-179.
[4798] Proclamation 7529, 67 Fed. Reg. 10553, 10555 (2002), para. 8 (Exhibit CC-13).
[4799] Korea's first written submission, para. 180.
[4800] United States' oral statement at the second substantive meeting, para. 138.
[4801] Canada's third party submission, para. 6.
[4802] Canada's third party submission, paras. 13-14.
[4803] Canada's third party submission, paras. 15-21, 24.

jurisdiction of a WTO panel. The exclusion is not a "pertinent issue of fact or law" pursuant to Articles 3.1 and 4.2(c) of the Agreement on Safeguards.[4804]

8.5 Canada adds that the President, in making his determination under the NAFTA Implementation Act, was not required to follow the USITC or to explain his reasons for not doing so.[4805]

B. CUBA

8.6 Cuba asserts that the safeguard measures imposed by the United States are completely incompatible with the Agreement on Safeguards and have caused distortions in the steel market. As a result, Cuba has to pay higher prices on its steel imports because several steel-producing countries have reduced their production. Due to increased tariffs in countries that used to purchase Cuban steel bar, these exports have come to a halt.[4806]

8.7 Cuba considers that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 because the USITC Report contained no demonstration concerning the existence of unforeseen developments. The United States also acted inconsistently with the obligation stipulated in Article 3.1 of the Agreement on Safeguards to publish findings and conclusions regarding unforeseen developments.[4807]

8.8 In relation to serious injury or threat of serious injury to the United States' steel industry, Cuba claims that the explanation given by the USITC is neither reasoned nor adequate. The USITC Report does not contain sufficient data to perform a correct evaluation of the domestic industry's situation.[4808] According to Cuba, the USITC Report does not demonstrate that the USITC has ensured non-attribution of injury or threat of injury caused by factors other than increased imports. Although the United States recognized that other factors have contributed to the injury suffered by the domestic industry, the USITC does not touch upon these factors in its report.[4809]

8.9 According to Cuba, the USITC has not correctly determined which is the domestic industry manufacturing products that are like or directly competitive to increased imported products. An incorrect industry definition results in an incorrect determination of serious injury and in the application of an unjustified safeguard measure. Firstly, the imports being imported in increased quantities must be clearly identified, rather than taking as a starting-point the four product categories identified in the Presidential request. The USITC's subsequent formation of groups of different individual products potentially masks the lack of increased imports for a specific product. Rather than relying on the characteristics of the product itself, the USITC assumed that all products produced with the same production process could be considered to be like.[4810]

8.10 Cuba also submits that the United States' safeguard measures show a lack of parallelism. The USITC evaluated imports from NAFTA countries in its investigation. Despite the finding that in several cases these imports significantly contributed to the serious injury caused to the domestic

[4804] Canada's third party submission, paras. 23-25, 7.
[4805] Canada's third party submission, para. 10.
[4806] Cuba's third party submission, pp. 4-5.
[4807] Cuba's third party submission, pp. 5-7.
[4808] Cuba's third party submission, p. 8.
[4809] Cuba's third party submission, pp. 8-9.
[4810] Cuba's third party submission, pp. 9-10.

industry, the USITC concluded that the exclusion of NAFTA imports does not affect the determination on injury and causality.[4811]

8.11 Finally, Cuba submits that the United States has violated its obligation under Article 5.1 of the Agreement on Safeguards by not demonstrating that the safeguard measure was imposed only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.[4812]

C. CHINESE TAIPEI

8.12 With regard to unforeseen developments, Chinese Taipei argues that the circumstances described in the first clause of Article XIX:1(a) of the GATT 1994 must be demonstrated in the same report, together with the fulfilment of the three conditions set out in Article 2.1 of the Agreement on Safeguards. Otherwise, the first clause of Article XIX:1(a) would become an additional condition and the required logical connection to the conditions of Article 2.1 of the Agreement on Safeguards could not be established. For the same reasons, the demonstration of unforeseen developments must also be made on a product-by-product basis. Since the USITC did not do this, it severed the required logical connection between the first clause of Article XIX:1(a) and the conditions of Article 2.1 of he Agreement on Safeguards. According to Chinese Taipei, this required logical connection also prevents Members from simply relying on any macroeconomic factor which affects all products that are part of macroeconomics. In any event, the 2nd Supplementary Report cannot change the fact that the USITC consider the existence of unforeseen developments when it was striving to fulfill the three conditions. The Russian crisis could not be regarded as an unforeseen development, given that the increase in imports from Russia was significantly higher in the years preceding the conclusion of the Uruguay Round than thereafter. Contrary to the United States' allegation, a mere sequential relationship does not qualify as logical connection. According to Chinese Taipei, there should at least be a demonstration that "unforeseen developments" have caused increased imports for each product or group of products to enter "under such conditions" and to such an extent as to cause serious injury or threat thereof. Finally, it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. The USITC failed to demonstrate, product by product, how such concessions were logically connected to the three conditions identified in Article 2.1 of the Agreement on Safeguards.[4813]

8.13 Chinese Taipei also argues that the USITC failed to identify the producers of the like products in order to define the domestic industry and failed to publish its findings in this regard and therefore acted inconsistently with Articles 3.1 and 4.1(c) of the Agreement on Safeguards. Article 4.1(c) of the Agreement on Safeguards provides that the "domestic industry" is the totality of the national producers of the like or directly competitive products, or those whose collective output of those products constitutes a major proportion of the total domestic production. The Member applying a safeguard measure needs to specify in the report of its competent authorities the finding and reasoned conclusion that the aggregated production of the producers suffering serious injury exceeds the percentage representing the major proportion of the total domestic production. Since "a major proportion" of the industry is within the scope of "all pertinent issues of fact and law" in Article 3.1, there is no apparent reason to exclude from the published findings and conclusions the information relating to the proportional level of production forming "a major proportion". From the number of the firms being sent questionnaires and the much lower number of the firms responding to the questionnaires, there is no reasonable basis for other Members to make any proper judgment on whether those responding producers constitute a "majority" or a major proportion of the national production. Chinese Taipei argues that statements made in the USITC Report are inconsistent with

[4811] Cuba's third party submission, p. 11.
[4812] Cuba's third party submission, p. 12.
[4813] Chinese Taipei's third party submission, paras. 4-18.

Article 2.1 of the Agreement on Safeguards because they specify only percentage ranges, rather than precise percentages, which, according to Chinese Taipei, makes the USITC Report untrustworthy. The percentages of several products also exceed 100%. Finally, the USITC Report bases itself on "domestic shipments" rather than "total production", which is the concept stipulated in Article 4.1(c) and which is different from "total shipments".[4814]

8.14 Chinese Taipei further submits that the "substantial cause" test applied by the United States and thus its findings are not in accordance with the Agreement. Article 4.2(b) of the Agreement on Safeguards makes clear that there are two basic requirements: first, to establish the causal link between increased imports and serious injury and, second, when there are other factors causing injury, not to attribute such injury to increased imports. As the Appellate Body has further explained, it is through distinguishing the injurious effects caused, respectively, by increased imports and other factors that "the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury". The application of the substantial cause test by the USITC itself is not in line with the required approach specified in Article 4.2(b). In a case where there are ten equally important causes of serious injury, one of them being increased imports, the United States would find a causal link. However, under Article 4.2(b), the competent authority should find no link between increase and injury because 10% should in no way be considered as serious enough to apply a safeguard measure. In the present case, one cannot see that the USITC has separated and distinguished the factors other than increased imports. One can also not find the method that ensures non-attribution of these other factors to increased imports. The USITC only conducted a relative comparison of these other factors with increased imports and ignored the fact that such other factors still contributed cumulatively to the said serious injury.[4815]

8.15 According to Chinese Taipei, the United States' safeguard measures have gone beyond the extent necessary to remedy serious injury and thus violate Article 5.1 of the Agreement on Safeguards. Given that the terms "serious injury" in Article 5.1 should bear the same meaning as those in other provisions in the same Agreement, the factors listed in Article 4.2(a) must also be those applied for the purpose of the Article 5.1 evaluation. In addition, when deciding whether the safeguard measure is within the extent necessary to remedy serious injury, the competent authorities need to review the same factors that had contributed to the serious injury. However, in its economic model, the USITC generally limits itself to three factors when evaluating the remedy, namely quantity, price, and revenue. It did not consider the factors identified in the investigation. In addition, the tariff measures in the said model cover the entirety of the injury caused by increased imports and by other factors, since those other factors are not separated and distinguished in this model. As a result, it cannot be verified whether the remedy measure is within the necessary extent.[4816]

8.16 Finally, Chinese Taipei recalls that, in *US – Line Pipe*[4817], the Appellate Body interpreted Article 3.1 by ruling that the Member imposing a safeguard measure must provide sufficient motivation for that measure. There is a violation of that provision in the present case where the President imposed a more restrictive tariff than that recommended by the USITC without any reasoning or explanation on the necessary extent of the measure.[4818]

[4814] Chinese Taipei's third party submission, paras. 19-24.
[4815] Chinese Taipei's third party submission, paras. 25-30.
[4816] Chinese Taipei's third party submission, paras. 31-36.
[4817] Appellate Body Report, *US – Line Pipe*, para. 260.
[4818] Chinese Taipei's third party submission, paras. 37-38.

D. MEXICO

8.17 Mexico expresses its interest in the correct interpretation of the rules governing the imposition of safeguard measures, in particular those referring to the special situation of Members party to a free-trade area. Article XXIV of the GATT 1994 clearly permits Mexico to be excluded from the application of a safeguard measure imposed by the United States, its NAFTA partner. This Article is a clear exception to the principle of most-favoured-nation treatment and has clearly been recognized as such by the Agreement on Safeguards.[4819]

8.18 Mexico notes that the complainants (with two exceptions) neither argue that NAFTA is questionable in the light of Article XXIV, nor that it confers the right to be excluded from a safeguard measure. Mexico also notes with satisfaction that Norway recognizes that neither the Agreement on Safeguards nor Article XIX of the GATT 1994 prevent the exclusion of imports from free-trade partners. The Reports of the Appellate Body in *US – Wheat Gluten* and *US – Line Pipe* were clear in not questioning this right. Mexico trusts that the Panel will follow that same line of thinking.

8.19 In relation to the claims that the principle of most-favoured-nation has been violated, Mexico refers to the arguments submitted by the United States and Canada, as well as to Mexico's statement before the Panel in *US – Line Pipe*. According to Mexico, it is well established that the non-application of safeguards to products from the constituents of a free-trade area is not only compatible with Article XXIV:8(b), but also faithful to the finality of this Article, which is to "facilitate trade". This was the focus supported by the Appellate Body in *Turkey – Textiles*. Mexico notes that Article XXIV:8(b) of the GATT 1994 contemplates the exclusion of safeguard measures as part of the "other restrictive trade regulations" that must be eliminated in the formation of a free-trade area.[4820]

8.20 Mexico further argues that the complainants who allege a violation of the principle of most-favoured-nation treatment completely ignore the last sentence of footnote 1 to the Agreement on Safeguards. This footnote clearly establishes that "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994". A simple interpretation of the terms of this provision removes any doubt about the nature of Article XXIV as an exception. Mexico agrees with the United States that this footnote purports to maintain the previous balance between Articles XXIV and other provisions of the GATT 1994, particularly Article XIX, bearing in mind that this balance existed prior to the implementation of the the Agreement on Safeguards.[4821]

8.21 With regard to parallelism, Mexico recalls the findings of the panel in *US – Line Pipe* that the principle of parallelism means that the United States had to establish explicitly that imports from sources other than Canada and Mexico satisfied the conditions for the application of a safeguard measure stipulated in Article 2.1 of the Agreement on Safeguards. In other words, while there must be a parallelism between the scope of the investigation and the scope of any resultant measure, *the principle of parallelism does not determine the scope of the investigation* (emphasis added). In this regard the complainants limit their allegations to the fact that the United States has not given a reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources satisfy the conditions for the application of a safeguard measure pursuant to Articles 2.1 and 4.2 of the Agreement on Safeguards. Mexico supports the response given by the United States that the Agreement on Safeguards does not prescribe the internal decision-making process for making a determination. In its response, the United States identifies the detailed analysis conducted by the USITC concerning imports from non-NAFTA sources, which makes the violation claims baseless.

[4819] Mexico's oral statement at the first substantive meeting, p. 1.
[4820] Mexico's oral statement at the first substantive meeting, pp. 1-2.
[4821] Mexico's oral statement at the first substantive meeting, p. 2.

Mexico also concurs with the United States that Article 4.2(b) does not provide for an obligation to examine NAFTA imports as a non-import "other factor".[4822]

8.22 Finally, Mexico supports the United States' arguments that the Presidential determinations relating to Article 802 of the NAFTA Agreement is not subject to the Articles 3.1 and 4.2(b) of the Agreement on Safeguards, but that this is a question exclusively related to NAFTA.[4823]

8.23 On the basis of the foregoing, Mexico requests the Panel to reject the claim that the exclusion of Mexico from the safeguard measure is incompatible with the GATT 1994 and the Agreement on Safeguards. In particular, Mexico requests that the Panel carefully examine the nature of the exclusion in the light of the object and purpose of Article XXIV and that, in consequence, it confirms the Members' interpretation that Article XXIV permits the exclusion of free-trade partners from the scope of safeguard measures, also with regard to the Agreement on Safeguards.[4824]

E. THAILAND

8.24 Thailand submits that the safeguard measures imposed on certain steel products by the United States have had a major impact on the industries and markets of Members. According to Thailand, the situation became worse when the European Communities followed suit with a view to protecting its domestic industry. This gives rise to a wide range of concerns of many, if not all, WTO Members to have recourse to panel so that negative effects of such measures, as applied, would be appropriately remedied. Thailand notes that under Proclamation No. 7529 of 5 March 2002, entitled "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products", a total of seven steel imports from Thailand were investigated by the USITC.[4825] Thailand appreciates the fact that five products out of seven are presently excluded from the application of such safeguard measures in accordance with Article 9.1 of the Agreement on Safeguards as a result of their share of imports not exceeding 3% as required by this Article. Nonetheless, two imports from Thailand, namely, welded carbon steel pipes and tubes (HS 7306), and carbon steel butt-welded pipe fittings (HS 7307), are still subject to definitive safeguard measures imposed by the United States. According to Thailand, the Thai steel industry has been adversely affected as a result thereof.[4826]

8.25 Thailand agrees with the legal arguments made by the complainants and some third parties that the United States has failed to justify adequately that the conditions set forth in Article 2 of the Agreement on Safeguards and Article XIX: 1(a) of the GATT 1994 have been met in applying definitive safeguard measures, this is especially so for arguments relating to the issue of lack of causal link. Thailand notes that the Appellate Body ruled in *US – Lamb* and *Argentina – Footwear (EC)* cases that "serious injury" is set at a higher threshold standard in the Agreement on Safeguards than those envisaged in the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures.[4827] It could be concluded, based on the reasoning in *US – Wheat Gluten* and *US – Line Pipe*, that the conditions whereby safeguard measures are applied under Article 2 and the definition of the term "serious injury" under Article 4.1(a) shall be met at all times, thus triggering the application of Article 3 on investigations to be followed by Article 5 on safeguard measures.

[4822] Mexico's oral statement at the first substantive meeting, pp. 2-3.
[4823] Mexico's oral statement at the first substantive meeting, p. 3.
[4824] Mexico's oral statement at the first substantive meeting, p. 3.
[4825] USITC Report.
[4826] Thailand's oral statement at the first substantive meeting, p. 1.
[4827] Appellate Body Report, *US – Lamb*, para. 124; Appellate Body Report, *Argentina – Footwear (EC)*, para. 94.

8.26 Thailand's major concern is that the Proclamation, by its non-application of the above measures on steel products from the free-trade area partners of the United States despite the USITC's finding of their significant contribution to serious injury, or threat thereof, to the domestic industry, would be WTO-inconsistent, in particular with the GATT 1994 and the Agreement on Safeguards. Thailand believes that WTO Members can impose safeguard measures only if they have demonstrated that subject imports from non-free trade partners satisfy the conditions for the application of a safeguard measure. In addition, Thailand states that from a reading of the Marrakesh Agreement Establishing the WTO, of which the GATT 1994 forms an integral part, Thailand remains to be convinced how and why elimination of duties, inclusive of other restrictive regulations of commerce, would imply or indicate non-application of safeguard measures which differ in their nature of application and characteristics. Thailand submits that, so far, there is no jurisprudence established that the interpretation to exclude members in a free trade area is consistent with the GATT 1994 and the Agreement on Safeguards, bearing in mind *Argentina – Footwear (EC)* and *US – Wheat Gluten* cases. Thus, according to Thailand, this line of argument means that the issue of whether GATT Article XXIV permits an imposing Member to exclude imports originating in its free-trade area partners from the scope of a safeguard measure in departure from Article 2.2 has not yet been clarified.[4828] The Appellate Body in *US – Line Pipe* held that investigating authorities, such as the USITC in this case, must, at the very least, "provide in its determination a reasoned and adequate explanation that 'establish[es] explicitly' " that imports from non-free trade area partners satisfied the conditions for the application of a safeguard measure, as set forth in Article 2.1 and elaborated in Article 4.2 of the Safeguard Agreement.[4829] [4830]

8.27 According to Thailand, the United States did not clearly demonstrate how imports from its non-free trade area partners, including Thailand, have independently satisfied the conditions permitting the application of definitive safeguard measures. Therefore, Thailand concurs with the point raised by the complainants in general, that the USITC analysis of certain tubular products is unclear because the investigating authorities reached different conclusions as to the injurious effects of the imports from free-trade area partners, and the Proclamation excluded these imports without explication.[4831] Thailand submits that it is, therefore, questionable whether a causal link between imports of said products from Thailand and other non-free trade area partners on the one hand, and serious injury or threat thereof on the other hand, does exist. The lack of causal link is a systemic issue and is of particular concern to Thailand because it is highly likely that, had USITC authorities excluded said imports from the free-trade area partners of the United States in its investigation, they would not have reached the conclusion that imports from Thailand caused serious injury or threat thereof. Thailand submits that because the USITC in its report, and subsequently the President of the United States in the Proclamation, failed to explicitly establish that imports from non-free trade area partners satisfied the conditions under Articles 2 and 4 of the Agreement on Safeguards, perhaps, the injurious effects of these imports to the United States might have been mistakenly attributed to imports from non-free trade area partners such as Thailand.[4832]

8.28 Thailand also submits that it is not convinced that the United States has satisfied the condition of "unforeseen developments". On this point, Thailand notes that the USITC referred to the devaluations in five Asian countries as the "Asian Financial Crisis" and the dissolution of the former Soviet Union as constituting unforeseen developments and that the USITC concluded that "[a]s

[4828] Appellate Body Report, *US – Line Pipe*, para. 198.
[4829] Appellate Body Report, *US – Line Pipe*, para. 198.
[4830] Thailand's oral statement at the first substantive meeting, pp. 2-3.
[4831] *US – Definitive Safeguard Measures on Imports of Certain Steel Products*, European Communities' first written submission, para. 529.
[4832] Thailand's oral statement at the first substantive meeting, p. 3.

currency depreciations and economic contractions disrupted other markets, the share of steel imports to the US market increased sharply and US prices declined".[4833] In addition, it is the USITC that admitted that demand in the United States remained strong. Thailand submits that if this was the case, the United States is required to prove that such unforeseen developments led to imports being increased in such quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.[4834]

8.29 In conclusion, Thailand submits that the current situation with respect to trade in steel has led several Members to apply safeguard measures to protect their domestic industries. Thailand is no exception. Thailand asserts that should this situation be prolonged, it would inevitably cause a chilling effect thereby resulting in an abusive application of safeguard measures. Thailand considers that safeguard measures cannot be regarded as beneficial to any Member, and developing country Members will have to bear the costs of their imposition unless such Members receive due consideration. Therefore, Thailand strongly believes that such measures should be used with prudence, and most importantly, in compliance with the WTO Agreement and GATT/WTO jurisprudence.[4835]

F. TURKEY

8.30 Turkey claims that the USITC failed to examine whether the import trends of the products under investigation were the result of "unforeseen developments" as provided for in Article XIX:1(a) of the GATT 1994. Turkey considers that, in a rapidly changing world, these types of events should be considered as foreseeable developments, occurring as the state of economies differs from one country to another. It was clear that the integration of the former Soviet Republics into world markets would have some effects on the world economy. The depreciation of the currencies of these republics was the natural result of that integration. The United States could have protected its industry against competing steel products from these non-WTO countries by raising its tariff levels. The effects of the unforeseen developments alleged by the United States were not restricted to the market of the United States, and they were also not country specific and product specific.[4836]

8.31 Turkey further argues that the United States has also violated its obligations under Article 2.1 of the Agreement on Safeguards by taking safeguard measures concerning rebar without demonstrating a sharp, sudden and significant increase in rebar imports. Based on Appellate Body jurisprudence, the USITC's safeguard investigation had to establish that the increase in imports has been recent enough, sudden enough, sharp enough, and significant enough both quantitatively and qualitatively to cause or threaten to cause serious injury or threat thereof to the domestic industry. The USITC's end-point-to-end-point comparison of the import figures of 1996 and 1998 with figures of 2000 fails to evaluate the trend or general direction of recent imports and to provide that increases in imports were recent, sudden, sharp and significant enough. On the basis of the data contained in the USITC Report, Turkey claims that the quantity of rebar imports declined in 2000 compared to 1999 and again in interim 2001 compared to interim 2000. Therefore, according to Turkey, the USITC's findings do not justify a determination that rebar is being imported at recently, sharply and significantly increased quantities. As a result, Turkey asserts that the United States has violated Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of Agreement on Safeguards.[4837]

[4833] New Zealand's first written submission, para. 4.12
[4834] Thailand's oral statement at the first substantive meeting, pp. 3-4.
[4835] Thailand's oral statement at the first substantive meeting, p. 4.
[4836] Turkey's third party submission, paras. 13-17.
[4837] Turkey's third party submission, paras. 23-27.

8.32 According to Turkey, the United States has further failed to provide an adequate and reasoned explanation of the existence of serious injury and therefore violated Article 4.2(a) of the Agreement on Safeguards. The USITC based a number of its injury determinations (capacity utilization, average unit values, productivity) on an end-point-to-end-point comparison (1996 against 2000), which does not give any information about the trends of the injury indicators over the investigation period. The USITC's conclusion is also contrary to its statistical evaluation which shows an increase of the domestic rebar production, capacity, capacity utilization, employment, domestic demand and domestic shipments. Turkey submits that the problem facing rebar manufacturers is of a financial nature (such as the massive increase in selling, general and administrative expenses) and cannot be attributed to imports. The USITC Report does not provide information regarding the aggregated size and production capacity of the companies taking different positions in response to the USITC's questionnaire. Turkey therefore concludes that the domestic rebar industry did not suffer serious injury or threat of serious injury as stated in the USITC Report.[4838]

8.33 Turkey further submits that by failing to demonstrate the existence of a causal link between the serious injury and increased imports, the United States has violated Article 4.2(b) of the Agreement on Safeguards. Turkey argues that the determination requires analysing the existence of a coincidence between the trends of increased imports and injury indicators. In addition, the United States has failed to separate the effects of injury caused by other factors through a reasoned and adequate explanation that injury caused by factors other than increased imports is not attributed to allegedly increased imports. Turkey observes that the actual figures give information about the failure of the United States' approach in the evaluation of a causal link between increase in imports and serious injury. There is no coincidence between the movements in imports and injury factors. The domestic rebar industry made substantial profits in spite of increases in imports between 1996 and 1999. Imports increased in 1997 (by 21%), 1998 (by 75%) and 1999 (by 49%), but the domestic industry had a positive operating income in each year. The industry had an operating loss in 1996, which was the year of the lowest rebar imports during the period of investigation. As rebar imports declined in 2000, total profit of domestic producers declined dramatically. Turkey asserts that the price declines were in fact linked to falling costs of raw materials. Turkey submits that this aforementioned information indicates that the USITC has failed to provide a detailed analysis demonstrating the existence of a causal link.[4839]

8.34 In Turkey's view, the United States has also failed to ensure that its safeguard measures on rebar are applied only to the extent necessary to prevent or remedy serious injury caused by increased imports and has therefore violated Articles 3.1 and 5.1 of the Agreement on Safeguards. The USITC has failed to tailor the measure by distinguishing and separating the injurious effects of other factors. The United States also ignored the substantial degree of import protection already afforded by anti-dumping or countervailing duty actions since 1997 against Turkey, Belarus, China, Indonesia, Korea, Latvia, Moldova, Poland, and Ukraine. The share and the trend of the share of these nine countries in the total rebar imports show that these actions are highly effective in protecting the domestic rebar industry against import competition. The safeguard measures on certain steel products also violates Articles 3.1 and 5.1 of the Agreement on Safeguards because, in the absence of an explanation, there are dissimilarities between the USITC Report and the Presidential Proclamation in terms of the level of protection provided.[4840]

[4838] Turkey's third party submission, paras. 28-35.
[4839] Turkey's third party submission, paras. 36-50.
[4840] Turkey's third party submission, paras. 55-61.

G. VENEZUELA

8.35 Venezuela claims that the safeguard measures imposed by the United States are incompatible with the GATT 1994 and the Agreement on Safeguards because:

(a) the condition of unforeseen developments under Article XIX of the GATT 1994 has not been fulfilled;

(b) with regard to many of the products subject to the investigation, there were no increased imports, as required by Article 2.1 of the Agreement on Safeguards;

(c) an incorrect definition of the relevant domestic industries was used, according to that stipulated in Articles 2.1, 4.2(a) and 4.1(c) of the Agreement on Safeguards;

(d) the relevant domestic industries did not suffer serious injury or the threat of serious injury, as required by Articles 2 and 4.2(a) of the Agreement on Safeguards;

(e) the possible increase in imports has not caused or threatened to cause serious injury to the domestic industry in the sense of Articles 2.1 and 4.2(b) of the Agreement on Safeguards, in particular because the domestic industry did not suffer serious injury and because the injury or threat of injury caused by other factors was attributed to imports;

(f) the safeguard measures do not apply only to the extent necessary to prevent or remedy serious injury, as required by Article 5.1 of the Agreement on Safeguards;

(g) there is no parallelism between the products alleged to have been imported in increased quantities and the products subject to the safeguard measures;

(h) Article 9.1 of the Agreement on Safeguards has not been observed;

(i) the report of the investigation and the other documents do not correctly establish the findings and conclusions on all pertinent issues of law and of fact, including the required justification of the safeguard measures ultimately applied, as required by Article 3.1 of the Agreement on Safeguards.[4841]

8.36 Venezuela further argues that no basis was shown for the exclusions of imports from Mexico, Canada, Israel and Jordan from the measures.[4842]

8.37 Although Venezuela is a developing country and does not pose any commercial threat to the steel industry of the United States, it was not taken into account for the exclusions, but its exports of rebar are subject to the safeguard measures. According to Venezuela, its inclusion among the origins covered by the measures amounts to a violation of the following Articles of the Agreement on Safeguards: Article 2.1 on increased imports; Article 2.2 on the application of the measure on products irrespective of their origin; and Articles 3.1, 4, 5.1, 8.1, 9.1, 12.2 and 12.3 on the adequate opportunity for interested parties.[4843]

[4841] Venezuela's third party submission, paras. 2-3.
[4842] Venezuela's third party submission, para. 10.
[4843] Venezuela's third party submission, paras. 11 and 15.

8.38 Venezuela draws particular attention to Article 9.1 of the Agreement on Safeguards, under which Venezuela should have been exempted from the application of the safeguard measures with regard to rebar. In June 2001, an anti-dumping investigation against Venezuelan imports was terminated precisely because the Venezuelan participation in the imports to the United States turned out to be "insignificant" under the Anti-Dumping and SCM Agreements. Venezuela submits that, indeed, in all the product categories subject to the present safeguard measures, imports from Venezuela are insignificant, and therefore incapable of causing injury to the domestic industry of the United States. Venezuela also observes that sources of rebar with a significantly higher import volume than Venezuela have been excluded from the measures at issue.[4844]

8.39 Venezuela also argues that the United States failed to provide reasoned and adequate explanations about how it made its determination on Article 9.1 of the Agreement on Safeguards and about why Venezuelan rebar exports did not satisfy the conditions of that Article. In 2001, imports from developing country Members affected by the measure amounted to only 15%, with Venezuelan exports representing 3.08%. In addition, the majority of Venezuelan exports were destined for Puerto Rico, a market not regularly supplied by producers from the United States. Venezuela asserts that, thus, the measure does not really protect steel manufacturers in the United States but, rather, it unduly penalizes Venezuelan exports, whose market share will go to third countries which have even contributed more to the rebar imports during the period of investigation. While Venezuela has been a reliable supplier of the United States' market, its rebar exporters have always been careful not to cause injury to the domestic industry. Since sales to the United States have represented over 50% of Venezuelan rebar exports, the current safeguard measures have the potential to reduce the exports of rebar very significantly, to cut the revenue of the Venezuelan industry and to increase idle capacity. Venezuela states that it hopes that the Panel will recommend that the DSB request the United States to abolish its safeguard measures, as required by the WTO Agreement.[4845]

IX. INTERIM REVIEW

9.1 On 6 February 2003, pursuant to Article 15.1 of the DSU, Article 16 of the Panel's working procedures and the revised timetable at paragraph 3(h), the Panel issued a single draft Descriptive Part for its Reports. Pursuant to the revised timetable, on 19 February 2003, the parties provided their comments on the draft Descriptive Part. The Panel issued its Interim Report on 27 March 2003. On 9 April 2003, pursuant to Article 15.2 of the DSU, Article 16 of the Panel's working procedures and the revised timetable at paragraphs 3(j) and (k), the parties provided their comments on the Interim Report. None of the parties requested that the Panel hold a further meeting with the parties to review part(s) of the Panel's Reports. Pursuant to the revised timetable at paragraph 3(l), on 16 April 2003, the parties submitted further written comments on the comments that had already been provided on the Panel's Interim Reports on 9 April 2003.

9.2 Pursuant to Article 15.3 of the DSU, this section of the Panel's Reports contains the Panel's response to the comments made by the parties in relation to both the draft Descriptive Part and the Interim Reports, and forms part of the Findings of the Panel's Reports.

A. DESCRIPTIVE PART

9.3 With respect to the draft Descriptive Part, the Panel reviewed all comments made by the parties on 19 February 2003. The complainants provided additional comments on the draft Descriptive Part in their comments of 9 April 2003 and 16 April 2003 on the Interim Findings. A

[4844] Venezuela's third party submission, paras. 15-16.
[4845] Venezuela's third party submission, paras. 17-18.

number of the comments made by the parties suggested insertion of text of the parties' submissions. The Panel accepted all such suggestions except those for which sources for such text were not indicated by the parties in their comments and could not be located by the Panel. A number of the comments made by the parties suggested insertion of footnote references or changes to the existing footnote references. These suggestions were largely accepted except those which the Panel considered to be erroneous or in cases where the Panel considered that the suggested footnote did not support the text to which the footnote related. Some of the comments contained suggested changes to, or insertions of, headings in the draft Descriptive Part. Again, the Panel accepted these suggestions unless it considered that the insertions or changes were not appropriate. The parties suggested re-ordering of the text in a number of sections of the draft Descriptive Part. The Panel accepted these changes where it considered it appropriate. Finally, the parties also suggested corrections to typographical and editorial errors which were accepted by the Panel. The Panel also made additional typographical and editorial changes to the Descriptive Part. Finally, the Panel recalls that in its cover letter dated 19 February 2003 attaching comments on the draft Descriptive Part, the complainants noted that they "have not insisted on systematically assuring that every argument is attributed to every complainant who made it (often in rather different contexts). The important point is that the arguments be present somewhere in the common descriptive part." We note, in this regard, in the Descriptive Part for our Reports, we made reference to specific complainants when indicating arguments that had been advanced. This was done not to attribute the argumentation exclusively to the identified complainants but, rather, to facilitate the review of the Descriptive Part by the parties.

B. PANEL'S FINDINGS AND CONCLUSIONS

9.4 In addition to comments on the draft Descriptive Part, the parties' provided comments on the Panel's findings and conclusions in their comments of 9 April 2003 and 16 April 2003. In summary, the parties' comments can be divided into a number of categories, which have been listed and dealt with below.

1. Typographical and editorial changes

9.5 The parties have suggested a number of editorial changes to the Panel's Interim Reports and corrections of typographical errors. The Panel has accepted all of these suggestions (sometimes with some minor additional amendments), except those for which the suggested changes appear to be erroneous (for example, in cases where a change has been suggested to a footnote reference but the source to which that reference pertains does not support the relevant text). The Panel notes in this regard that it has amended cross-references to the Descriptive Part of its Reports as well as cross-references within the section of the Panel's Reports containing its findings. The Panel has also corrected other typographical errors and made some additional editorial changes. The suggestions for editorial changes made by the parties that have been accepted by the Panel include those pertaining to paragraphs 10.1, 10.18, 10.20, 10.131, 10.370, 10.398, 10.444, 10.702 and 10.711 of the Panel's Interim Reports.

2. Graphs generated by the Panel and the data used as basis for graphs

9.6 With respect to graphs that were generated by the Panel on the basis of USITC data and which are contained in its Reports, the Panel notes that, at the suggestion of the complainants, it has included footnote references indicating the source(s) of data used for all such graphs. It has also clarified the units for the productivity graphs that are contained in the Panel's findings on causation. The United States noted that the productivity graph following paragraph 10.367 of the Panel's Interim Reports reflected incorrect data. The Panel has re-generated this graph using the correct productivity data.

3. Ways in which facts and parties' arguments are reported

9.7 A number of the comments made by the parties suggested changes to the way in which the facts, the parties' arguments and the USITC's findings had been reported in the Reports.

9.8 In particular, the parties suggested changes to paragraph 10.1 of the Panel's Interim Reports to clarify that the DSB did not establish five different panels that were conducted through a single panel process but, rather, it accepted eight requests for the establishment of a panel and referred them all to a single panel pursuant to Article 9.1 of the DSU. The complainants also argued that paragraph 10.213 of the Panel's Interim Reports should be modified so as to fully reflect the European Communities' arguments that there had not been an adequate explanation by the USITC for a sufficient increase in imports of cold-finished bar. China also requested clarification of paragraph 10.157 of the Panel's Interim Reports to make it clear that China has not challenged the USITC's choice of a five-year period of investigation *per se*. The Panel has accepted, at least partially, these suggested amendments and revised its findings accordingly.

9.9 The United States requested amendment to paragraph 10.357 of the Panel's Interim Reports to make it clear that the USITC findings that had been excerpted in that paragraph were not complete (although they had been cited elsewhere in the Panel's causation findings). The Panel has accepted this suggestion and made all the necessary consequential changes to accommodate this request. The United States also requested changes to paragraphs 10.639 and 10.676 of the Panel's Interim Reports to ensure that they correctly reflect the USITC findings. These suggested changes were accepted by the Panel and we have revised our findings accordingly.

4. Clarifications of certain aspects of the Interim Findings

9.10 The parties have also made suggestions to clarify certain aspects of the Interim Reports.

9.11 In particular, the Panel agreed with the complainants that the Panel's increased imports finding for "welded pipe" is without prejudice to the question of the product definition. However, the Panel rejected the complainants' requests that paragraph 10.595 of the Panel's Interim Reports be amended and agreed with the United States that the pre-existing order of the Panel's findings was logical.

9.12 The Panel also accepted the United States' request in relation to paragraphs 10.291-10.292 of the Panel's Interim Reports to make it clear that it was the Panel and not the USITC that characterized the USITC's causation analysis as a "coincidence" or "conditions of competition" analysis. In requesting this amendment, the United States noted that the USITC does not segregate its causal link analysis into two forms of analysis – that is, a "coincidence" analysis or a "conditions of competition" analysis. In accepting the suggestion made by the United States, the Panel notes that it considered it necessary to develop an analytical framework to assess the USITC's findings on causal link for each of the safeguard measures for the following reasons. First, the Agreement on Safeguards does not prescribe how causal link should be demonstrated. At the same time, WTO jurisprudence indicates that coincidence is central to a causation analysis. In this regard, a number of complainants have argued that the failure by the USITC to undertake a coincidence analysis in relation to some of the safeguard measures was fatal. Finally, the Panel is of the view that tools other than a coincidence analysis, such as a conditions of competition analysis, could be used to establish or support causal link findings under Article 4.2(b) of the Agreement on Safeguards. The analytical framework developed in paragraphs 10.306-10.308 takes the above-mentioned consideration into account.

9.13 The Panel notes that the United States has requested a number of additional changes in the Panel's measure-by-measure analysis to reflect the fact that the Panel, rather than the USITC, categorized the USITC analysis as a coincidence or conditions of competition analysis. In light of the Panel's changes to paragraphs 10.291 and 10.292 of the Panel's Interim Reports, the Panel does not consider that the majority of these additional changes are necessary. However, in its measure-by-measure analysis, the Panel has, despite the changes made to paragraphs 10.291 and 10.292 of the Panel's Interim Reports**,** made the additional changes where confusion might exist.

9.14 In addition, the United States notes that in paragraph 10.375 of the Panel's Interim Reports, the Panel states that the sources for domestic and import average values for CCFRS are unclear. The United States has in its review comments provided clarification of the source for these values. On the basis of this clarification, the Panel has deleted its statement that the source for such data is unclear, despite arguments by the complainants in their comments of 16 April 2003 of the continuing lack of clarity concerning the source for such data. Nevertheless, in light of the United States' explanation of the basis for calculation of the average unit values for domestic CCFRS together with comments made by the United States in relation to paragraph 10.421 of the Panel's Interim Reports dealing with the relevance of the product definition of CCFRS in the context of the USITC's causation analysis, the Panel has added to what was paragraph 10.375 of its Interim Reports to note the difficulties associated with the aggregation of data by the USITC, which were acknowledged by the USITC itself in its Report.

9.15 Linked to the comments made by the United States regarding the availability of data in the USITC report on CCFRS as a single product, the United States argues that paragraph 10.421 of the Panel's Interim Reports mistakenly states that "on a number of occasions, the USITC failed to produce necessary data for CCFRS as a whole and/or it relied upon data for the items that comprised CCFRS rather than for CCFRS without explaining why and how such specific data on such items related to the determination concerning CCFRS as a whole". In light of the data that was pointed to by the United States above in relation to paragraph 10.375 of the Panel's Interim Reports, the Panel has made the necessary changes to paragraph 10.421 of the Interim Reports.

9.16 The United States has also requested, in relation to paragraph 10.421 of the Panel's Interim Reports, that the Panel confirm that in its view the USITC's exclusive reliance upon sub-category data and failure to produce or consider aggregate data was the *sole* basis for the Panel to conclude that the USITC admitted that CCFRS could not be subjected to the application of the causation requirement and that that, in turn,it was also the sole basis for the Panel to conclude that the CCFRS grouping is inconsistent with the requirements of Article 4.2(b) of the Agreement on Safeguards. The Panel has clarified paragraph 10.421 of the Panel's Interim Reports. As stated, there were a *number* of bases upon which the Panel considered that the product definition for CCFRS was such that it could not properly be subjected to the requirements of Article 4.2(b) of the Agreement on Safeguards. In this regard, the Panel notes that the clarificatory amendments that have been made by the Panel to the paragraph take account of the concerns raised by the complainants in their comments of 16 April 2003. The Panel has also taken into account the United States' comment that the conclusion of violation with Article 4.2(b) on the basis of the product definition of CCFRS is not necessary to the Panel's overall conclusions on causation with respect to CCFRS.

9.17 The United States has made a number of comments that essentially request clarification of the distinction between "average unit values" and "prices". In particular, the United States has requested the Panel to modify the language contained in paragraph 10.432 of the Panel's Interim Reports and the accompanying graph to make it clear that the Panel is referencing "average unit values" rather than "prices". Similar requests were made by the United States in relation to paragraphs 10.456, 10.477 and 10.521 of the Panel's Interim Reports and their accompanying graphs. The Panel has made the

requested changes. In addition, the Panel has amended the Reports to make it clear that in reviewing pricing analyses undertaken by the USITC as part of its causal link analysis, the Panel treated unit values as a proxy for prices. As noted in our findings below, we consider that this is acceptable given that this is apparently what the USITC itself did. Further, we understand that price trends mirror unit value trends. As a related point which appears to be raised by the requests for amendments made by the United States, in our reports, we do not consider that any distinction exists between "unit values" on the one hand and "average unit values" on the other hand. More particularly, in the context of this case, we consider that unit values for a particular year are implicitly averages.

9.18 The complainants requested the Panel to clarify that it did not find that there was any USITC determination other than that made on 22 October 2001 and that the Supplementary Reports were only part of the explanation of that determination. The Panel agrees that, for each imported product, the USITC made, on 22 October 2001, one determination for the purposes of Articles 2 and 4 of the Agreement on Safeguards. However, the Panel is of the view that the requirement to demonstrate the cirumstances of unforeseen developments pursuant to Article XIX of GATT 1994 is additional to the requirement to provide a determination indicating compliance with the conditions of Articles 2 and 4 of the Agreement on Safeguards. Indeed, the Panel notes that none of the complainants have claimed that the requirement to demonstrate unforeseen developments is one of the conditions for imposition of a safeguard measure pursuant to Articles 2 and 4 of the Agreement on Safeguards.[4846] The WTO jurisprudence explictly states that the WTO pre-requisites for the imposition of a WTO-compatible safeguard include both the factual demonstration of unforeseen developments pursuant to Article XIX of GATT 1994 and the determination that the conditions of Articles 2 and 4 of the Agreement on Safeguards have been fulfilled.[4847] A coherent, reasoned and adequate explanation that all such requirements have been respected must be included in the report of the competent authority, as required by Article 3.1 of the Agreement on Safeguards and before a safeguard measure is applied.

9.19 The Panel has also clarified other aspects of its Interim Findings, including paragraphs 10.13, 10.17, 10.29, 10.48, 10.74 (footnote 4924), 10.122, 10.132, 10.143, 10.148, 10.149, 10.406-10.411, 10.419, 10.445, 10.448, 10.471, 10.489, 10.505, 10.538, 10.567, 10.617, 10.623, 10.630, 10.641 and 10.668.

5. The Panel's appraisal of the parties' arguments and facts

9.20 The United States has challenged the Panel's appraisal of arguments and facts in relation to a number of the measures at issue. In particular, the United States challenges the basis for the Panel's conclusions in paragraph 10.401 of the Panel's Interim Reports arguing that the USITC did not state that legacy costs had caused any of the declines in the condition of the CCFRS industry during the period of investigation because legacy costs actually declined during the period of investigation. The United States continues by arguing that the fact that legacy costs had been a burden on the industry prior to the period of investigation or that they might present difficulties to the industry in the future says nothing about whether legacy costs caused declines in the industry's condition during the period of investigation. On the basis of the foregoing, the United States requests the Panel to remove its finding that the USITC's analysis of legacy costs failed to establish that the injury caused by this factor together with other factors was not attributed to increased imports. The complainants oppose this request.

[4846] None of the complainants have suggested that the basis for their unforeseen developments claims were found in Articles 2 or 4 of the Agreement on Safeguards. See in this regard the content of the complainants' requests for establishment of a panel in Articles 3.1 to 3.8 of the Descriptive Part.

[4847] Appellate Body Report, *US – Lamb*, para. 72.

9.21 The Panel has decided to reject the United States' requested amendment. The Panel has reviewed the USITC's findings and the arguments made in relation to legacy costs and remains of the view that the USITC failed to ensure that injury caused by legacy costs, together with other factors, was not attributed to increased imports when assessing whether increased imports of CCFRS were causing injury to the relevant domestic producers. However, in light of comments made by the United States in this regard, the Panel has elaborated upon its findings to highlight the absence of an adequate explanation by the USITC and to emphasize that the mere fact that the issue of legacy costs pre-dated the period of investigation and may have decreased during the period of investigation does not necessarily mean that they did not play a role in causing injury to the domestic industry.

9.22 The United States has also challenged the Panel's conclusion in paragraph 10.440 of the Panel's Interim Reports that the USITC acknowledged that inefficient producers were a possible cause of injury to the hot-rolled bar industry. In light of the United States' comments, the Panel has reviewed the USITC's findings and the claims and arguments made by the parties on this issue and has revised its findings to reflect its agreement with the United States. Necessary consequential changes have also been made to our Reports.

9.23 With respect to paragraph 10.455 of the Panel's Interim Reports, the United States argues that there is no basis for the Panel to be unclear regarding the USITC's reasons for using quarterly data for individual cold-finished bar products when average data was available. The United States points in this regard to note 627 on page 105 of the USITC Report. The Panel has examined the cited note and is of the view that it relates to the relative merits of pricing data for specific products within the cold-finished bar product category. The Panel does not consider that this note contains a discussion of the relative merits of quarterly versus (annual) average unit values and, therefore, does not provide any justification for the use of quarterly data by the USITC in the absence of a reasoned and adequate explanation as to why the available annual data had not been used on this occasion while such data had been used for a number of the other measures at issue. We note that the quarterly data upon which the USITC relied suggested underselling whereas the annual average data did not.

9.24 The United States has also challenged the Panel's review of the USITC's assessment of domestic capacity increases for FFTJ contained in paragraph 10.527 of the Panel's Interim Reports. As a first point, the United States argues that the Panel misunderstood the reference to "substantial" to mean "enormous" when interpreting the USITC comment that "the increase in capacity would not be expected to place substantial pressure on domestic prices". The Panel was under no such misunderstanding. The USITC Report indicates that downward pressure *was* exerted by capacity on prices, however one interprets "substantial". The Panel is of the view that all relevant "other factors" – even those with limited injurious effects on the domestic industry – must be, together with other relevant factors, identified, distinguished and assessed with a view to reaching an overall conclusion on whether or not increased imports had a genuine and substantial relationship of cause and effect with the injury suffered by the relevant domestic industry.

9.25 The United States also requested the Panel to explain why it concluded that the USITC acknowledged that domestic capacity increases played a role in causing the injury that was suffered by the domestic industry. The Panel notes that in paragraphs 10.527-10.531 of the Panel's Interim Reports, it explained why it considered that the USITC conceded that increases in capacity lead, at least in part, to downward pressure on domestic prices which, in turn, impacted upon the state of the domestic industry.

9.26 The United States has also requested the Panel to revise its findings in paragraphs 10.559 and 10.563 of the Interim Reports that the USITC could have provided a reasoned and adequate non-attribution analysis for demand declines by explaining that operating margin declined irrespective of

demand trends. In making this request, the United States submits that the very analysis sought by the Panel was provided on page 212 of the USITC Report. The Panel has considered the mentioned page of the USITC report and is of the view that it confirms the Panel's conclusion, which is challenged by the United States. The relevant page states clearly that demand declined *in late 2000 and interim 2001* whereas substantial declines in the situation of the domestic industry occurred *prior to 2000 and 2001*. The fact that injury occurred prior to the point at which a factor comes into play does not detract from the conclusion that the factor may still play a role in causing injury beyond that point in time. We have elaborated our findings to make this clear.

6. Omissions

9.27 The parties have also raised what they consider to be omissions from the Panel's Interim Reports. The Panel agreed with the following suggestions made by the parties. The complainants requested elaboration of paragraph 10.370 of the Panel's Interim Reports to correctly sum up all the reasons why the Panel considered the USITC's finding to be inadequate. The complainants also suggested that the Panel's Interim Reports should indicate that the Panel did not consider it necessary to specifically address the argument made by a number of complainants that a gap between the range of products for which increased imports and serious injury were allegedly found and those on which safeguard measures were finally imposed also constituted a violation of the principle of parallelism.

9.28 However, there were a number of instances where the Panel did not agree either fully or partly that an omission existed and, in those circumstances, declined to make any amendment or, at least, declined to make the requested amendment. In particular, in their comments, the complainants note that Japan had included a claim under Article XIX:1 of GATT 1994 concerning the United States' failure to abide by the increased imports, causation and parallelism standards. The complainants further noted that although the Panel addressed this claim in its findings on increased imports, it failed to include a reference to Article XIX in its summary findings on increased imports. According to the complainants, nor did the Panel address this claim in its findings on causation and parallelism. The United States did not agree with the complainants' comments in this regard.

9.29 The Panel is well aware of the claims made by Japan and other complainants under Article XIX of GATT 1994. However, the Panel does not consider that a specific finding on Article XIX in relation to increased imports, causation and parallelism would enhance the complainants' rights . The Panel notes that Article XIX was not much argued by most parties other than in the context of unforeseen developments. Accordingly, the Panel has decided to reject the request made by the complainants to add a reference to Article XIX in its findings on causation and parallelism. In addition, the Panel does not consider that a reference to Article XIX is necessary in relation to its findings on increased imports. Accordingly, consistent with its approach in relation to the other sections of its Reports, the Panel has revised its findings on increased imports to remove references to Article XIX. In our view, the removal of such references will not in any way diminish the complainants' rights with reference to their claims on increased imports in the present dispute.

9.30 Similarly, the complainants note that Japan and Norway included a claim under Article 4.2(c) of the Agreement on Safeguards concerning the US decision-making process for tin mill products and stainless wire products. The complainants note that although this claim is a part of the Panel's findings on causation, Article 4.2(c) is not listed in the summary findings on causation. They also argue that the Article 4.2(c) claim should also have been addressed by the Panel in its findings on increased imports. They argue that given that the Panel found a violation of Article 3.1 with respect to increased imports for tin mill products and stainless steel wire, a violation of Article 4.2(c) should have been found to exist. The United States did not agree with the complainants' comments in this regard.

9.31 With respect to the first point, namely whether a finding of violation of Article 4.2(c) is necessary in relation to the issue of causation, the Panel considers that such a reference would not enhance the complainants' rights. In addition, the Panel observes that Article 4.2(c) was not extensively addressed by the parties as a discrete basis for violation of the causation requirements. Accordingly, consistent with its approach in relation to the other sections of its Reports, the Panel has revised its findings on causation to remove references to Article 4.2(c) in its discussion on the claims of violation of the causation requirements for tin mill products and stainless steel wire. In our view, the removal of such references will not diminish the parties' rights with regard to causation matters in the present dispute.

9.32 As for the second point, the Panel agrees that certain parallels can be drawn between Article 4.2(c) and Article 3.1 of the Agreement on Safeguards. However, the Panel does not consider that an additional reference to Article 4.2(c) in relation to the Panel's findings on increased imports or causation would enhance the complainants' rights. Accordingly, the Panel has decided to reject the suggestion made by the complainants to add a reference to Article 4.2(c) to its summary findings on causation and in its findings on increased imports for tin mill products and stainless steel wire.

7. Confidentialization of data

9.33 The United States has raised a number of concerns regarding comments made by the Panel in its Interim Reports in relation to the confidentialization of data. The Panel agrees that, in some circumstances, Members have the obligation to confidentialize certain information and this obligation should not reduce Members' right to take safeguard actions. The Panel also accepts that the United States should not be held responsible for having confidentialized certain data. To the extent that a reasoned and adequate alternative means of supporting its conclusions were provided by the USITC, the Panel has made the necessary changes to paragraph 10.455 (dealing with cold-finished bar), paragraph 10.552 (dealing with stainless steel bar) and 10.577 and 10.583 (dealing with stainless steel rod) of the Panel's Interim Reports.

9.34 With respect to paragraph 10.455 of the Panel's Interim Reports, the United States challenges the Panel's statement that "difficulties with data call into question whether 'underselling' actually existed" on the basis, *inter alia*, that the Panel had questioned the confidentialization of certain relevant data. We have reviewed our findings in light of our comments above with respect to data or information that can be used in substitution for redacted data. Nevertheless, the Panel maintains its findings in this regard with respect to cold-finished bar in light of the absence of explanation regarding the data relied upon by the USITC, which calls into question whether "underselling" actually existed.[4848]

9.35 With respect to paragraph 10.552 of the Panel's Interim Reports (dealing with stainless steel bar) which states that the Panel was unable to assess whether significant import underselling occurred during the period of investigation due to the confidentialization of relevant information, the United States notes that while domestic prices were redacted from the price comparisons contained in a number of tables to which the Panel had referred, the USITC Report contained another table, Table STAINLESS-99, in which it summarized the instances of underselling by Canadian, Mexican and non-NAFTA imports.

9.36 The Panel has examined that table and considers that it is sufficient to indicate that import underselling occurred. In particular, as indicated in our revised findings, Table STAINLESS-99 refers to 40 instances of underselling by non-NAFTA imports and provides a range of the margins of

[4848] See para. 9.23 above.

underselling of 0.1 to 51.8 % that applied for all of those instances. As indicated in our findings, this fact – that there were 40 instances of underselling by non-NAFTA imports – has not been contested by the complainants and we consider that it is contrary to our standard of review to reassess the quality of this evidence in the absence of any prima facie challenge. In our view, although relevant data was redacted from the USITC Report, the USITC nevertheless provided alternative information that sought to substitute the redacted data. We have revised our findings accordingly to reflect our conclusions in this regard.

9.37 The United States has challenged the basis for the Panel's comments in paragraphs 10.578-10.579 of the Panel's Interim Reports that the USITC's analysis with respect to stainless steel rod does not contain any comparison between import and domestic prices. The United States points to note 1419 on page 220 of the USITC Report together with Table STAINLESS-100 and Table STAINLESS-C-5 to indicate that such a price comparison was undertaken. While Table STAINLESS-C-5 does not contain any public data, the Panel accepts that Table STAINLESS-100 does contain relevant information and has revised its findings accordingly.

9.38 The complainants have also suggested that paragraph 10.559 of the Interim Reports be amended to indicate that, when information has been confidentialized, in order for an explanation to be reasoned and adequate, there should be an indication of the applicable trends sufficient to substantiate the investigating authority's findings. As discussed in paragraphs 10.272-10.275 of our findings, we consider that, in some circumstances, Members have the obligation pursuant to Article 3.2 of the Agreement on Safeguards to confidentialize certain information although they can base their determination on such confidentialized information. Such an obligation should not reduce Members' rights to take safeguard actions. In cases where information has been confidentialized, the Panel has examined whether the competent authority provided a reasoned and adequate explanation through means other than full disclosure of that data. In our view, trends derived from data that has been redacted may provide sufficient evidence that the relevant explanation is reasoned and adequate. However, the Panel considers that trends are not the only way in which to support allegations based upon confidentialized data.

8. Request for separate panel reports

9.39 With regard to the United States' request for separate panel reports, the United States requested the Panel to clarify in paragraph 10.728 of the Interim Reports its statement that the issuance of a single consolidated Descriptive Part reflected the fact that "each of the complainants relied upon arguments made and evidence adduced by other complainants in relation to their respective claims ...". According to the United States, this statement could mistakenly be read to entitle a complainant to rely on another Member's arguments and evidence in order to satisfy that complaining party's burden of proof.

9.40 The Panel agrees with the United States that a complaining party bears the burden of establishing a prima facie case for each of the claims it makes and it may not rely on the other complaining parties to make its prima facie case, if they had litigated their respective disputes independently. The Panel recalls that the complainants made common claims for all measures and all these common claims are properly before the Panel. The Panel notes that in the present dispute, with the apparent agreement of the United States, the co-complainants referred to and relied upon each other's arguments and demonstrations and explicitly stated as much.[4849] From the initiation of the

[4849] See for example, European Communities' first written submission, paras. 16-17; Switzerland's first written submission, para. 10; Norway's first written submission, para. 8; Brazil's first written submission, para. 3; New Zealand's first written submission, para. 1.5; China's first written submission, para. 8; Japan's first

panel process, parties have recognized[4850] that the complainants would act together on some common claims and the United States would respond to such common claims while responding as well to claims specific to some of the complainants. The complainants often cross-referenced each others' written submissions, they coordinated their presentations to the Panel and divided among themselves the argumentation on common claims, often explicitly stating that they were speaking on behalf of all complainants. The complainants submitted common comments on the Descriptive Part, common comments on the Interim Findings as well as a common response to the United States' comments on the Interim Findings. At all these stages, the United States provided one response addressing collectively the arguments made by the complainants. We are aware that Panels are not entitled to make the case for the complainants.[4851] WTO jurisprudence recognizes that panels may, after an assessment of the evidence and argumentation made by complainants, reach a conclusion as to whether, overall, the complainants made their prima facie case.[4852] We believe that in the present case, each of the complainants has made a prima facie case that the safeguard measures at issue were inconsistent with the WTO provisions listed in our Recommendations, through their own and with each other's demonstration. We have revised our findings to clarify this point.

9. Release of the confidential Interim Reports

9.41 Finally, we would like to address the issue of confidentiality of the Interim Reports. When, on 26 March 2002, we transmitted our Interim Reports to the parties, we clearly indicated that such Reports were confidential. Indeed, pursuant to the DSU, all panel proceedings remain confidential until the Panel Report is circulated to WTO Members. We had also explicitly emphasized at all our meetings with the parties that the panel proceedings were confidential. This was accepted by the parties and reflected in the Panel's working procedures and in all our relevant correspondance with the parties. Therefore, we are concerned to discover that parties have not respected this confidentiality obligation and have disclosed aspects of the Panel's Interim Reports. We consider that this lack of respect of a specific requirement imposed by the DSU and the Panel's working procedures is regrettable and should not remain unmentioned.

X. FINDINGS

A. INTRODUCTION

1. Panel's terms of reference – a single panel established

10.1 In accordance with Article 6 of the DSU, eight requests for the establishment of a panel were filed with the DSB in relation to the present dispute. The DSB accepted these requests and, pursuant to Article 9, we were ultimately given the mandate to examine the eight requests for the establishment of a panel, through a single panel process.[4853]

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written submission, para. 5; Korea's first written submission, para. 7. Throughout their written and oral submissions the complainants refered to each other's allegations and arguments. See also the oral statements of the complainants (before the Panel) stating that each of the comlainant was speaking on a specific matter on behalf of the other complainants.

[4850] See para. 5 of the Panel's working procedures quoted in para. 6.1 of the Descriptive Part

[4851] Appellate Body Report, *Japan – Agricultural Products II*, paras. 126-130.

[4852] Appellate Body Report, *Korea – Dairy*, para. 145. The Appellate Body confirmed this view in *Thailand – H-Beams*, para. 134. See also the Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.50.

[4853] The first panel request (European Communities – WT/DS248/6) was accepted on 3 June 2002; the second and third (Japan – WT/DS249/6; Korea – WT/DS251/7) on 14 June 2002 the fourth, fifth and sixth (China – WT/DS252/5; Switzerland – WT/DS253/5; Norway – WT/DS254/5) on 24 June, the seventh (New

10.2 On 29 July 2002, the Panel met with the parties for its organizational meeting. On 31 July 2002, the Panel wrote to the parties issuing some preliminary and organizational rulings including its timetable and working procedures.[4854] The Panel notes, at this early stage, that its Working Procedures do not make reference to a "single" or "multiple" panel report(s). The working procedures refer to "interim report" (in paragraph 16). The timetable only refers to various aspects of the "report" (again in singular) in paragraphs 3(h), (i), (m) and (n) of the timetable. The timetable as well as the size and content of the executive summaries of the United States reflected the fact that the United States would have to reply to common claims and claims specific to some of the complainants.

10.3 The Panel met with the parties for the first substantive meeting on 29, 30 and 31 October 2002. With a view to ensuring an efficient process for this single panel, the complainants coordinated their oral presentations. The Panel met with the parties for the second substantive meeting on 10, 11 and 12 December 2002; once again the complainants coordinated their presentations to the Panel. Numerous questions to the parties were asked by the Panel and the parties. The complainants often responded individually to the Panel's and the United States' questions. On 28 January 2003, the United States requested the issuance of separate panel reports instead of a single report. We address the United States' request in paragraphs 10.716 ff.

2. Claims

10.4 The complainants claim that the United States' safeguard measures do not satisfy the WTO prerequisites for taking such action, including those mentioned in Articles 2, 3, 4, 5, 7, 8, 9 and 12 of the Agreement on Safeguards and Articles X and XIX of GATT 1994. All complainants are challenging all safeguard measures but not all their claims are the same. All complainants have raised some common claims in respect of all of the measures. Some complainants have raised specific claims in respect of all or some of the measures. The detailed claims of the complainants are listed in Section III *supra*.

3. The measures at issue

10.5 By Proclamation No. 7529 of 5 March 2002, bearing the title "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products", accompanied by a Memorandum for the Secretary of Treasury, the Secretary of Commerce and the USTR, the US President imposed on 20 March 2002 definitive safeguard measures on imports of the following steel products:[4855]

– A tariff of 30% imposed on imports of "Certain Flat Steel other than Slabs", that is: (i) Plate[4856]; (ii) Hot-Rolled Steel[4857]; (iii) Cold-Rolled Steel[4858]; (iv) Coated Steel.[4859]

Zealand – WT/DS258/9) on 8 July and finally the eighth (Brazil – WT/DS/259/10) on 29 July 2002. The content of the panel requests can be found in paras. 3.1 to 3.8 of the Descritive Part. See also the following minutes of the DSB: WT/DSB/M/125, WT/DSB/M/127, WT/DSB/M/128, WT/DSB/M/129 and WT/DSB/M/130.

[4854] The Panel's working procedures are contained in para. 6.1 of the Descriptive Part of the present Reports.

[4855] Proclamation No. 7529 of 5 March 2002, "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products", Federal Register, Vol. 67, No. 45, 7 March 2002, p. 10553; Memorandum for the Secretary of Treasury, the Secretary of Commerce and the USTR of 5 March 2002 on the "Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products by the President of the United States of America", Federal Register Vol. 67, No. 45 of 7 March 2002, p. 10593, Exhibit CC-13.

[4856] As defined in the superior text to subheadings 9903.72.50 through 9903.72.60 in the Annex to the Proclamation.

A tariff rate quota on the fifth product of the product group "Certain Flat Steel", that is Slabs.[4860] The out-of-quota tariff (applicable beyond 5.4 million short tons) is 30%.

– A tariff of 30% imposed on imports of tin mill products[4861];

– A tariff of 30% imposed on imports of hot-rolled bar[4862];

– A tariff of 30% imposed on imports of cold-finished bar[4863];

– A tariff of 15% imposed on imports of rebar[4864];

– A tariff of 15% imposed on imports of certain tubular products[4865];

– A tariff of 13% imposed on imports of carbon and alloy fittings and flanges[4866];

– A tariff of 15% imposed on imports of stainless steel bar[4867];

– A tariff of 8% imposed on imports of stainless steel wire[4868];

– A tariff of 15% imposed on imports of stainless steel rod.[4869]

10.6 From its examination of the complainants' requests for establishment of a panel, the Panel notes first, that *all* complainants have challenged *all* the safeguard measures imposed by the United States pursuant to Proclamation No. 7529 of 5 March 2002. The Panel also notes that the complainants are challenging the *application* of the United States' safeguard measures but none of the

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[4857] As defined in the superior text to subheadings 9903.72.62 through 9903.72.77 in the Annex to the Proclamation.
[4858] As defined in the superior text to subheadings 9903.72.80 through 9903.72.98 in the Annex to the Proclamation.
[4859] As defined in the superior text to subheadings 9903.72.99 through 9903.73.14 in the Annex to the Proclamation.
[4860] As defined in the superior text to subheadings 9903.72.30 through 9903.72.48 in the Annex to the Proclamation.
[4861] As defined in the superior text to subheadings 9903.73.15 through 9903.73.27 in the Annex to the Proclamation.
[4862] As defined in the superior text to subheadings 9903.73.28 through 9903.73.38 in the Annex to the Proclamation.
[4863] As defined in the superior text to subheadings 9903.73.39 through 9903.73.44 in the Annex to the Proclamation.
[4864] As defined in the superior text to subheadings 9903.73.45 through 9903.73.50 in the Annex to the Proclamation.
[4865] As defined in the superior text to subheadings 9903.73.51 through 9903.73.62 in the Annex to the Proclamation.
[4866] As defined in the superior text to subheadings 9903.73.66 through 9903.73.72 in the Annex to the Proclamation.
[4867] As defined in the superior text to subheadings 9903.73.74 through 9903.73.81 in the Annex to the Proclamation.
[4868] As defined in the superior text to subheadings 9903.73.91 through 9903.73.96 in the Annex to the Proclamation
[4869] As defined in the superior text to subheadings 9903.73.83 through 9903.73.89 in the Annex to the Proclamation.

complainant is challenging the United States' statute on safeguards *per se*, nor are the complainants challenging the practices of the USITC *per se*.

10.7 However, the complainants in their argumentation have discussed and challenged what they call the "methodologies" used by the USITC when making its determinations for those safeguard measures. Nevertheless, as noted by the European Communities in its oral statement to the second substantive meeting, "complainants have not chosen in this case to request any findings relating to US safeguards law or general practice. … When we say that the complainants are not attacking the methodologies of the USITC *per se* we mean that we are simply attacking the methods of analysis actually *used in this case* – not necessarily the methodologies that the USITC traditionally uses, as the US seems to believe. … I repeat again – our complaint is with the steps that the USITC actually took – or failed to take – in this case."[4870]

10.8 The Panel believes, therefore, that the complainants' reference(s) to the USITC methodologies or practices in their argumentation may be helpful to its understanding of the way in which the United States actually made its determination for each of the safeguard measures at issue.

B. GENERAL CONSIDERATIONS FOR THIS DISPUTE

1. Interpretation of the Agreement on Safeguards and Article XIX of GATT 1994

10.9 Article XIX of GATT 1994 and the Agreement on Safeguards provide WTO Members with the conditional right to limit market access (and take measures that would otherwise be inconsistent with incurred obligations) and obtain temporary relief when unforeseen developments have resulted in increased imports (absolute or relative) that are causing or threatening to cause serious injury to the relevant domestic producers.

10.10 Safeguard actions may be needed for the very reason that a Member has incurred obligations (namely, market-access commitments) which prohibit that Member from taking any measure that is inconsistent with its bindings or the GATT prohibition of quantitative restrictions, for instance. In this sense, Article XIX of GATT 1994 and the Agreement on Safeguards operate as exceptions, particularly to Articles II and XI of GATT 1994.

10.11 Article XIX of GATT and the Agreement on Safeguards provide for exceptions to general GATT market access rules in situations of emergency. In *US – Line Pipe*, the Appellate Body reiterated the following statement that it had made in *Argentina – Footwear (EC)* :

> "As part of the context of paragraph 1(a) of Article XIX, we note that the title of Article XIX is: '*Emergency Action on Imports of Particular Products*'. The words 'emergency action' also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:1(a) requires that a product be imported '*in such increased quantities* and *under such conditions* as *to cause or threaten serious injury* to domestic producers'. (emphasis added) Clearly, this is not the language of ordinary events in routine commerce. In our view, the text of Article XIX:1(a) of GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions'. And, such 'emergency actions' are to be invoked only in situations when, as a result of obligations incurred

[4870] European Communities' oral statement on behalf of all complainants to the second substantive meeting, paras. 5-6.

> under GATT 1994, a Member finds itself confronted *with developments it had not 'foreseen' or 'expected' when it incurred that obligation*. The remedy that Article XIX:1(a) allows in this situation is temporarily to 'suspend the obligation in whole or in part or to withdraw or modify the concession'. Thus, Article XIX is clearly, and in every way, an extraordinary remedy.
>
> This reading of these phrases is also confirmed by the object and purpose of Article XIX of GATT 1994. *The object and purpose of Article XIX is, quite simply, to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with 'unexpected' and, thus, 'unforeseen' circumstances which lead to the product 'being imported' in 'such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products'. …*
>
> … In furthering this statement of the object and purpose of the *Agreement on Safeguards*, it must always be remembered that safeguard measures result in the temporary suspension of concessions or withdrawal of obligations, such as those in Article II and Article XI of GATT 1994, which are fundamental to the *WTO Agreement*. …"[4871] (emphasis added)

10.12 In *US – Line Pipe*, the Appellate Body also emphasized that:

> "[P]art of the *raison d'être* of Article XIX of the GATT 1994 and the *Agreement on Safeguards* is, unquestionably, that of *giving a WTO Member the possibility*, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation *that, in the judgement of that Member, makes it necessary to protect a domestic industry temporarily*.[4872] (emphasis added)
>
> There is, therefore, a natural tension between, on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against "fair trade" beyond what is necessary to provide extraordinary and temporary relief. A WTO Member seeking to apply a safeguard measure will argue, correctly, that the *right* to apply such measures must be respected in order to maintain the *domestic* momentum and motivation for ongoing trade liberalization. In turn, a WTO Member whose trade is affected by a safeguard measure will argue, correctly, that the *application* of such measures must be limited in order to maintain the *multilateral* integrity of ongoing trade concessions. *The balance struck by the WTO Members in reconciling this natural tension relating to safeguard measures is found in the provisions of the Agreement on Safeguards*." (emphasis added)[4873]

10.13 Moreover, the Panel, when interpreting Article XIX of GATT 1994 and the Agreement on Safeguards, must bear in mind that exceptions under WTO law are not to be interpreted narrowly[4874]

[4871] Appellate Body Report, *Argentina – Footwear* (*EC*), paras. 93–95. See also, Appellate Body Report, *Korea – Dairy*, paras. 86-88.

[4872] Appellate Body Report, *US – Line Pipe*, para 82.

[4873] Appellate Body Report, *US – Line Pipe*, para. 83.

[4874] This principle of interpretation in WTO law was first established by the Appellate Body in *EC – Hormones* (para. 104) for the SPS Agreement. It was reiterated recently in the Appellate Body Report in *EC – Sardines* (para. 271), when discussing Article 2.4 of the TBT Agreement; in the Panel Report in *US – Carbon Steel* (para. 8.45, upheld by the Appellate Body) when discussing Article 21.3 of the SCM Agreement; in the

but rather in light of the ordinary meaning of the terms of such exception provisions taking into account the object and purpose of the Agreement on Safeguards, including the need to maintain a balance between market access and safeguards rights and obligations. Since the Agreement on Safeguards itself would have been drafted so as to recognize its exceptional nature and the emergency character of safeguard measures, the Agreement on Safeguards does not call for any especially restrictive interpretation.

2. The two fundamental enquiries under the Agreement on Safeguards: the (conditional) *right* to take a safeguard measure and the *application* of a chosen measure

10.14 The distinction between the (conditional) right to take a safeguard measure and the application of a specific measure was clearly recognized by the Appellate Body in *US – Line Pipe*:

> "This natural tension is likewise inherent in two basic inquiries that are conducted in interpreting the *Agreement on Safeguards*. *These two basic inquiries are: first, is there a right to apply a safeguard measure? And, second, if so, has that right been exercized, through the application of such a measure, within the limits set out in the treaty? These two inquiries are separate and distinct.* They must not be confused by the treaty interpreter. One necessarily precedes and leads to the other. *First*, the interpreter must inquire whether there is a right, under the circumstances of a particular case, to apply a safeguard measure. For this right to exist, the WTO Member in question must have determined, as required by Article 2.1 of the *Agreement on Safeguards* and pursuant to the provisions of Articles 3 and 4 of the *Agreement on Safeguards*, that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. *Second*, if this first inquiry leads to the conclusion that there *is* a right to apply a safeguard measure in that particular case, then the interpreter must next consider whether the Member has applied that safeguard measure 'only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment', as required by Article 5.1, first sentence, of the *Agreement on Safeguards*. Thus, the right to apply a safeguard measure—even where it has been found to exist in a particular case and thus can be exercised—is not unlimited. Even when a Member has fulfilled the treaty requirements that establish the right to apply a safeguard measure in a particular case, it must do so 'only to the extent necessary'." (emphasis added)[4875]

10.15 Throughout its examination, this Panel has kept the two enquiries distinct. The Panel is of the view that, first, it must examine whether the United States had the *right* to take the safeguard measures. Second, should the Panel consider that the United States had the right to take such safeguard measures, the Panel would then assess whether the measures were applied (as regards the type of measure, their level and duration) only to the extent necessary to remedy or prevent serious injury and allow for readjustment.

10.16 In examining whether the United States had a right to impose the specific safeguard measures at issue, the Panel will concern itself with the application of Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994 (the latter being relevant in particular for the assessment

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Article 21.5 Appellate Body Report in *US – FSC* (para. 127) when discussing the scope and meaning of footnote 59 of the SCM Agreement; and in the Appellate Body Report in *Brazil – Aircraft* (para. 137) when dealing with the scope of the provisions on developing countries.

[4875] Appellate Body Report, *US – Line Pipe*, para. 84.

of whether the United States was faced with unforeseen developments) in reviewing the report of the competent authority. In relation to the second enquiry, when assessing the appropriateness of such safeguards measures, the importing Member is obliged, when challenged by a WTO Member who has made a prima facie case of inconsistency with Article 5.1 of the Agreement on Safeguards, to justify before the Panel that the safeguard measures were imposed only to the extent necessary to prevent or remedy injury and allow for readjustment. Reversals of this burden of proof may take place.

3. The Agreement on Safeguards is concerned with the "determination"

10.17 The Panel recalls that the Agreement on Safeguards is concerned with the ultimate determination made and reflected in the Member's report of investigation. There is no provision on how or when the investigation is to be initiated or whether, in a specific Member, the initiation of the investigation should be undertaken by the King, the President or the industry. Nor does the Agreement on Safeguards dictate the manner in which determinations are to be arrived at. What matters is that, ultimately, there is a reported determination of the right to take a safeguards measure (pursuant to Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994) and that, if, and when, challenged *prima facie* before a WTO panel, the choice of safeguard measure (Articles 5, 7 and 9) can be justified. The Appellate Body made that clear in *US – Line Pipe*:

> "We note also that we are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. *We are concerned only with the determination itself*, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or—as here—six individual decision-makers under the municipal law of that WTO Member. *What matters to us is whether the determination, however it is decided domestically, meets the requirements of the Agreement on Safeguards*."[4876]
>
> "Article 5.1 does not establish a general procedural obligation to demonstrate compliance with Article 5.1, first sentence, at the time a measure is applied."[4877] (emphasis added)

10.18 The Panel recalls that, in the present dispute, the United States explained that the USITC made its determination on 22 October 2001 pursuant to Articles 2 and 4 and that it was contained in a report published in December 2001 (the "initial USITC Report"). The USITC provided Supplementary Reports in February 2002. The complainants in the present dispute have challenged the findings supporting the October determination on the basis of the data and evidence contained in the Report published in December 2001. The Panel has thus examined the December 2001 Report when assessing the complainants' claims and arguments relating to increased imports in Section X.D of the present Panel Reports as well as complainants' claims on causation, in Section X.E of the present Panel Reports.

10.19 The United States, following its October determination, decided to exclude all imports from Canada, Mexico, Jordan and Israel from the application of its safeguard measures. Seemingly, in an attempt to comply with the United States' parallelism obligations, USTR requested, *inter alia*, additional information from USITC on the impact of the exclusions from the measure of imports from

[4876] Appellate Body Report, *US – Line Pipe*, para. 158.
[4877] Appellate Body Report, *US – Line Pipe*, paras. 233-234.

Israel and Jordan, and for certain steel products from Canada and Mexico. This was (partly) the subject of the February Second Supplementary Report. The complainants have challenged whether the October and February reports satisfy the requirements of parallelism, on the basis of the data contained in those reports. The Panel has examined the complainants' claims and arguments relating to parallelism in Section X.F of the present Panel Reports and has reviewed both reports.

10.20 The February Second Supplementary Report also contains information relating to "unforeseen developments". For the reasons mentioned in paragraphs 10.55-10.58 below, we have decided to assume, *arguendo*, for the purposes of reviewing the unforeseen developments' demonstration under Article XIX of the GATT 1994 in the present dispute that the February Second Supplementary Report was part of the "report of the competent authority" . We have, therefore, decided that when assessing the complainants' claims relating to unforeseen developments, in Section X.C, we will examine the USITC's initial report as well as its explanations relating to unforeseen developments contained in the February Second Supplementary Report.

4. Standard of review

10.21 The Panel discusses specific applications of its standard of review throughout its Reports. The Panel would like to recall at this early stage that the general standard of review contained in Article 11 of the DSU[4878] is applicable to disputes involving claims of violation of the Agreement on Safeguards and Article XIX of GATT 1994.

10.22 The jurisprudence has examined the application of such general standard of review in the specific context of the Agreement on Safeguards. In *Argentina – Footwear (EC)*, the Appellate Body stated that, pursuant to Article 4, a Panel cannot conduct a *de novo* review of the evidence or substitute its analysis and judgment for that of the importing Member, but "[t]o determine whether the safeguard investigation and the resulting safeguard measure applied by [a Member] were consistent with Article 4 of the *Agreement on Safeguards*, the Panel was obliged, by the very terms of Article 4, to assess whether the [Member's] authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination."[4879]

10.23 The panels in *US – Wheat Gluten* and in *US – Line Pipe* concluded that a panel must assess whether a reasoned and adequate explanation has been provided as to how the facts support the determination[4880]. In *US – Lamb*, the Appellate Body added that "a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate only if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some

[4878] Article 11 of the DSU reads as follows: "Function of Panels: The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."

[4879] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 118 and 121.

[4880] Panel Report, *US – Wheat Gluten*, para. 8.5; Panel Report, *US – Line Pipe*, para. 7.194

alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation."[4881]

10.24 In *US – Cotton Yarn*, the Appellate Body referred to its jurisprudence developed under the Agreement on Safeguards and relied upon it for a dispute under the Agreement on Textiles and Clothing:

> "Our Reports in these disputes under the *Agreement on Safeguards* spell out key elements of a panel's standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations. This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority."[4882]

10.25 The Panel is of the view that the standard of review applicable in the present dispute must be seen in light of the distinction between the first and second enquiry that the Panel must perform when assessing a Member's compliance with the requirements of the Agreement on Safeguards and Article XIX of GATT 1994. When assessing a Member's compliance with its obligations pursuant to Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT, the Panel is *not* the initial fact-finder. Rather, the role of the Panel is to "review" determinations and demonstrations made and reported by an investigating authority.

10.26 The situation is different in the context of the second enquiry when assessing whether the measures were applied only to the extent necessary to prevent the serious injury caused by increased imports. In that situation, it is before the Panel, during the WTO dispute settlement process, that the importing Member is forced for the first time to respond to allegations relating to the level and extent of its safeguard measures. For us, this is clear from the following statement of the Appellate Body in *US – Line Pipe*:

> "[I]t is clear, therefore, that, […] Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied "only to the extent necessary.
>
> Article 5.1 does not establish a general procedural obligation to demonstrate compliance with Article 5.1, first sentence, at the time a measure is applied."[4883]

10.27 In that second enquiry, the Panel is thus reviewing whether the measures "as applied" comply with the requirements of Articles 5, 7, 8 and 9 of the Agreement on Safeguards on the basis of the evidence and arguments put forward by the parties during the WTO dispute settlement process.

[4881] Appellate Body Report, *US – Lamb*, para. 106.
[4882] Appellate Body Report, *US – Cotton Yarn*, para. 74
[4883] Appellate Body Report, *US – Line Pipe*, paras. 233-234.

5. Burden of proof

10.28 In general, under WTO law, the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption (or prima facie case) that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence and arguments to rebut the presumption. Therefore, it is for the complainants to convince the Panel that the United States did not comply with the provisions of the Agreement on Safeguards when it imposed its safeguards measures.

10.29 As discussed above, in the context of the Panel's first enquiry, it is for the complainants to convince the Panel that, in its Report, the United States failed to provide a reasoned and adequate explanation that the WTO pre-requisites for the imposition of safeguard measures were satisfied. In practice, before the WTO panel, the United States will defend USITC's demonstrations and determinations, and the complainants will challenge their WTO-compatibility. In the context of the Panel's second enquiry – when assessing whether the safeguard measures were imposed only to the extent necessary – the Appellate Body has ruled that when the panel concludes, at the end of its first enquiry, that the safeguard measures were imposed in violation of Article 4.2(b), a reversal of the burden of proof occurs so that there is a presumption that the safeguard measures were applied in a manner inconsistent with Article 5.1.[4884]

6. USITC data

10.30 As noted throughout our Reports, all data that has been relied upon by the Panel has been obtained directly from the USITC Report or from the various tables and annexes to which that report refers. In a number of sections in our Reports, we have represented USITC data in graphical form. In cases where data was available for interim 2001, the relevant graphs plot interim 2000 data together with interim 2001 data. We have indicated the USITC Report references to the sources for graphs contained in the Panel's Reports.

C. CLAIMS RELATING TO UNFORESEEN DEVELOPMENTS

1. Claims and arguments of the parties

10.31 The arguments of the parties can be found in Section VII.C.1 *supra*.

10.32 The European Communities, China, Switzerland, Norway and New Zealand claim that the USITC Report was issued without examining the issue of unforeseen developments, and/or that it did not provide an adequate and reasoned explanation of those developments and the manner in which they resulted in increased imports.[4885] New Zealand adds that the competent authority has failed to demonstrate the existence of unforeseen developments as a matter of fact.[4886] Moreover, the European Communities, China, Norway and New Zealand claim that no opportunity was provided by the USITC to interested parties to present evidence and their views on the issue of unforeseen developments.[4887] For all of these reasons, they claim that the United States has failed to comply with

[4884] See Appellate Body Report, *US – Line Pipe*, paras. 261-262.

[4885] European Communities' first written submission, paras. 122-123; China's first written submission, para. 86; Switzerland's first written submission, paras. 109-110; Norway's first written submission, paras. 110-111; New Zealand's first written submission, para. 4.11.

[4886] New Zealand's first written submission, para. 4.29

[4887] European Communities' first written submission, para. 178; China's first written submission, para. 125; Norway's first written submission, paras. 166; New Zealand's first written submission, para. 4.30; see also their respective written replies to Panel question No. 1 at the first substantive meeting.

the provisions of both Article 3.1 of the Agreement on Safeguards and Article XIX:1(a) of GATT 1994.

10.33 The United States responds that the USITC identified the unforeseen developments that resulted in increased imports of certain steel products in a manner that was consistent with the United States' obligations under Article XIX of GATT 1994 and Article 3.1 of the Agreement on Safeguards.[4888]

2. Relevant WTO provisions

10.34 Article XIX:1(a) of GATT 1994 provides as follows:

> "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

10.35 Article 3.1 of the Agreement on Safeguards provides:

> "A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law."

3. Analysis by the Panel

(a) The cumulative application of Article XIX of GATT 1994 and the Agreement on Safeguards

10.36 Article XIX of GATT 1994 provides that a Member is entitled to impose a safeguard measure "[i]f, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products". There is no reference to unforeseen developments in the Agreement on Safeguards. However, as repeatedly affirmed by the Appellate Body, Articles 1 and 11.1(a) of the Agreement on Safeguards express the continuing applicability of Article XIX of GATT which has been clarified and reinforced by the Agreement on Safeguards.[4889] This interpretation ensures that the provisions of the

[4888] United States' first written submission, para. 925.

[4889] See for instance the Appellate Body Report in *Korea – Dairy* at para. 74: "We agree with the statement of the Panel that: It is now well established that the WTO Agreement is a "Single Undertaking" and

Agreement on Safeguards and those of Article XIX are given their full meaning and their full legal effect within the context of the WTO Agreement.[4890]

10.37 It is now clear that the circumstances of unforeseen developments within the meaning of Article XIX:1(a) of GATT 1994 must be demonstrated as a matter of *fact*, together with the conditions mentioned in Article 2.1 of the Agreement on Safeguards, in the report of the competent authority and before a safeguard measure can be applied.[4891]

(b) Standard of review

10.38 As mentioned in paragraphs 10.21-10.24 above, the role of this Panel in the present dispute is not to conduct a *de novo* review of the USITC's determination.[4892] Rather, the Panel must examine whether the United States respected the provisions of Article XIX of GATT 1994 and of the Agreement on Safeguards, including Article 3.1. As further developed below, the Panel must examine whether the United States demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers.[4893]

10.39 In considering whether the United States demonstrated as a matter of fact that unforeseen developments resulted in increased imports causing serious injury, the Panel will also examine, in application of its standard of review, whether the competent authorities "considered all the relevant facts and had adequately explained how the facts supported the determinations that were made."[4894]

(c) What can constitute an unforeseen development?

10.40 An unforeseen development, pursuant to Article XIX:1(a) GATT 1994, is an unexpected circumstance which has led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to relevant domestic producers.[4895] In the current dispute, the United States argues that the USITC identified the financial crises that engulfed Southeast Asia (Asian crisis) and the former USSR (Russian crisis), the continued strength of the United States' market and persistent appreciation of the US dollar, and the confluence of all of these events as unforeseen developments.[4896] The European Communities, China, Switzerland and Norway contend that none of these events constituted unforeseen developments, nor did any combination of

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therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously …" and para. 78: "Having found that the provisions of *both* Article XIX:1 of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* apply to any safeguard measure taken under the *WTO Agreement* ".

[4890] Appellate Body Reports, *Argentina – Footwear (EC)*, para. 95; *Korea – Dairy*, para. 85; *US – Lamb*, para. 71.

[4891] Appellate Body Report, *US – Lamb*, para. 72; Appellate Body Report, *Korea – Dairy*, para. 85.

[4892] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 116-117; Appellate Body Report, *US – Lamb*, para. 97.

[4893] Appellate Body Report, *US – Lamb*, paras. 103-106.

[4894] Appellate Body Report, *Argentina – Footwear (EC)*, para. 121; Appellate Body Report, *US – Lamb*, para. 102.

[4895] Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

[4896] United States' first oral statement, para. 72.

them.[4897] The same four complainants as well as New Zealand argue that the developments mentioned by the United States were not unforeseen because they were not unexpected.[4898]

10.41 The legal standard that is used to determine what constitutes an unforeseen development is, as agreed by the parties, at least in part, subjective. This is supported by the Appellate Body, who stated in *Korea – Dairy* that safeguard measures "are to be invoked only in situations when … an importing Member finds itself confronted with developments *it had not 'foreseen' or 'expected'* when *it* incurred [its] obligation [under GATT 1994]." (emphasis added)[4899]

10.42 What was "unforeseen" when the contracting parties negotiated their first tariff concessions in all likelihood differs from what can be considered to be unforeseen today. The Panel notes that after 50 years of GATT, tariffs have, for many products, disappeared or reached very low levels. Futher, what constitutes "unforeseen developments" for an importing Member will vary depending on the context and the circumstances. Nevertheless, the subjectivity of the standard does not take away from the fact that the unexpectedness of a development[4900] for an importing Member is something that must be demonstrated through a reasoned and adequate explanation.

10.43 In addition, the standard for unforeseen developments may also be said to have an objective element. The appropriate focus is on what should or could have been foreseen in light of the circumstances. The standard is not what the specific negotiators had in mind but rather what they could (reasonably) have had in mind. This was recognized early in GATT by the *US – Fur Felt Hats* decision, which characterized unforeseen developments as "developments […] which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".[4901]

10.44 Moreover, since all the WTO prerequisites, including the demonstration of unforeseen developments, must be satisfied by each safeguard measure, the Panel believes that the factual demonstration of unforeseen developments[4902] must also relate to the specific product(s) covered by the specific measure(s) at issue. Therefore the reasoned and adequate explanation relating to unforeseen developments must contain *specific* factual demonstrations of unforeseen developments identified to have resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers for each safeguard measure at issue.

10.45 In assessing whether the USITC provided a reasoned and adequate explanation of unforeseen developments that resulted in increased imports causing serious injury, it is logical to consider whether the USITC addressed unforeseen developments at all in its published reports, as required by Article 3.1 of the Agreement on Safeguards and Article XIX of GATT 1994, which has been challenged by the complainants.

[4897] European Communities' first written submission, para. 151; China's first written submission, para. 97; Switzerland's first written submission, para. 137; Norway's first written submission, para. 139.

[4898] Switzerland's first oral statement on behalf of the complainants, para. 15.

[4899] Appellate Body Report, *Korea – Dairy*, para. 86 and Appellate Body Report, *Argentina – Footwear (EC)*, para. 93 (emphasis added).

[4900] Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

[4901] *US – Fur Felt Hats*, para. 9, cited with approval in Appellate Body Report, *Argentina – Footwear (EC)*, para. 96; Appellate Body Report, *Korea – Dairy*, para. 89.

[4902] Appellate Body Report, *US – Lamb*, para. 72; Appellate Body Report, *Argentina – Footwear (EC)*, para. 92; Appellate Body Report, *Korea – Dairy*, para. 85.

(d) Demonstration of "unforeseen developments" as a matter of fact: when, where and how to demonstrate unforeseen developments

(i) Claims and arguments of the parties

10.46 The arguments of the parties can be found in Sections VII.C.1; C.2(f) *supra*.

(ii) Analysis by the Panel

10.47 The Panel recalls that the complainants first raised issues relating to the format and timing of the demonstration of unforeseen developments. The complainants argue that the USITC Report was issued without examining the issue of unforeseen development. They submit that the initial USITC Report, with the exception of a discussion on the Asian and Russian crises, never addressed the requirement of unforeseen developments. They add that the Second Supplementary Report does not form part of the USITC Report and is an *ex post* attempt to demonstrate the existence of unforeseen developments, which did not feature in the same report as the USITC's determination. They argue, therefore, that the Second Supplementary Report should be disregarded. The United States responds that it is perfectly acceptable to issue separate reports, as there is no express guidance on "when, where and how" a demonstration of unforeseen developments must be made. According to the United States, the choice of whether the components of the report are issued at the same time or over a period of time is left to the discretion of the individual Member.[4903] The Panel will deal with the issues of the form and timing of the competent authorities' report in turn.

The "form" of the demonstration of unforeseen developments in relation to the decision to apply safeguard measures

10.48 In *US – Lamb*, the Appellate Body made it clear that the demonstration of unforeseen developments must be found in the report of the competent authority.[4904] As the parties have pointed out, the requirement to publish a report is a necessary step in conducting an investigation consistent with Article 3.1. However, Switzerland argues that the demonstration of unforeseen developments must be found in the same report as the one containing the determination made pursuant to Articles 2 and 4 of the Agreement on Safeguards and seems to imply that these elements should be contained in a single document.

10.49 The Panel agrees with the United States that nothing in the requirement to publish a report dictates the form that the report must take, provided that the report complies with all of the other obligations contained in the Agreement on Safeguards and Article XIX of GATT 1994. In the end, it is left to the discretion of the Members to determine the format of the report, including whether it is published in parts, so long as it contains all of the necessary elements, including findings and reasoned conclusions on all pertinent issues of fact and law. Together, these parts can form the report of the competent authority.

10.50 The Panel believes that a competent authority's report can be issued in different parts but such multi-part or multi-stage report must always provide for a coherent and integrated explanation proving satisfaction with the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards, including the demonstration that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers. Whether a report drafted in different parts or a multi-stage report constitutes "the report of the competent authority" is to be determined on a

[4903] United States' first written submission, para. 952.
[4904] Appellate Body Report, *US – Lamb*, para. 72; Appellate Body Report, *Korea – Dairy*, para. 85.

case-by-case basis and will depend on the overall structure, logic and coherence between the various stages or the various parts of the report. If separate parts of the report are issued at different times, the discussion relating to unforeseen developments must, in all cases, be integrated logically in the overall explanation as to how the importing Member's safeguard measures satisfies the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards. The publication of a report in many stages may produce added difficulties for the competent authorities to set forth coherent findings in a reasoned and adequate manner.

10.51 The complainants have also argued that the timing of the USITC's demonstration is not in accordance with the requirements of Article XIX of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as articulated by the Appellate Body. We deal with this issue below

The timing of the demonstration of unforeseen developments: before the application of the measure

10.52 Given that the demonstration of unforeseen developments is a prerequisite for the application of a safeguard measure[4905], it cannot take place after the date as of which the safeguard measure is applied. This has been confirmed by the Appellate Body, which noted, in *US – Lamb,* that although Article XIX provides no express guidance on where and when the demonstration of unforeseen developments is to be made, it is nonetheless a prerequisite, and "it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed."[4906] Any demonstration made after the start of the application of a safeguard measure would have to be disregarded automatically as it cannot afford legal justification for that measure.

10.53 Article 3.1 of the Agreement on Safeguards requires *inter alia* that Members apply a safeguard measure only after competent authorities set forth "their findings and reasoned conclusions reached on all pertinent issues of fact and law." Accordingly, the Appellate Body Report in *US – Lamb* stated that since the demonstration of unforeseen developments is a pertinent issue of fact and law for the application of a safeguard measure, "it follows that the published report of the competent authorities … must contain a 'finding' or 'reasoned conclusion' on 'unforeseen developments'."[4907] Such a reasoned and adequate explanation of how unforeseen developments resulted in increased imports causing serious injury must form part of the overall reported explanation by the competent authority that it has satisfied all the WTO prerequisites for the imposition of a safeguard measure. Since the demonstration of unforeseen developments must be included in the published report of the competent authorities it is necessary to look for the demonstration of unforeseen developments in the "report of the competent authority", completed and published prior to the application of the safeguard measures.

10.54 The Panel notes that, according to the United States, 22 October 2001 was the date of the determination made pursuant to Articles 2 and 4 of the Agreement on Safeguards.[4908] This determination was included in the USITC's Report published in December 2001. On 22 October 2001, the USITC had not completed its demonstration relating to unforeseen developments. In the Second Supplementary Report of 4 February 2002, findings were made principally with respect to the issues of "unforeseen developments" and potential exclusions of certain countries from the application of the

[4905] Appellate Body Report in *Korea – Dairy*, paragraph 85; see also, Appellate Body Report, *Argentina – Footwear (EC)*, para. 92.

[4906] Appellate Body Report, *US – Lamb*, para. 72 (emphasis in original); see also Panel Report, *US – Line Pipe*, para. 7.296.

[4907] Appellate Body Report, *US – Lamb*, para. 76.

[4908] United States' written reply to Panel question No. 15 at the first substantive meeting.

safeguard measures. The safeguard measures came into effect on 20 March 2002, pursuant to a proclamation by the President on 5 March 2002.[4909] We recall that the demonstration of unforeseen developments must be made in the report of the competent authority and before the measure is applied. To the extent that the February Second Supplementary Report formed part of the competent authority' report – an issue which we will ultimately not need to decide for reasons explained below – the demonstration of unforeseen developments was not necessarily made in an untimely fashion, since this later report was published before the measure was applied.

Conclusion

10.55 Before a decision to apply a safeguard measure can be made in accordance with Article 2 of the Agreement on Safeguards and Article XIX of GATT, a number of conditions must be fulfilled, and certain circumstances must be demonstrated. It is only once all of these prerequisites or requirements are fulfilled, including the completion of the investigation and the issuance of a report containing findings and reasoned conclusions, that a Member is entitled to impose a WTO-compatible safeguard measure.

10.56 The United States refers to 22 October 2001 as the date of the determination pursuant to Articles 2 and 4 of theAgreement on Safeguards. In the Panel's opinion that date cannot constitute the time at which full compliance was achieved with the requirements of Article XIX of GATT and the Agreement on Safeguards, since the USITC could only have completed its demonstration of unforeseen developments on 4 February 2002.

10.57 The Panel is of the view that the determination of satisfaction with the conditions mentioned in Articles 2 and 4 of the Agreement on Safeguards, as well as the factual demonstration of unforeseen developments required by Article XIX of GATT 1994, are distinct elements for which specific findings can be made by the competent authorities at different moments, as long as all such findings are logically and coherently integrated in a report published before the safeguard measure is applied.

10.58 For the purpose of the present review, the Panel will assume, *arguendo*, that the USITC Second Supplementary Report of February 2002 is part of the "USITC Report" for the purposes of Article 3.1 of the Agreement on Safeguards (and XIX of GATT 1994 relating to unforeseen developments). Therefore, any demonstration of unforeseen developments which must take place before the measure is applied must also be found in the USITC multi-stage report. The Second Supplementary Report was the last document published by the competent authority before the application of the safeguards measure, that could be said to form part of the "report of the competent authority". Since the Second Supplementary Report is the last pronouncement with regard to "unforeseen developments" before the application of the measures, the findings contained within it are the latest the Panel will take into consideration.

(e) The conduct of the investigation – the obligation to consult interested parties

(i) Claims and arguments of the parties

10.59 The arguments of the parties can be found in Section VII.C.2.(f)(iii) *supra*.

[4909] Proclamation 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, 7 March 2002.

(ii) Analysis by the Panel

10.60 The Panel recalls that the European Communities, China, Norway and New Zealand argue that, because the issue of unforeseen developments was only discussed in the Second Supplementary Report which came out after the conclusion of the investigation, the interested parties were not given an opportunity to comment on the discussion. This, they argue, is contrary to Article 3.1 of the Agreement on Safeguards, which contains a general obligation to allow interested parties to express their views and comment on the views and evidence of other parties concerning all pertinent issues of law and fact, including the issue of unforeseen developments.[4910] The United States responds that the USITC Report shows that the unforeseen conditions, which are demonstrated in the USITC Second Supplementary Report, informed its injury determination.[4911] Moreover, the USITC specifically sought information on unforeseen developments in the course of its investigation. Accordingly, argues the United States, the allegation that interested parties had no opportunity to present evidence and their views on this issue is patently incorrect.[4912]

10.61 The Panel recognizes that Article 3.1 of the Agreement on Safeguards provides certain procedural guarantees to interested parties, such as "reasonable public notice" and "public hearings or other appropriate means [to] present evidence and their views". The important role of interested parties was recognized by the Appellate Body in *US – Wheat Gluten*, when it stated as follows:

> "The focus of the investigative steps mentioned in Article 3.1 is on 'interested parties', who must be notified of the investigation, and who must be given an opportunity to submit 'evidence', as well as their 'views', to the competent authorities. The interested parties are also to be given an opportunity to 'respond to the presentations of other parties'. The *Agreement on Safeguards*, therefore, envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities."[4913]

10.62 Since the opportunity of interested parties to present evidence and their views is a necessary part of the investigation, it must be reflected in the published report. The United States does not dispute this, but argues instead that the interested parties were given multiple opportunities to present evidence and the USITC actively sought their input.[4914] According to the United States, this is reflected in the USITC Report.[4915]

[4910] European Communities' first written submission, para. 177; China's first written submission, para. 124; Norway's first written submission, para.165; New Zealand's first written submission, para. 4.29; European Communities', China's and Norway's written replies to Panel question No. 1 at the first substantive meeting.

[4911] USITC Report, pp. OVERVIEW-17, OVERVIEW-18, OVERVIEW-57.

[4912] United States' first written submission, para. 954; United States' written reply to Panel question No. 1 at the first substantive meeting.

[4913] Appellate Body Report, *US – Wheat Gluten*, para. 54.

[4914] In response to the Panel's question No.1 at the first substantive meeting, the United States replied: "In this investigation, the ITC gave public notice of its institution of the steel investigation. (66 Fed. Reg. 35267 (3 July 2001)). The ITC invited public comments and suggestions regarding the content of its questionnaires, which included a question regarding unforeseen developments. (66 Fed. Reg. 34717 (29 June 2001)). The ITC received extensive responses to that public request, including one 110-page submission from respondents from a variety of countries, including Japan, Korea, Brazil, and New Zealand. (Joint Comments of Respondents on Draft Questionnaires, 2 July 2001, Exhibit US-67.) The ITC accepted prehearing written submissions with no page limits, and several of those initial written submissions discussed unforeseen developments. (*E.g.*, Respondents' Joint Prehearing Framework Brief, 12 Sept. 2001 (Joint filing from 40 companies in 25 countries,

10.63 In particular, the USITC requested, by way of questionnaires to be returned by 30 July 2001, that the importers, producers and purchasers:

> "[P]lease identify any developments during the last ten years that resulted in certain steel products under investigation being imported into the United States in such increased quantities as to have an adverse impact on the domestic industry[ies] during the period January 1996-June 2001. For each development, please describe the development, when it occurred, and whether it was unexpected."[4916]

10.64 Based on the above questions, it is clear that the issue of unforeseen developments was part of the investigation. By inviting comments in response to the questionnaires, and addressing the issue during its public hearings[4917], the Panel is of the view that the United States has complied with its Article 3.1 obligation to provide "appropriate means in which importers, exporters and other interested parties [can] present evidence and their views".

10.65 The European Communities complains that "there was no provisional reasoning on or explanation of unforeseen developments on which interested parties could comment".[4918] The Panel does not believe that Article 3 of the Agreement on Safeguards requires the competent authority to send to interested parties "draft findings" of its demonstration relating to unforeseen developments in order to allow them to comment prior to the publication of the competent authority's report.

10.66 We, therefore, reject the European Communities, China, Norway and New Zealand 's claims that the United States violated Article 3.1 in refusing to provide to interested parties an opportunity to present evidence and share their views on unforeseen developments.

(f) Reasoned and adequate explanation that unforeseen developments resulted in increased imports causing serious injury

10.67 Following the approach suggested by the Appellate Body in *US – Lamb*[4919], the Panel will now consider whether the USITC offered a reasoned and adequate explanation as to why and how the cited unforeseen developments could be so regarded. This requires, at a minimum, some discussion by the competent authority as to how the developments were unforeseen at the appropriate time, and

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including Japan, Brazil, Thailand, Korea, the European Communities, Venezuela, Norway, India, New Zealand, and China), pp. 106-109 (Exhibit US-68); Prehearing Submission of the European Commission, 10 Sep. 2001, pp. 4-5 (Exhibit US-69); AK Steel Prehearing Brief, 11 Sep. 2001, pp. 60-63 (Exhibit US-70); Prehearing Brief of United Steelworkers of America, 11 Sep. 2001, pp. 129-131 (Exhibit US-71); Prehearing Brief of Domestic Carbon Flat Steel Producers, 11 Sep. 2001, pp. 31-36 (Exhibit US-72); Respondents' Joint Prehearing Brief for Product #18, Seamless Tubular Products other than OCTG, 10 Sep. 2001, pp. 11-13 (Exhibit US-73); Minimill Coalition (Long Products) Prehearing Brief, 11 Sep. 2001, pp. 18-22 (Exhibit US-74).) The ITC's prehearing Staff Report included information on the Asian economic crisis, continuing post-dissolution difficulties in the former USSR republics, and the appreciation of the US dollar. (Prehearing Staff Report at OVERVIEW-22-24 and OVERVIEW-70-71 (Exhibit US-75)). The ITC held a series of public hearings at which various Commissioners directly solicited comments from the parties on unforeseen developments. (Tr., pp. 326-327 (Chairman Koplan) (Exhibit US-44); 343 (Commissioner Hillman) (Exhibit US-45); 1445 (Vice Chairman Okun) (Exhibit US-46); and 2626 (Vice Chairman Okun) (Exhibit US-47)). The ITC accepted post-hearing written submissions with no page limits, several of which also discussed the issue of unforeseen developments."

[4915] United States' second written submission, para. 168.

[4916] Domestic Producer's Questionnaire, question I-7 (US-41); Importer's Questionnaire, question I-6 (US-42); Purchaser's Questionnaire, question I-6 (US-43).

[4917] United States' first written submission, para. 954.

[4918] European Communities' second written submission, para. 85.

[4919] Appellate Body Report, *US – Lamb*, para. 73.

why conditions in the second clause of Article XIX:1(a) occurred as a result of circumstances in the first clause.

(i) Unforeseen developments

Claims and arguments of the parties

10.68 The arguments of the parties can be found in Section VII.C.1 *supra*.

Analysis by the Panel

10.69 We will begin our assessment of the USITC's explanation of the unforeseen developments by considering the competent authority's explanation of why they were unforeseen. The Panel will then move on to consider the explanation of how the unforeseen developments "resulted in" increased imports. In order to answer these questions, it is necessary to ask what the alleged unforeseen developments were and as of when they must have been unforeseen.

10.70 The Appellate Body in both *Argentina – Footwear (EC)* and *Korea – Dairy* quoted the following statement from the *US – Fur Felt Hats* GATT Working Party report of 1951:

> " '[U]nforeseen developments' should be interpreted to mean *developments occurring after the negotiation of the relevant tariff concession* which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated."[4920]

10.71 In its report in *Korea – Dairy*, the Appellate Body made the following finding:

> "And, such 'emergency actions' are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation."[4921]

10.72 The United States argues that the four factors cited by the USITC, namely the Russian crisis, the Asian crisis and the continued strength of the United States' market together with the persistent appreciation of the US dollar, each constituted unforeseen developments. It also argues that the confluence, or simultaneous occurrence, of these three events amounted to an unforeseen development.[4922]

10.73 The complainants argue that none of the above events constituted unforeseen developments, nor did any combination of them.[4923] Moreover, they argue that the explanation of how the above events have resulted in increased imports has not been performed in a manner that is reasoned and adequate.

10.74 Parties agree that, in the present dispute, the point in time at which developments should have been unforeseen is that of the completion of the Uruguay Round. The Panel will apply the above

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[4920] *See* Appellate Body Reports, *Argentina – Footwear (EC)*, para. 96, and *Korea – Dairy*, para. 89, citing *US – Fur Felt Hats* , adopted 22 October 1951.

[4921] *See* Appellate Body Reports, *Argentina – Footwear (EC)*, para. 93, and *Korea – Dairy*, para. 86.

[4922] United States' first oral statement, para. 72.

[4923] European Communities' first written submission, para. 151; China's first written submission, para. 97; Switzerland's first written submission, para. 137; Norway's first written submission, para. 139.

interpretation to determine if the USITC assessed whether the developments which it identified were unforeseen as at the time that the Uruguay Round negotiations were concluded.

The Asian and Russian crises

10.75 The complainants argue that the Asian and Russian crises could not have been unforeseen because they were not unexpected.[4924] With respect to the Russian crisis, the dissolution of the USSR occurred in 1991. New Zealand argues that the United States' negotiators were fully aware of this when they agreed to tariff concessions during the Uruguay Round.[4925] The complainants contend that if a development had started before the concessions were granted, it could not be considered to have been unforeseen. For them, there is normally a close temporal connection between the unforeseen developments and the increased imports.[4926] Taking the figures from the USITC Report that show consumption drops and export increases, they argue that the changes in steel markets were much more pronounced after the dissolution of the former Soviet Union in 1991 than later on and could, therefore, not be unforeseen after 1994.[4927]

10.76 The United States responds that the Southeast Asia and former USSR crises were perhaps foreseeable in the general, hypothetical sense, but the timing, extent and ongoing effect on global steel trade were not foreseen by the United States until well after the conclusion of the Uruguay Round.[4928] It claims that the unforeseen developments that it is invoking took place after the Uruguay Round. The East Asian financial crisis began in mid-1997, and although the Soviet Union collapsed in 1991, with resulting dislocations in the successor states, these were not the developments that the USITC found to be unforeseen. Rather, the developments in question were such that those countries' conditions changed after 1996 from the condition prevalent at the time of the Uruguay Round negotiations.[4929]

10.77 The Panel will first consider the USITC's explanation of the Asian crisis as an unforeseen development before considering the Russian crisis, the invocation of the strength of the United States' economy and the appreciation of the US dollar, as well as the confluence of those factors.

Asian crisis

10.78 The USITC offered the following explanation in its initial report:

> "[S]ignificant production capacity increases occurred during a period of disruption in world steel markets. The depreciation of several Asian currencies in late 1997 and early 1998 significantly curtailed steel consumption in those countries and created a pool of steel seeking alternative markets."[4930]

10.79 For the Panel, this statement amounts to an identification of the depreciation of Asian currencies, which occurred in 1997 and 1998, and its effects on the steel world market, as unforeseen developments. Although it does not provide an explanation as to why the development was unforeseen, we can assume that, as the crisis began in 1997, it could not have been foreseen by the

[4924] Switzerland's first oral statement, delivered on behalf of the complainants, para. 15.
[4925] New Zealand's first written submission, paras. 4.25-4.27.
[4926] European Communities' first written submission, para 133; Norway's first written submission, para. 121; China's first written submission, para. 90.
[4927] Switzerland's first oral statement, delivered on behalf of the complainants, paras. 16-17.
[4928] United States' first written submission, para. 930.
[4929] United States' written reply to Panel question No. 11 at first substantive meeting.
[4930] USITC Report, p. 58 (footnotes omitted).

United States negotiators in 1994, when the Uruguay Round ended. Moreover, it is consistent with the following statement of the USITC, which was made in the Second Supplementary Report:

> "Growth rates in [South East Asian] countries exceeded eight percent per year in the first half of the 1990s. These high growth rates were supported by even sharper growth in exports. As late as the fall of 1997, economists projected continued growth at similarly impressive rates for these emerging markets. Despite this period of intense growth and generally optimistic predictions, the 'Asian Financial Crisis' began with the depreciation of the Thai baht in mid-1997. The depreciation of the baht and loss of investor confidence sparked a wider crisis that affected many developing markets. The crisis slowed economic growth and reduced demand for steel in many emerging country markets. Between 1997 and 1998, steel consumption in Indonesia, Korea, Malaysia, the Philippines, and Thailand fell by 29.6 million tons, a drop of 41.4 percent. In Korea alone finished steel consumption dropped by 14.5 million tons or 34.4 percent. The crisis also led to depreciations in the currencies of the Philippines, Indonesia, Malaysia, and Korea with respect to the US dollar. By January 1998, these currencies had declined between 38 and 76 percent in nominal terms."[4931]

10.80 Likewise, this statement identifies the Asian financial crisis as an unforeseen development, which began in 1997. It also explains that the development was not foreseen. Based on the USITC statements quoted above, the Panel concludes that the United States demonstrated that the Asian crisis and its effects on the steel world market could constitute an unforeseen development within the meaning of Article XIX of GATT 1994, since the Asian Crisis took place after the United States last negotiated its tariff concessions on the steel products covered by the investigation at issue. We explore in paragraphs 10.96-10.101 below, the USITC's explanation that the confluence of the Asian financial crisis, together with other factors (the Russian financial crisis, the strong United States' economy and the strong US dollar) constituted unforeseen developments that resulted in increased imports causing serious injury to the relevant domestic producers.

Russian crisis

10.81 With respect to the Russian crisis, the USITC stated, in its initial Report, that:

> "The dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries."[4932]

10.82 Further, in the Second Supplementary Report, the USITC explains that:

> "Although the dissolution of the former Soviet Union and the resulting economic dislocations in the former Soviet republics predated the conclusion of the Uruguay Round, unanticipated financial difficulties led to a sharp increase in exports of steel from the former Soviet Union between 1996 and 1999.[4933] In particular, as Russia and other former republics experienced intense financial disruptions and currency

[4931] USITC Second Supplementary Report, p. 4 (footnotes omitted).
[4932] USITC Report, p. 58 (footnotes omitted).
[4933] (original footnote) Exports increased because reductions in steel production in the former Soviet Union did not keep pace with declines in consumption. Steel consumption fell more than 70 percent from 1991 to 1998. USITC Pub. 3479, Vol. II at Table OVERVIEW-4.

> fluctuations in this period, steel exports rose nearly 22 percent.[4934] Other Eastern European countries also emerged as net exporters of steel."[4935]

10.83 The unforeseen developments, as identified by the USITC, were the "unanticipated financial difficulties", which, in particular, were the "intense financial disruptions and currency fluctuations" between 1996 and 1999, resulting from the dissolution of the Soviet Union.

10.84 The Panel is of the view that this statement distinguishes between the foreseen financial difficulties that arose from the dissolution of the USSR, and the financial difficulties that were unforeseen. The Panel is also of the view that there may be instances when an event which is already known will develop into a situation initially unforeseen. Therefore, an unforeseen development may evolve from well-known prior facts. Nevertheless, the competent authority must provide a reasoned and adequate explanation as to how the later developments were unforeseen given the earlier known facts.

10.85 Therefore, the Panel will accept, *arguendo*, that there may have been, between 1996 and 1999, unforeseen financial disruptions and currency fluctuations linked to the USSR dissolution that were thus unforeseen at the conclusion of the Uruguay Round.

The strength of the US economy and the appreciation of the US dollar

10.86 The European Communities, Norway, Switzerland and China argue that the "robustness" of the United States' market cannot be considered an "unforeseen development" by the United States, because United States' economic policy was likely to have been conducted with this objective.[4936] These complainants argue that the growth of the United States' economy started in 1990, well before the Uruguay Round, so it must have been foreseen.[4937] The European Communities, Norway and Switzerland also challenge the notion that such favourable developments are capable of being considered unforeseen developments, since the term within the meaning of Article XIX is meant to cover unfavourable developments or shocks to the system that are susceptible to lead to adverse consequences. Such is not the case of the "robustness" of the United States' economy and the strength of the US dollar.[4938]

10.87 The United States responds that nothing in Article XIX prevents the continued strength of a market or the appreciation of a currency from constituting an unforeseen development.[4939] It argues that in *US – Fur Felt Hats*, the unforeseen development was a shift in fashion to a different sort of hat. That shift in fashion was presumably unfavourable to the industries making the less fashionable hats, but that shift could probably not be described as "unfavourable" in any broader sense. According to the United States, *US – Fur Felt Hats* supports the conclusion that an unforeseen development may be a development that could be described as neutral or even positive in general terms, but which results in a change in trade patterns that proves injurious to a particular industry.[4940]

[4934] (original footnote) USITC Pub. 3479, Vol. II at OVERVIEW-19 and Table OVERVIEW-5.

[4935] USITC Second Supplementary Report, p. 4.

[4936] European Communities' first written submission, para. 150; Switzerland's first written submission, para. 136; Norway's first written submission, para. 138; China's first written submission, para. 100.

[4937] Switzerland's first oral statement, delivered on behalf of the complainants, para. 19.

[4938] European Communities' second written submission, para. 56; Norway's second written submission, para. 40; Switzerland's second written submission, para. 31.

[4939] United States' first written submission, paras. 972-973, citing USITC Second Supplementary Report, p.1; USITC Report, Table OVERVIEW-16.

[4940] United States' second oral statement, para. 106.

10.88 The Panel turns immediately to the explanation afforded by the USITC, which states that:

> "While other markets experienced significant turmoil and contraction after 1997, demand in the United States remained robust. Indeed, the US economy enjoyed an overall economic expansion in the 1990s of unprecedented length. Consequently, US demand for steel remained strong."

10.89 From the above statement, it seems that the competent authority did not interpret the robustness of the United States' economy to be an "unforeseen development" in and of itself[4941], but rather, it viewed the strength of the economy in the context of the turmoil in other markets. Therefore, the Panel is of the view that the strength of the United States' market was considered by the USITC along with the other alleged unforeseen developments and as part of a set of world events which *together* constituted unforeseen developments.

10.90 As regards the US dollar appreciation, the European Communities, Norway, China and Switzerland argue that a change in the value of a currency such as the US dollar cannot be accepted as an unforeseen development.[4942] According to the European Communities, China and Norway, exchange-rate developments are foreseeable in two main senses.[4943] First, it is foreseeable that the exchange rate between two currencies that are not fixed will change over time. Second, it is foreseeable that the exchange rate of a currency of a country with a robust economy and low inflation (such as the United States in the 1990s) will rise over time compared with the currency of a country with a weak economy and high inflation rate (such as Russia).[4944] For them, the value of the dollar in relation to other currencies has regularly changed by significant amounts since the collapse of the Bretton Woods system of fixed exchange rates in 1971. Such changes can no longer be considered to be "unforeseen", but it must, on the contrary, be considered to be quite expected that the dollar would not remain stable vis-à-vis other currencies.[4945]

[4941] However see at para. 976 of its first written submission, the United States argues that:

> "The ITC report cited a number of unforeseen developments that resulted in the ten steel products being imported into the United States in such increased quantities and under such conditions as to cause serious injury to the domestic industries. Each of those developments was unforeseen in and of itself. However, the confluence of this particular set of events can be described as an unforeseen development."

See also the United States' written reply to Panel question No. 18 at the first substantive meeting:

> "Are you relying/did the ITC rely on the robustness of the United States Dollar as an unforeseen development?
>
> The robustness of the United States dollar was a development which combined with the other developments, namely, the currency crises in Southeast Asia and the former USSR countries and the continued growth in steel demand in the US market as other markets declined, to produce the increased volume of imports."

[4942] European Communities' first written submission, para. 152; Switzerland's first written submission, para. 138; Norway's first written submission, para. 140; China's first written submission, para. 101.

[4943] European Communities', China's, and Norway's written replies to Panel question No. 10 at the first substantive meeting.

[4944] European Communities', China's, and Norway's written replies to Panel question No. 10 at the first substantive meeting.

[4945] Switzerland's first oral statement, delivered on behalf of the complainants, para. 20.

10.91 The United States responds that nothing in Article XIX prevents the appreciation of a currency from constituting an unforeseen development. The period under investigation saw persistent and widespread appreciation of the US dollar against virtually all other major currencies.[4946] The United States argues that the fact that exchange rates change over time could be described as foreseeable, but not necessarily foreseen. Particular exchange rate developments, such as an unusually rapid or severe change in rates, are not likely to have been foreseen at the time of a particular concession. It argues that the complainants have presented no evidence that the currency disruptions that occurred prior to the import surges were in fact foreseen by anyone, much less that those events were foreseen by any negotiator from the United States during the Uruguay Round.[4947]

10.92 Once again, the Panel turns immediately to the USITC explanation, which states that:

> "Continued growth in the US market, combined with uncertainty and contraction in other markets, led to significant upward pressure on the US dollar. The dollar appreciated significantly against many currencies during the period of investigation, and that appreciation became more notable after the foreign currency dislocations of 1997 and 1998. Between 1996 and the first quarter of 2001, many currencies experienced double-digit declines, in real terms, relative to the dollar.[4948] The high value of the US dollar made the US market an especially attractive market for steel products displaced from other markets."

10.93 Like the statement above regarding the strength of the United States' economy, this statement by the competent authority shows that the appreciation of the US dollar was not thought to be a stand-alone "unforeseen development". Instead, the USITC considered the relevance of the appreciation of the US dollar "after the foreign currency dislocations of 1997 and 1998". Presumably, it was the fact that the United States dollar remained high while the Thai baht, the Russian ruble and other Southeast Asian and Eastern European currencies became weak that allegedly resulted in increased imports. Moreover, the competent authority recognized the link between the upward pressure on the dollar and the combination of the growth in the United States' market with the contraction in other markets.

10.94 Since we believe the USITC did not regard the continued strength of the United States' market and appreciation of the US dollar as a distinct development, separate from the other alleged unforeseen developments, the Panel does not need to address the arguments of the complainants that such factors could not constitute unforeseen developments.

10.95 The Panel will thus review the explanation provided by the USITC which, in our view, treated the strength of the United States' market and the appreciation of the US dollar as factors that were part of a confluence of developments that together caused turmoil in these markets.

The confluence of developments

10.96 The European Communities, China, Switzerland and Norway argue that no combination of events cited by the USITC can constitute an unforeseen development.[4949]

[4946] United States' first written submission, paras. 972-973, citing USITC Second Supplementary Report, p.1; USITC Report, Table OVERVIEW-16.

[4947] United States' written reply to Panel question No. 10 at the first substantive meeting.

[4948] (original footnote) USITC Pub. 3479, Vol. II, Table OVERVIEW-16.

[4949] European Communities' first written submission, para. 151; China's first written submission, para. 97; Switzerland's first written submission, para. 137; Norway's first written submission, para. 139.

10.97 The United States argues that the robustness of the US dollar was a development which combined with the other developments, namely, the currency crises in Asia and the former USSR and the continued growth in steel demand in the United States' market as other markets declined, lead to increased imports.[4950]

10.98 The Panel has already accepted that the Russian and the Southeast Asian financial crises, at least conceptually, could be considered unforeseen developments that did not exist at the end of the Uruguay Round. We have also found that the USITC did not consider the strength of the United States' economy and the appreciation of the US dollar as unforeseen developments *per se;* it had referred to these factors in relation to other unforeseen developments, which *together* had resulted in increased imports causing or threatening to cause injury.

10.99 Article XIX does not preclude consideration of the confluence of a number of developments as "unforeseen developments". Accordingly, the Panel believes that confluence of developments can form the basis of "unforeseen developments" for the purposes of Article XIX of GATT 1994. The Panel is of the view, therefore, that it is for each Member to demonstrate that a confluence of circumstances that it considers were unforeseen at the time it concluded its tariff negotiations resulted in increased imports causing serious injury.

10.100 To the complainants' argument that the changes in steel markets were much more pronounced in 1991 following the dissolution of the former Soviet Union than later on and could not, therefore, be unforeseen after 1994, the Panel notes that the fact that the dissolution of the USSR and its overall effects may have constituted an unforeseen development in 1991 does not mean that a subsequent financial crisis also resulting somehow from the dissolution of the USSR, cannot, with other developments, be considered part of a "confluence of unforeseen developments" in 1997 for the purpose of Article XIX of GATT 1994.[4951]

10.101 The Panel will now proceed to an assessment of whether the USITC provided a reasoned and adequate explanation that the Asian and Russian crises taken together, alongside the additional factors of the strength of the United States' economy and the appreciation of the US dollar, and their effects on steel world markets, *resulted* in increased imports into the United States causing or threatening to cause serious injury to the relevant domestic producers.

(ii) " as a result of unforeseen developments and tariffs concessions"

Claims and arguments of the parties

10.102 The arguments of the parties can be found in Section VII.C.2.(d).

Analysis by the Panel

10.103 We recall that Article XIX of GATT 1994 reads as follows:

> "If, *as a result* of *unforeseen developments and* of the effect of the obligations incurred by a contracting party under this Agreement, including *tariff concessions*, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, (…)."

[4950] United States' written reply to Panel question No. 17 at the first substantive meeting.
[4951] Switzerland's first oral statement, delivered on behalf of the complainants, paras. 16-17.

10.104 The Appellate Body has interpreted the phrase "as a result of" in Article XIX:1(a) of GATT 1994 as a logical connection that exists between the first two clauses of that Article. In other words, a logical connection must be demonstrated to have existed between the elements of the first clause of Article XIX:1(a) – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions" – and the conditions set forth in the second clause of that Article – "increased imports causing serious injury" – for the imposition of a safeguard measure.[4952]

> Logical connection between unforeseen developments and "increased imports so as to cause serious injury"

10.105 In the following paragraphs, we note some of the references to the Russian crisis, the Asian crisis and exchange rates in the initial USITC Report and the Second Supplementary Report including the separate views of Commissioners Okun and Bragg.

10.106 The USITC offered the following statements, in its initial Report, with respect to:

> "CCFRS:
>
> These significant production capacity increases occurred during a period of disruption in world steel markets. The depreciation of several Asian currencies in late 1997 and early 1998 significantly curtailed steel consumption in those countries and created a pool of steel seeking alternative markets.[4953] The dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries.[4954] [4955]
>
> Hot-rolled bar:
>
> The timing of domestic producers' price declines do not correspond precisely to the timing of the import surges. The record, however, indicates that imports had a negative effect on prices and that the domestic industry used different strategies over the course of the period examined to compete with the imports. The largest increase in hot-rolled bar imports occurred in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries. Import volumes increased by 29.5 percent from 1997 to 1998.[4956] [4957]
>
> Cold-finished bar:
>
> A substantial increase in cold-finished bar imports occurred in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries.[4958]

[4952] Appellate Body Reports, *Argentina – Footwear (EC)*, para. 92; *Korea – Dairy*, para. 85.
[4953] (original footnote) CR and PR, p. OVERVIEW-17.
[4954] (original footnote) CR and PR, p. OVERVIEW-18.
[4955] USITC Report, p. 58.
[4956] (original footnote) CR and PR, Table LONG-5.
[4957] USITC Report, p. 96.
[4958] USITC Report, p.106, fn. 630.

> Rebar:
>
> Rebar imports increased significantly in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries.[4959]
>
> Stainless Steel Wire Rod:
>
> We have taken into account a number of factors that affect the competitiveness of domestic and imported stainless rod in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, market conditions, and exchange rates."[4960]

10.107 In a separate decision, Commissioner Okun made the following remark with respect to the "Selection of Import Quotas" as part of a "Justification for Form of Relief":

> "[T]he record indicates that the currencies of selected countries, many of which export substantial amounts of steel to the United States, demonstrated substantial depreciations relative to the US dollar.[4961] Exchange rate fluctuations between the US dollar and foreign currencies can have a significant effect on the relative competitiveness of global steelmakers selling products in the US market. Quotas prevent a surge of low-priced imports from countries that have experienced currency depreciations."[4962]

10.108 The USITC also appended the following to its December 2001 Report:

> "THE ASIAN FINANCIAL CRISIS
>
> The 'Asian Financial Crisis' began with the depreciation of the Thai baht in mid-1997, followed by depreciations in the currencies of the Philippines, Indonesia, Malaysia and Korea. During January 1996-January 1998, the currencies of these five countries depreciated between 38 and 76% in nominal terms. As these economies slowed, their finished steel consumption fell significantly (figure OVERVIEW-7). Finished steel consumption in Indonesia, Korea, Malaysia, the Philippines and Thailand together fell by 29.6 million tons during 1997-98, with the largest decline occurring with respect to Korean finished steel consumption, 14.5 million tons.[4963]
>
> […]

[4959] USITC Report, p. 113.
[4960] USITC Report, p. 217.
[4961] (original footnote) CR/PR at Table OVERVIEW-16. All but two countries showed depreciations.
[4962] Views of Vice Chairman Deanna Tanner Okun on Remedy, USITC Report, p.437.
[4963] USITC Report, Vol. II, p. OVERVIEW-17; Followed this excerpt is Figure OVERVIEW-7, a graph entitled "Finished steel consumption in selected Asian countries, 1991-99", demonstrating the consumption trends for Indonesia, Korea, Malaysia, the Philippines and Thailand. Unfortunately, we are unable to reproduce the graph in the present Panel Reports because we do not have the data upon which the graph was based, p. OVERVIEW-18.

POST-USSR DEVELOPMENTS

Changes in Russia and other states formerly part of the USSR during 1991-2000 have had an impact on the global steel market. The shift in these states toward market forces in 1992 precipitated a drop in overall economic activity, especially in industrial output and investment such as machine building, which has been a major focus of the USSR steel industry. The problems in the overall post-USSR economy resulted in sharp declines in both steel production (table OVERVIEW-3) and steel consumption (table OVERVIEW-4).

Table OVERVIEW-3
Production of Crude Steel in Russia, Ukraine and the Former USSR, 1991-2000

Country	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Quantity (1,000 tons)										
Russia	(1)	73,902	64,329	53,817	56,879	54,303	53,475	48,315	56,792	65,160
Ukraine	(1)	46,041	35,953	26,550	24,596	24,622	28,257	26,951	30,268	34,620
Former USSR[2]	146,460	130,077	108,171	86,281	87,194	85,088	89,334	82,051	94,975	(1)

[1] Not available
[2] Includes all of the states of the former USSR. Virtually all of the steel production is in Russia, Ukraine and Kazakhstan (in order of the volume produced).

Source: IISI

Table OVERVIEW-4
Apparent Consumption of Finished Steel in Russia, Ukraine and the Former USSR, 1991-2000

Country	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Quantity (1,000 tons)										
Russia	(1)	50,539	34,026	21,904	20,728	18,082	17,200	16,979	18,633	25,358
Ukraine	(1)	27,901	16,510	7,718	6,505	6,946	9,041	5,954	9,592	10,695
Former USSR[2]	111,029	84,495	56,997	37,785	35,502	33,407	34,840	31,753	37,045	44,873

[1] Not available
[2] Includes all of the states of the former USSR.

Source: IISI

The movement toward a market economy also resulted in a disruption of traditional trade flows for steel within the former COMECON structure. COMECON was set up in 1949 to facilitate trade and economic cooperation between the USSR and certain communist countries. The organization attempted to integrate the economies of Eastern Europe with that of the USSR. From 1949 to 1991, USSR steel exports primarily went to COMECON members. With the breakup of the USSR and movement by the former USSR toward a market economy, COMECON became obsolete. The ending of COMECON in 1991 marked a loss to the former USSR of its traditional foreign buyers of its steel. The position of the former USSR in the global steel market changed from a minor player in 1991 to the largest steel exporter in the

world by 1999. These developments have resulted in trade frictions in many markets. Anti-dumping investigations or orders have been initiated against imports of Russian steel by 21 trading partners including Argentina, Brazil, Canada, Chile, China, Colombia, the EU, India, Indonesia, Korea, Malaysia, Mexico, Peru, the Philippines, South Africa, Taiwan, Thailand, Turkey, the United States, Venezuela and Vietnam. In addition, both the EU and the United States have negotiated agreements setting quotas on imports of most Russian steel products. The United States also has two suspension agreements in place on imports of Russian hot-rolled steel and steel plate.

With the restructuring of the economy in the post-USSR period, energy and transportation costs are rising, resulting in a significant increase in production costs. Full restructuring and movement toward market relations is hindered in part because these mills continue to provide the entire wage base in some areas. Several also accounted for a sizable share of USSR regional agricultural production. Therefore, steel producers face decreased domestic demand and increased energy, transportation and input costs while lacking the ability to cut costs by substantially reducing the number of employees. One way steel producers have tried to resolve these problems is to substantially increase exports (table OVERVIEW-5).

Table OVERVIEW-5
Exports of Steel from Russia, Ukraine and the Former USSR, 1991-2000

Country	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Quantity (1,000 tons)										
Russia	(1)	7,912	18,388	28,275	30,178	29,762	28,798	27,377	30,313	(1)
Ukraine	(1)	8,580	12,083	12,831	12,848	13,387	17,803	17,583	20,896	(1)
Former USSR[2]	6,101	21,375	33,160	44,278	46,481	46,763	51,696	49,916	57,018	(1)

[1] Not available
[2] Includes all of the states of the former USSR.

Source: IISI

[…]

EXCHANGE RATES

Exchange rate fluctuations between the US dollar and foreign currencies can have a significant effect on the relative competitiveness of global steelmakers selling products in the US market. As shown in table OVERVIEW-16, the dollar has strengthened considerably against the currencies of many of the major import sources for subject steel products during the period examined. As a country's currency depreciates against the dollar, the foreign producer can lower product prices expressed in dollars in the US market while still receiving the same price expressed in its home currency. These shifts are mitigated somewhat in many countries as the major raw materials used in steelmaking, such as iron ore, scrap, and metallurgical coal and coke, are sold on a dollar-basis throughout the world. However, for

countries that purchase raw materials in the global market, an estimated two-thirds of the costs of steelmaking are still in local currencies.[4964]

[…]

Table OVERVIEW-16
Overall Appreciation and Depreciation Amounts for Currencies
of Selected Countries relative to the US dollar,
January-March 1996 through January-March 2001

Country	Nominal Exchange Rate		Real Exchange Rate	
	Appreciation	Depreciation	Appreciation	Depreciation
Argentina	–	–	–	11.5
Australia	43.4	–	48.1	–
Brazil	–	52.0	–	24.9
Canada	–	10.5	–	9.1
Germany	–	30.4	–	36.0
India	–	33.5	–	8.2
Indonesia	–	76.3	–	31.1
Italy	–	24.8	–	25.0
Japan	–	10.4	–	20.1
Korea	–	38.4	–	31.7
Latvia	–	11.3	–	13.8
Mexico	–	22.4	36.7	–
Netherlands	–	31.1	–	33.6
Poland	–	37.9	55.8	–
Romania	–	89.7	10.9	–
Russia	–	83.3	–	45.6
South Africa	–	51.9	–	37.1
Spain	–	31.2	–	31.2
Thailand	–	41.5	–	37.0
Turkey	–	91.9	–	19.2
United Kingdom	4.8	–	2.2	–
Source: International Monetary Fund, *International Financial Statistics*, December 1999 and July 2001.				

[4964](original footnote) Peter Marcus and Karlis Kirsis, *Steel in 2001: Constraints Unparalleled, Opportunities Unmatched*, presented to Steel Success Strategies XVI, World Steel Dynamics, 19 June 2001.

10.109 On 3 January 2002, the USTR asked the USITC to provide, *inter alia*, additional information on unforeseen developments. On 9 February 2002, the USITC responded to this request, submitting its Second Supplementary Report, which states by way of introduction:

> "We provide the following response to USTR's request that we identify any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof. (…)
>
> To the extent that WTO panel decisions have suggested that the concept of 'unforeseen' developments relates to the expectations of negotiators of the relevant tariff concessions, we note that such an assessment is in many respects outside of the purview of this agency, since multilateral trade negotiations are not within its mandate, but are the responsibility of the USTR and relevant Executive Branch agencies."[4965]

10.110 The Second Supplementary Report then goes on to provide an explanation of "unforeseen developments". The USITC's explanation is rather brief:

> "At the time of the Uruguay Round negotiations, and for some time after its conclusion, there had been substantial overall economic growth in a number of emerging markets, most notably those in southeast Asia. Growth rates in those countries exceeded eight percent per year in the first half of the 1990s.[4966] These high growth rates were supported by even sharper growth in exports.[4967] As late as the fall of 1997, economists projected continued growth at similarly impressive rates for these emerging markets.[4968] Despite this period of intense growth and generally optimistic predictions, the "Asian Financial Crisis" began with the depreciation of the Thai baht in mid-1997.[4969] The depreciation of the baht and loss of investor confidence sparked a wider crisis that affected many developing markets. The crisis slowed economic growth and reduced demand for steel in many emerging country markets. Between 1997 and 1998, steel consumption in Indonesia, Korea, Malaysia, the Philippines, and Thailand fell by 29.6 million tons, a drop of 41.4 percent.[4970] In Korea alone finished steel consumption dropped by 14.5 million tons or 34.4 percent.[4971] The crisis also led to depreciations in the currencies of the Philippines, Indonesia, Malaysia, and Korea with respect to the US dollar.[4972] By January 1998, these currencies had declined between 38 and 76 percent in nominal terms.[4973]

[4965] (original footnote) USITC Second Supplementary Report, Attachment I, pp. 1-4 (Exhibit CC-11).
[4966] (original footnote) World Economic Outlooks, October 1995-October 1997, Surveys by the Staff of the International Monetary Fund, Exh. 19 of Minimill 201 Coalition (Long Products) Prehearing Injury Brief.
[4967] (original footnote) World Economic Outlooks and APEC Economic Forecasts, Exhs. 19 and 20 of Minimill 201 Coalition (Long Products) Prehearing Injury Brief.
[4968] (original footnote) World Economic Outlooks, Exh. 19 of Minimill 201 Coalition (Long Products) Prehearing Injury Brief and pp. 20-21.
[4969] (original footnote) *Steel*, Inv. No. TA-201-73, USITC Pub. 3479 (Dec. 2001), Vol II, OVERVIEW-17.
[4970] (original footnote) USITC Pub. 3479, Vol. II, OVERVIEW-17.
[4971] (original footnote) USITC Pub. 3479, Vol. II, OVERVIEW-17.
[4972] (original footnote) USITC Pub. 3479, Vol. II at OVERVIEW-17.
[4973] (original footnote) USITC Pub. 3479, Vol. II at OVERVIEW-17.

Although the dissolution of the former Soviet Union and the resulting economic dislocations in the former Soviet republics predated the conclusion of the Uruguay Round, unanticipated financial difficulties led to a sharp increase in exports of steel from the former Soviet Union between 1996 and 1999.[4974] In particular, as Russia and other former republics experienced intense financial disruptions and currency fluctuations in this period, steel exports rose nearly 22 percent.[4975] Other Eastern European countries also emerged as net exporters of steel.[4976]

While other markets experienced significant turmoil and contraction after 1997, demand in the United States remained robust. Indeed, the US economy enjoyed an overall economic expansion in the 1990s of unprecedented length. Consequently, US demand for steel remained strong. Apparent US consumption of certain flat-rolled carbon steel products rose by 7.8 percent between 1996 and 2000, and apparent US consumption peaked in 2000.[4977] Apparent US consumption of long products rose by 20.5 percent between 1996 and 2000 and apparent US consumption for the period peaked in 2000.[4978] Apparent US consumption of tubular products rose 18.2 percent between 1996 and 2000, with apparent US consumption peaking in 2000.[4979] Apparent US consumption of stainless products increased 29.5 percent between 1996 and 2000, with apparent US consumption peaking in 2000.[4980]

Continued growth in the US market, combined with uncertainty and contraction in other markets, led to significant upward pressure on the US dollar. The dollar appreciated significantly against many currencies during the period of investigation, and that appreciation became more notable after the foreign currency dislocations of 1997 and 1998. Between 1996 and the first quarter of 2001, many currencies experienced double-digit declines, in real terms, relative to the dollar.[4981] The high value of the US dollar made the US market an especially attractive market for steel products displaced from other markets.

Steel imports historically have played a role in the US market.[4982] After the beginning of the Asian and Russian economic crises, however, unusually large volumes of foreign steel production were displaced from foreign consumption. The US market, in which demand remained strong, was the destination for a significant portion of that displaced foreign production. Widespread currency devaluations made the displaced exports especially attractive to US purchasers on price terms. As currency depreciations and economic contractions disrupted other markets, the share of steel imports to the US market increased sharply and US prices declined."[4983] [4984] [4985]

[4974] (original footnote) Exports increased because reductions in steel production in the former Soviet Union did not keep pace with declines in consumption. Steel consumption fell more than 70 percent from 1991 to 1998. USITC Pub. 3479, Vol. II at Table OVERVIEW-4.

[4975] (original footnote) USITC Pub. 3479, Vol. II at OVERVIEW-19 and Table OVERVIEW-5.

[4976] (original footnote) Questionnaire Responses of US producers, importers, purchasers, and foreign producers.

[4977] (original footnote) INV-Y-209 at Table FLAT-ALT7.

[4978] (original footnote) USITC Pub. 3479, Vol. III at Table LONG-C-1.

[4979] (original footnote) USITC Pub. 3479, Vol. III at Table TUBULAR-C-1.

[4980] (original footnote) USITC Pub. 3479, Vol. III at Table STAINLESS-C-1.

[4981] (original footnote) USITC Pub. 3479, Vol. II at Table OVERVIEW-16.

[4982] (original footnote) USITC Pub. 3479, Vol. II at Figure OVERVIEW-10.

[4983] (original footnote) USITC Pub. 3479, Vol. II at Figures OVERVIEW-10 and OVERVIEW-16.

10.111 We also looked at Commissioner Bragg's separate opinion in the Second Supplementary Report with respect to "unforeseen developments". Her statement, in its entirety, is as follows:

> "For each affirmative determination I rendered under Section 202(b)(1) of the Trade Act, as I stated in my separate views on injury, I considered the condition of the domestic industry over the course of the relevant business cycle, in order to properly understand the role of imports in the US market over the period of investigation. I further examined factors other than imports that may be a cause of serious injury or threat to the domestic industry.[4986] Importantly, these other factors were also considered within the context of the relevant business cycle.
>
> The framework of my injury analyses was based upon the statutory directive that the Commission consider the condition of each domestic industry over the course of the relevant business cycle[4987], as well as examine factors other than imports that may be a cause of serious injury or threat to the domestic industry.[4988] Importantly, both the timing and trend of each domestic industry's business cycle are difficult, if not impossible to anticipate, as well as those conditions of competition which can magnify or diminish the operation of each domestic industry's business cycle. Although the nature and importance of the business cycle for each domestic industry is empirically recognized to varying degrees, it is only within the context of the course of the relevant business cycle, including the unexpected and uncontrollable upturn and downturn in the cycle, together with the unprecedented level of injury demonstrated by the domestic industries and the unforeseen volume and timing of increased imports, that one can adequately determine the full and relevant impact of increased imports on the domestic industries over the entire period of investigation.
>
> In particular, as the record data indicate, imports increased over the period of investigation with many product categories at issue experiencing peak import volumes in 1998. It is apparent that these increased imports were the result of the

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[4984] (original footnote) Most of the increase in stainless and tool steel imports occurred late in the period of investigation. The record indicates that the dramatic changes in exchange rates for the US dollar during the period of investigation led to increased imports of stainless and tool steel products during the latter half of the period. Moreover, while the Asian financial crisis and the dissolution of the Soviet Union (and the consequent changes in the Russian and Eastern European markets for steel) may have played a smaller role than they did on imports of other steel products covered by this investigation, their continued effect made the US market more attractive to imports of stainless and tool steel products. These unforeseen developments affected the conditions of competition under which stainless and tool steel imports caused serious injury or threatened to cause serious injury to the domestic stainless bar, stainless wire rod, stainless wire, stainless fittings, and tool steel industries. *See* INV-Z-013.

[4985] USITC Second Supplementary Report.

[4986] (original footnote) In the investigation questionnaires, US producers, US importers, foreign producers, and US purchasers identified certain developments (and whether the developments were unexpected) during the last ten years that resulted in certain steel products under investigation being imported into the United States in such increased quantities as to have an adverse impact on the domestic industries during the period January 1996 to June 2001. Generally, for each of the like product categories I found in my determinations, the responses identified several common unforeseen developments, including the Asian economic crisis, Russian economic crisis, the collapse of the USSR., emergence of Eastern Europe and China as global steel producers, increasing US demand, the strength of the US dollar relative to foreign currencies, and lower prices of imports. See Commission questionnaire responses from US producers, US importers, foreign producers, and US purchasers indicating any developments and whether such developments were unexpected.

[4987] (original footnote) 19 U.S.C. § 2252(c)(2)(A).

[4988] (original footnote) 19 U.S.C. § 2252(c)(2)(B).

unforeseen global financial crises in Asia and Russia, as well as unanticipated levels of global steel overcapacity, the collapse of foreign steel markets, emerging countries beginning massive steel production, and foreign producers focusing their sales into the lucrative US market, as discussed in my colleagues' response.[4989] Each of these factors was identified in several questionnaire responses. The timing of these imports was such that the volume of imports increased just as the domestic producers expected to enjoy gains in profitability given the simultaneous upswing in the relevant business cycle. As stated in my views, historically, gains during upswings are essential for domestic producers to build financial resources to withstand the inevitable downturn in the cycle. Thus, here the impact of opportunities lost during an upswing in the cycle not only had an immediate impact on the domestic industry by virtue of suppressed and depressed prices, lost sales, and resulting lost revenues, but also produced carryover effects on the domestic industry, which lingered as the cycle turned lower.

Having lost opportunities to the unforeseen increase and timing of imports during the upturn in the relevant business cycle of each domestic industry, many of the industries were therefore weakened in their ability to withstand a downturn and unprepared for the continued impact of lower-priced and sustained imports. As the cycles turned lower towards the end of the investigation period, imports continued entering the United States at relatively high levels further pressuring the domestic market. The effects of injury carryover from the unexpected 1998 surges, together with the more contemporaneous injury resulting from imports continuing to enter the United States at high levels, had a combined hammering effect on the various domestic industries and disrupted the ability of each domestic industry to adjust to the business cycle. As a result, profits for most domestic industries declined sharply and several domestic producers were forced into bankruptcy.

Accordingly, the unforeseen developments identified in this investigation include the Asian economic crisis, Russian economic crisis, the collapse of the USSR., emergence of Eastern Europe and China as global steel producers, increasing US demand, the strength of the US dollar relative to foreign currencies, and lower prices of imports. Within the context of the relevant business cycle of each domestic industry, these unforeseen developments, as identified by several questionnaire responses, led to the relevant steel products being imported into the United States in such unforeseen timing and increased quantities as to be a substantial cause of unprecedented level of serious injury demonstrated by the domestic industry."

Claims and arguments of the parties

10.112 The arguments of the parties can be found in Section VII.C.2(d)(i) *supra*.

[4989] (original footnote) I concur with my colleagues' discussion regarding the response to question 1-Unforeseen developments, with exception of the first three paragraphs. Although I do not necessarily disagree with the perspective provided in the first three paragraphs, I note that the parties and others did not have an opportunity to comment on this construction of "unforeseen developments."

Analysis by the Panel

10.113 Although all of the parties to this dispute recognize the need to show that a logical connection exists between "unforeseen developments" and the increased imports which a Member is seeking to address through the use of a safeguard measure[4990], they differ on how this can be achieved.

10.114 For the complainants, there must be a "causal link" between "unforeseen developments" and increased imports that cause or threaten to cause serious injury.[4991] The investigating authority must explain how these developments are linked to the increased imports that they rely on for the imposition of a safeguard measure.[4992] For the complainants, the USITC's analysis was based on scattered and incomplete facts and resulted in vague suggestions and speculations that severe currency dislocations in the former USSR and Asia led to massive increases of exports, or reductions in steel imports, in these countries, which consequently increased the amounts of steel on the world market and allegedly caused increased imports into the United States. The USITC's assumptions rely on data showing a decline in consumption of steel in the affected markets. The USITC did not, however, address whether production also declined in those markets. According to the United States, the phrase "as a result of" indicates that one thing is the "effect, consequence, issue, or outcome" of another. Therefore, showing that a product is being imported in such quantities and under such conditions as to cause serious injury as a result of unforeseen developments by itself establishes a logical connection between the first and second clauses of Article XIX:1(a). There is no need for a further demonstration or explanation.[4993]

10.115 The Panel agrees with New Zealand that it would be improper to reduce to a nullity the obligation to explain how "unforeseen developments" resulted in increased imports causing or threatening to cause serious injury. In some cases, the explanation may be as simple as bringing two sets of facts together. However, in other situations, it may require much more detailed analysis in order to make clear the relationship that exists between the unforeseen developments and the increased imports that are causing or threatening to cause serious injury. The nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation, its extent and its quality are all factors that can affect whether a explanation is reasoned and adequate.

10.116 First, the Panel notes that at no point in the initial USITC Report is the issue of "unforeseen developments" *per se* mentioned, except, as the complainants have pointed out, in a footnote in the separate view of one commissioner explaining that although such a demonstration is required in WTO law, it is not required by US law.[4994] There is otherwise no discussion of the effects of unforeseen developments for the specific safeguard measures at issue. It is true that the dissolution of the USSR and the depreciation of Asian currencies are mentioned with respect to CCFRS.[4995] The relevant paragraph, which pertains to a discussion on causation, refers to the OVERVIEW section of the Appendix to the Report, a 2-3 pages discussion on the Russian crisis, the Asian crisis and exchange rates. There are also additional references in the determinations for hot-rolled bar, cold-finished bar,

[4990] Appellate Body Reports, *Argentina – Footwear (EC)*, para. 92; *Korea – Dairy*, para. 85.

[4991] See the written replies of the European Communities, China, and Norway to Panel question No. 2 at the first substantive meeting.

[4992] New Zealand's written reply to Panel question No. 2 at the first substantive meeting.

[4993] United States' written reply to Panel question No. 2 at the first substantive meeting.

[4994] Switzerland's first oral statement, paras. 8-10, citing USITC Report, Vol. I, separate opinion of Commissioner Bragg, p. 270, footnote 4. (Exhibit CC-6).

[4995] See para. 10.106.

rebar and stainless steel rod, as listed in paragraphs 10.106-10.108 above. In the OVERVIEW section, the Russian and Asia crises as well as exchange rate fluctuations are identified, and post-USSR changes are even referred to as "developments"[4996], but the identification of these crises and fluctuations is not done within the context of an explanation of whether they constituted unforeseen developments and whether they resulted in increased imports causing injury.

10.117 In addition, in its initial Report, the USITC stated that "[t]he dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries", again without any supporting data.[4997] Moreover, the United States points in its submissions to the increase of imports from Russia, Kazakhstan and Lithuania.[4998] These figures were part of a chart of imports from numerous countries (INV-Y-180), but the chart was cross-referred in the USITC Report only to support statements relating to NAFTA imports[4999] or imports generally without any discussion of whether the imports were as a result of unforeseen developments.[5000] More importantly, they were not cited in support of, or included in, any discussion relating to unforeseen developments. Likewise, therefore, they cannot be used before the Panel to fill gaps in the USITC's reasoning.

10.118 In summary, there are only ad hoc references to the Asian and Russian crises in the initial USITC Report, which did not address the issue of "unforeseen developments" *per se*. Moreover, there is no adequate discussion of the linkage between unforeseen developments and increased imports causing serious injury in relation to each of the specific safeguard measures at issues in this dispute.

10.119 We examine now the February Second Supplementary Report which begins with the following statement:

> "We provide the following response to USTR's request that we identify any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof. (…)"

10.120 This may be an acknowledgement by the USITC that it was, for the first time, formally identifying "unforeseen developments" that resulted in the relevant steel products being imported into the United States in such increased quantities as to cause serious injury or the threat thereof, within the meaning of Article XIX of GATT 1994. We note in this regard the statement by the USITC that "To the extent that WTO panel decisions have suggested that the concept of 'unforeseen' developments relates to the expectations of negotiators of the relevant tariff concessions, we note that such an assessment is in many respects outside of the purview of this agency, since multilateral trade

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[4996] See para. 10.108.

[4997] USITC Report, p. 58.

[4998] United States' first written submission, paras. 970-971, citing USITC Dataweb tables (US-49), which were not included in the report of the competent authority, and INV-Y-180 :-(US-40), which was cited in the report of the competent authority but for reasons having nothing to do with an explanation of unforeseen developments.

[4999] USITC Report, pp. 167-169, footnotes 1026, 1032, 1044; p. 179, footnote 1109; pp. 213-214, footnotes 1354-1355 and 1357-1361; pp. 222-223, footnotes 1433-1437; similar cross-references can be found among the Commissioners' separate views.

[5000] USITC Report, p. 210, footnote 1328; p.213, footnote 1353; p. 218, footnote 1402; p. 222, footnote 1432; p. 371, footnote 88; pp. 372-373, footnote 98; p. 374, footnote 108; pp. 387-388, footnote 165; p. 396, footnote 203; p. 402, footnote 245; similar cross-references can be found among the Commissioners' separate views.

negotiations are not within its mandate, but are the responsibility of the USTR and relevant Executive Branch agencies."[5001]

10.121 In the Secondary Supplementary Report, the USITC insists on the *overall effects* of the Asian and Russian financial crisis together with the strong US dollar and economy to displace steel to other markets (and evidenced by what it calls "trade frictions in many markets"). Following the Russian crisis, for instance, anti-dumping investigations or orders had been initiated against imports of Russian steel by 21 trading partners including Argentina, Brazil, Canada, Chile, China, Colombia, the EU, India, Indonesia, Korea, Malaysia, Mexico, Peru, the Philippines, South Africa, Taiwan, Thailand, Turkey, the United States, Venezuela and Vietnam.

10.122 In our view, the weakness of the USITC Report is that, although it describes a plausible set of unforeseen developments that may have resulted in increased imports to the United States from various sources, it falls short of demonstrating that such developments actually resulted in increased imports into the United States causing serious injury to the relevant domestic producers.

10.123 The Panel is of the view that even if "large volumes of foreign steel production were displaced from foreign consumption"[5002] this does not, in itself, imply that imports to the United States increased as a result of unforeseen developments. Article XIX of GATT, however, requires a demonstration that the unforeseen development resulted in *increased imports into* the United States. In our view, the USITC's explanation failed to link these steel market displacements to the specific increased imports *into the United States* at issue.

10.124 The USITC does refer to increased imports: "In particular, as the record data indicate, imports increased over the period of investigation with many product categories at issue experiencing peak import volumes in 1998". However, again such a reference is made without any supporting data. The USITC adds that "as currency depreciations and economic contractions disrupted other markets the share of steel imports to the US market increased sharply and US prices declined" and "[w]idespread currency devaluations made the displaced exports especially attractive to US purchasers on price terms". While this may have been true, and we note in this regard the increased imports data contained in the USITC's increased imports findings, there is no reference to any specific supporting discussion or evidence.

10.125 It may very well be that the contractions in consumption to which the USITC referred in some parts of the world resulted in increased imports to the United States, especially if overproduction of steel products generally in the world steel market led to price suppression. Although this may be a plausible explanation, the USITC did not provide any data to support its general assertion that the confluence of unforeseen developments resulted in the *specific* increased imports at issue in this dispute. The Panel is of the view that in light of the complexity of the matter, a more sophisticated and detailed economic analysis was called for.

10.126 As the complainants have rightly pointed out, the USITC's explanation relates to steel production in general and does not describe how the unforeseen developments resulted in increased imports in respect of the *specific* steel products at issue.[5003]

[5001] USITC Second Supplementary Report, Attachment I, pp. 1-4 (Exhibit CC-11).

[5002] See para. 10.110.

[5003] European Communities' first written submission, paras. 136-139; Switzerland's first written submission, para. 122-125; Norway's first written submission, paras. 124-127; China's first written submission, paras. 94-96, New Zealand's first written submission, para. 4.20.

10.127 The Panel finds that while it is not necessary for an unforeseen development to affect only one economic sector, or to affect segments of an economic sector or industry differently, it was necessary for the USITC to explain how the increased imports of the specific steel products subject of the investigation were linked to and resulted from the confluence of unforeseen developments. Presumably, the Asian and Russian crises affected some countries worse than others and certain steel products more than others depending on the countries' respective production fo such products. This was certainly the view of producers who stated in USITC questionnaires for example that the Asian financial crisis was having an adverse impact on the operation of the domestic industry with respect to stainless steel wire, but not with respect to stainless steel rod, stainless steel bar or rebar.[5004]

10.128 In spite of what it asked the producers to do in the questionnaires, the USITC made no attempt to differentiate between the impact that the alleged unforeseen developments had on the different product sectors to which the various safeguard measures related.

10.129 In a footnote, the USITC stated:

> "Most of the increase in *stainless and tool steel imports* occurred late in the period of investigation. The record indicates that the dramatic changes in exchange rates for the US dollar during the period of investigation led to increased imports of stainless and tool steel products during the latter half of the period. Moreover, while the Asian financial crisis and the dissolution of the Soviet Union (and the consequent changes in the Russian and Eastern European markets for steel) *may have played a smaller role than they did on imports of other steel products covered by this investigation*, their continued effect made the US market more attractive to imports of stainless and tool steel products. These unforeseen developments affected the conditions of competition under which stainless and tool steel imports caused serious injury or threatened to cause serious injury to the domestic stainless bar, stainless wire rod, stainless wire, stainless fittings, and tool steel industries. *See* INV-Z-013."[5005]

10.130 The USITC did not further develop this point but instead, simply asserted that "unforeseen developments resulted "as the record data indicate, [in] imports increased over the period of investigation with many product categories at issue experiencing peak import volumes in 1998".[5006] The USITC did not back-up such an allegation by pointing to the relevant data for each specific steel safeguard measures at issue.

10.131 The same is true with Commissioner Bragg who provided additional separate views on unforeseen developments in the February Second Supplementary Report. Leaving aside the question of the value of one Commissioner's view in relation to the majority, Commissioner Bragg's asserts clearly "that these increased imports were the result of the unforeseen global financial crises in Asia and Russia…". However, the Commissioner does not back-up her conclusion, stating simply that the conclusion in her cited sentence "is apparent". In a footnote she adds: "(…) *resulted in certain steel products under investigation being imported into the United States in such increased quantities* as to have an adverse impact on the domestic industries during the period January 1996 to June 2001." (emphasis added). Here again, Commissioner Bragg seems to be able to conclude that "certain" steel products increased. However, she did not specify which ones and how increased imports for each of the safeguard measures were connected to the identified confluence of unforeseen developments.

[5004] Table STAINLESS-108, USITC Report, Vol. III, p. STAINLESS-89, and Table LONG-102, USITC Report, Vol. II, p. LONG-100.

[5005] USITC, Second Supplementary Report, at footnote 24, p. 4.

[5006] See para. 10.111.

10.132 Although the United States argues that there were data to support the USITC's analysis, which extended beyond consumption data for the most severely affected countries in south east Asia and production and consumption data for the former USSR republics[5007], the Panel is concerned with this evidence which was presented as relevant evidence for the first time before the Panel and was not cited in the USITC Report as part of a reasoned and adequate explanation of unforeseen developments.

10.133 For instance, the United States points in its submission[5008] to parts of the USITC Report, which contain footnote references to tables that show imports by country and by product for the entire period of investigation.[5009] It is undoubtedly true that these tables contained data that could have been used to explain how unforeseen developments resulted in increased imports that caused injury. However, the competent authority did no such thing. In fact, the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came.

10.134 In its submissions, the United States also points to the increase of imports from Indonesia, Korea, Malaysia, the Philippines and Thailand.[5010] We find that this *ex post* supporting evidence, which relies on information not found or mentioned in the report of the competent authority, (but available on the USITC website), may be useful to dispel alternative arguments put forth by the complainants, and it may even be the proper explanation of how unforeseen developments resulted in increased imports. However, it raises the issue of whether the United States is, at this later stage of the WTO dispute settlement process, trying to fill gaps left by the USITC in its explanation provided in its published Report.

10.135 The Panel believes that in light of the complexities deriving from the confluence of unforeseen developments that the USITC referred to, coupled with the complexity of the case at hand, the explanation provided by the USITC how unforeseen developments resulted in increased imports causing serious injury is not reasoned and adequate. Moreover, it is not supported by relevant data and it does not demonstrate, as a matter of fact, that such unforeseen developments resulted in increased imports into the United States of the specific steel products that are the subject of the safeguard measures at issue.

10.136 The complainants also argue, in particular, that there was no demonstration that those unforeseen developments resulted in increased imports from Russia and that the United States was not entitled to take account of increased imports from Russia. We address this issue below.

> Logical connection between a Member's tariff concessions and increased imports causing serious injury
>
> *Claims and arguments of the parties*

10.137 The arguments of the parties can be found in Section VII.C.2.(d) *supra*.

[5007] United States' written reply to Panel question No. 7 at the second substantive meeting.

[5008] United States' first written submission, paras. 966 – 970.

[5009] The sections of the USITC Report to which the United States has brought our attention are: pp. 65-66 (CCFRS), 99-100 (hot-rolled bar), 107-108 (cold-finished bar), 115-116 (rebar), 168-170 (certain welded pipe), 178-180 (FFTJ), 213-214 (stainless steel bar), 222-223 (stainless steel rod), 259-260 (stainless steel wire, Commissioner Koplan), 303-305 (carbon flat products and stainless steel wire and wire rope, Commissioner Bragg), 309-310 (tin mill, Commissioner Miller), 347 (stainless steel wire and wire rope, Commissioner Delaney).

[5010] United States' first written submission, paras. 962-965, citing China's first written submission, para. 103 and USITC Dataweb tables (US-49).

Analysis by the Panel

10.138 The complainants' arguments arise out of the language of Article XIX:1(a), which provides *inter alia* that increased imports causing injury must occur "*as a result of* unforeseen developments *and of the effect of* the obligations incurred by a contracting party under this Agreement, including *tariff concessions*."

10.139 The Appellate Body in *Korea – Dairy* and *Argentina – Footwear (EC)* stated:

> "With respect to the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … ", *we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions*. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994."[5011] (emphasis added)

10.140 It seems to us that when the Appellate Body wrote "this phrase simply means" it was interpreting "as a result of … tariff concessions" to mean that the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product.

10.141 However, the complainants have argued that the present dispute raises a different issue. For them, the issue is whether a Member can invoke a safeguard measure in order to protect its industry from increased imports coming from a non-WTO Member – in other words, from a country with which it has no relevant WTO obligations or tariff concession.

10.142 The Panel agrees with the parties that safeguard measures are to be used against imports of products for which WTO tariff concessions have been granted. The issue here, however, is that it is not clear whether the USITC wanted to argue that the confluence of unforeseen developments led to increased imports from Russia or the ex-Soviet Republics *per se*. In its initial Report, the USITC indeed asserts "[t]he dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries."[5012] In its Second Supplementary Report, USITC also submits that "unanticipated financial difficulties led to a sharp increase in exports of steel from the former Soviet Union between 1996 and 1999.[5013]" Yet, towards the end of its demonstration, the USITC seems to argue rather that unforeseen developments together led generally to world displacement of steel markets that resulted in increased imports of steel products into the United States from various and numerous foreign sources:

> "Steel imports historically have played a role in the US market.[5014] After the beginning of the Asian and Russian economic crises, however, unusually large volumes of foreign steel production were displaced from foreign consumption. The US market, in which demand remained strong, was the destination for a significant

[5011] Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

[5012] USITC Report, p. 58 (footnotes omitted).

[5013] Exports increased because reductions in steel production in the former Soviet Union did not keep pace with declines in consumption. Steel consumption fell more than 70 percent from 1991 to 1998. USITC Pub. 3479, Vol. II at Table OVERVIEW-4.

[5014] (original footnote) USITC Pub. 3479, Vol. II at Figure OVERVIEW-10.

> portion of that displaced foreign production. Widespread currency devaluations made the displaced exports especially attractive to US purchasers on price terms. As currency depreciations and economic contractions disrupted other markets, the share of steel imports to the US market increased sharply and US prices declined."[5015] [5016] [5017]

10.143 The Panel understands the United States' arguments to be that the displacements of steel on world markets led to increased imports to the United States from all sources, and not only to increased imports from Asia and Russia. We believe the USITC could argue that the geographical location of the birth or origin of unforeseen developments may differ from the origin of increased imports, but this hypothesis calls for a reasoned and adequate explanation of such correlation of events and effects.

10.144 We are of the view that this later USITC's explanation of the effects of such a confluence of unforeseen developments leading to increased imports from numerous sources seems plausible but it is not sufficiently supported and explained. Therefore, in light of our ultimate conclusion in paragraphs 10.145-10.150 below, the Panel sees no need to examine the complainants' argument that increased imports (directly) from Russia are not relevant on the grounds that the United States has no tariff concessions with Russia.

4. Conclusion

10.145 In sum, the Panel believes that the complexity of the unforeseen developments pointed to by USITC called for a more elaborate demonstration and supporting data than that provided by the USITC. For instance, although USITC states that "[t]he US market, in which demand remained strong, was the destination for a significant portion of that displaced foreign production"[5018], one is left to wonder how much steel was displaced in the first place and from where. If the portion being imported to the United States was thought by the competent authority to be "a significant portion", this would suggest that the USITC was aware of how much was displaced in total, as well as how much was displaced to the United States as opposed to other countries, or at least the proportion.

10.146 We believe that, the USITC should have offered a more comprehensive and coherent explanation as to how the unforeseen developments *resulted in* increased imports into the United States, their origin and their extent. We believe the USITC could argue that the geographical location of the birth or origin of unforeseen developments may differ from the origin of increased imports, but failed to provide a reasoned and adequate explanation to that effect.

10.147 The Panel recalls that since the demonstration of unforeseen developments is a pre-requisite to the imposition of a safeguard measure, such demonstration must be performed for each safeguard

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[5015] (original footnote) USITC Pub. 3479, Vol. II at Figures OVERVIEW-10 and OVERVIEW-16.

[5016] (original footnote) Most of the increase in stainless and tool steel imports occurred late in the period of investigation. The record indicates that the dramatic changes in exchange rates for the US dollar during the period of investigation led to increased imports of stainless and tool steel products during the latter half of the period. Moreover, while the Asian financial crisis and the dissolution of the Soviet Union (and the consequent changes in the Russian and Eastern European markets for steel) may have played a smaller role than they did on imports of other steel products covered by this investigation, their continued effect made the US market more attractive to imports of stainless and tool steel products. These unforeseen developments affected the conditions of competition under which stainless and tool steel imports caused serious injury or threatened to cause serious injury to the domestic stainless bar, stainless wire rod, stainless wire, stainless fittings, and tool steel industries. *See* INV-Z-013.

[5017] USITC Second Supplementary Report.

[5018] See para. 10.110.

measure. Even if unforeseen developments provide the same justification for several safeguard measures, the Panel believes that the USITC was obliged to explain why this is so and why the specific products under examination were affected individually by the confluence of unforeseen developments.

10.148 On the basis of the foregoing, the Panel finds that, in light of the complexity of the allegations made by USITC, including its reliance on a confluence of economic factors, the USITC failed to provide a reasoned and adequate explanation of how the confluence of unforeseen developments it pointed to had resulted in increased imports into the United States of the specific steel products at issue – causing serious injury to the relevant domestic producers. Therefore, there is no need to examine the remainder of the arguments raised by the complainants, including whether the facts supported the USITC's unforeseen developments' findings.

10.149 For all of the above reasons, the Panel finds that the USITC's unforeseen development findings do not provide a reasoned and adequate explanation of how the confluence of the Asian and Russian Crises, together with the strong United States' economy and US dollar, actually resulted in specific increased imports into the United States causing serious injury to the relevant domestic producers.

10.150 Therefore, the Panel finds that all safeguard measures at issue in this dispute are inconsistent with the requirements of Article XIX:1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards with regard to the demonstration of unforeseen developments.

D. CLAIMS RELATING TO INCREASED IMPORTS

1. Claims and arguments of the parties

10.151 The claims and arguments of the parties regarding "increased imports" are set out in Sections VII.F.2-4 *supra*.[5019]

2. Relevant WTO provisions

10.152 Article 2.1 of the Agreement on Safeguards, which sets forth the conditions for the application of a safeguard measure, reads as follows:

> "A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces the like or directly competitive products." (footnote omitted)

10.153 Article 4.2 sets forth the operational requirements for determining whether the conditions identified in Article 2.1 exist. Regarding increased imports, Article 4.2(a) requires in relevant part that:

[5019] The Panel is aware of the fact that some of the complainants did not invoke Article XIX of GATT 1994 in support of their claims relating to increased imports. Accordingly, the Panel has not examined such claims but, rather, has focused on the claims made under Articles 2 and 4 of the Agreement on Safeguards, which were made by all the complainants. The Panel considers that this approach does not in any way affect the parties' rights in relation to their respective claims and defences relating to increased imports in this dispute.

> "[I]n the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate … the rate and amount of the increase in imports of the product concerned in absolute and relative terms …"

3. Analysis by the Panel

(a) The requirements of Articles 2.1 of the Agreement on Safeguards

10.154 Article 2.1 of the Agreement on Safeguards requires that before a Member applies a safeguard measure, it determines "that [a] product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products …".

10.155 All parties agree that Article 2.1 contains three conditions that must be satisfied before a safeguard measure can be imposed and one of these conditions is concerned with "increased imports". Parties disagree on whether Article 2.1 imposes any threshold for this "increased imports" requirement whether quantitative and/or qualitative.

10.156 The complainants refer to *Argentina – Footwear (EC)* where the Appellate Body stated that:

> "[I]ncreased quantities of imports should have been unforeseen or unexpected… In our view the determination of whether the requirements of imports 'in such increased quantities' is met is not merely mathematical or technical requirements. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be '*such* increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'."[5020]

10.157 The United States takes issue with this interpretation by the Appellate Body of the wording of Article 2.1 of the Agreement on Safeguards. For the United States, the Appellate Body could not have read into Article 2.1 requirements that were not envisaged by the drafters of the treaty. In particular, the United States points to the wording of Article 2.1 which does not include any reference to the terms "recent", "sudden", "significant" and "sharp". Moreover, the United States is of the view that once a competent authority has determined that imports have increased, it is entitled to, and it will, examine whether such increased imports are causing serious injury so that only increased imports that are causing serious injury will authorize WTO compatible safeguard measures. Only once the competent authority has reached such findings relating to the serious injury and causation can it make an overall determination that increased imports are causing serious injury to the producers of domestic like products. In other words, the United States argues that whether the increased imports are recent *enough*, sudden *enough*, sharp *enough,* and significant *enough to cause* or threaten serious injury are questions that are answered as competent authorities proceed with the remainder of their analysis (*i.e.*, with their consideration of serious injury or threat thereof and causation). According to the United

[5020] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

States, these analyses need not form a part of the evaluation of the threshold issue of whether the imports have increased either absolutely or relative to the domestic industry.[5021]

10.158 The Panel notes, first, that all parties agree that Article 2.1 requires that imports have increased. A conclusion that imports have increased, would normally call for a comparison between the levels of imports in different periods or at different points in time. Article XIX of GATT 1994 and Article 2.1 of the Agreement on Safeguards are silent on precisely which points in time are to be the basis for the comparison.

10.159 However, Article 2.1 of the Agreement on Safeguards requires that "a product is being imported in … increased quantities". The Panel believes that the use of the present tense in the verb phrase "is being imported" in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports and that the increase in imports was "recent". The Panel notes that neither the Agreement on Safeguards nor Article XIX of GATT 1994 specify expressly the length of the period of investigation for the purpose of increased imports.

10.160 The complainants do not challenge the choice of a five-year period of investigation *per se*. Complainants rather disagree with the fact that, generally, the USITC did not focus sufficiently on the situation of imports in the latest part of the period of investigation.

10.161 The Panel believes that whether imports have recently increased, therefore, calls for an identification of the relevant recent period as well as an assessment of the situation of imports during that recent period, on a case-by-case basis. Moreover, the amount of (absolute or relative) increased imports in practice often shows not an unequivocal upward movement, but instead both upward and downward movements which alternate over time with different amplitudes.[5022] Since there is no defined or prescribed periods within which imports must be compared, a competent authority must conduct a quantitative and qualitative analysis of the features of the development of import numbers over the entire period of investigation and assess whether, overall, imports have increased recently.[5023]

10.162 As regards the question of *how* recently the imports must have increased, the Panel notes, as the Panel in *US – Line Pipe* did[5024], that Article 2.1 of the Agreement on Safeguards speaks of a product that "is being imported … in such increased quantities". Thus, imports need not be increas*ing* at the time of the determination; what is necessary is that imports *have* increas*ed*, if the products continue "being imported" in (such) increas*ed* quantities. The Panel, therefore, agrees with the *US – Line Pipe* Panel's view that the fact that the increase in imports must be "recent" does not mean that it must continue up to the period immediately preceding the investigating authority's determination, nor up to the very end of the period of investigation.[5025] As pointed out by the Panel in *US – Line Pipe*[5026], the most recent data must be the focus, but should not be considered *in isolation* from the data pertaining to the less recent portion of the period of investigation. However, as indicated by the present continuous "are being", there is an implication that imports, in the present, remain at higher (i.e. increased) levels.

[5021] United States' first written submission, para. 177.

[5022] In this regard, *see* as illustrative examples, the graphs on absolute and relative imports represented hereafter in this Section on Increased Imports.

[5023] *See* also Panel Report, *Argentina – Footwear (EC)*, para. 8.161.

[5024] Panel Report, *US – Line Pipe*, para. 7.207.

[5025] Panel Report, *US – Line Pipe*, para. 7.207.

[5026] Panel Report, *US – Line Pipe*, para. 7.207.

10.163 Whether a decrease in imports at the end of the period of investigation, in the individual case, prevents a finding of increased imports in the sense of Article 2.1 of the Agreement on Safeguards will, therefore, depend on whether, despite the later decrease, a previous increase nevertheless results in the product (still) "being imported in (such) increased quantities". In this evaluation, factors that must be taken into account are the duration and the degree of the decrease at the end of the relevant period of investigation, as well as the nature, for instance the sharpness and the extent, of the increase that intervened beforehand.

10.164 To give an extreme example, a short and very recent slight decrease would not detract from an overall increase if imports have increased tenfold over the several years beforehand. Conversely, to give an opposite extreme example, one could no longer talk about a product that "is being imported in (such) increased quantities", or in fact in *any* increased quantities at all, if, at the time of the determination, import numbers have plummeted nearly to zero or to a level below any past point in the period of investigation.[5027]

10.165 The Panel believes that, in their investigation whether imports have increased in the recent period, and whether increased imports are causing serious injury to the domestic producers of like or directly competitive domestic products, competent authorities are required to consider the *trends* in imports over the period of investigation, as suggested by Article 4.2(a).[5028] While Article 4.2(a) requires the evaluation of the "rate and amount of the increase in imports … in absolute and relative terms", the Panel sees no basis for the argument that this rate must always accelerate or that the rate must always be positive at each point in time during the period of investigation.

10.166 Moreover, the Panel recalls that the very purpose of a safeguard measure is to address the results of unexpected events (unforeseen developments pursuant to Article XIX of GATT), namely increased imports causing serious injury. This unforeseen and unexpected character of the developments resulting in the increased imports as well as the emergency nature of safeguard measures calls for an assessment of whether imports increased suddenly so that the situation became one of emergency for which safeguard measures became necessary. The Panel believes therefore that increased imports must be "sudden".

10.167 We consider that when the Appellate Body stated "that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'"[5029], it was operating under the mandate of Article 3.2 of the DSU which is to clarify the existing provisions, here the meaning of in "such increased quantities".[5030] In the Panel's view, a finding that imports have increased pursuant to Article 2.1 can be made when an increase evidences a certain degree of recentness, suddenness, sharpness and significance.

10.168 The Panel agrees with the United States that there are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an "increase" in the sense of Article 2.1 of the Agreement on Safeguards. In contrast, from the absence of *absolute* standards one

[5027] We do not intend to rule out that an exception could be made, if, despite the deep drop, there are indications that this drop is only temporary and in some sense artificial. *See*, also, Panel Report, *Argentina – Footwear (EC)*, para. 8.159.

[5028] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129; and Panel Report, *Argentina – Footwear (EC)*, para. 8.276.

[5029] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

[5030] The Panel is also bound by the mandate to clarify the existing provisions, which obviously also implies, as pointed out in Article 19.2 of the DSU that, in their findings and recommendations, a panel and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements."

cannot conclude that there are no standards at all and that any increase between any two identified points in time meets the requirements of Article 2.1 of the Agreement on Safeguards. The Panel also agrees with the United States that the inquiry is not whether imports have increased "recently and suddenly" *in the abstract*. A *concrete* evaluation is what is called for. A competent authority must conduct an analysis considering all the features of the development of import quantities and that an increase in imports has a certain degree of being recent and sudden.

10.169 The Panel believes that although a competent authority must make a single[5031] determination that increased imports were such as to cause serious injury, the Panel considers that distinct findings are necessary for each of the requirements of Article 2.1 of the Agreement on Safeguards. Before a Member can impose a safeguard measure, it must have demonstrated relevant unforeseen developments (Article XIX of GATT 1994) and it must have made a determination that increased imports were causing serious injury (Article 2.1 of the Agreement on Safeguards) to the relevant domestic producers. The Panel considers that the investigation of the three requirements that compose the determination that increased imports are causing serious injury and the demonstration whether this resulted from unforeseen developments, do not have to be performed or completed in any specific order. Together these distinct findings must provide a reasoned and adequate explanation (Articles 2, 3.1 and 4 of the Agreement on Safeguards) as to how the relevant pre-requisites to imposing a WTO compatible safeguards measure are satisfied.

10.170 Having said this, the Panel agrees with the United States that in assessing whether the facts justify a conclusion that imports had increased in "such quantities " and "under such conditions" the competent authorities must demonstrate in the first instance that there was an increase in imports, absolute or relative to domestic production. This does not mean that ultimately "any increase will do", as the competent authorities must also determine whether such an increase is sudden and recent within a relevant period of time determined on a case-by-case basis.

10.171 The Panel believes, however, that such a competent authority's findings on increased imports, distinct from its causality and injury findings, may be informed by the results of its entire investigation. The competent authority's findings on the first requirement – increased imports – may have effects on the injury findings or on the causation findings, as prescribed by Article 4.2(a). As a competent authority considers the other conditions necessary for imposition of a safeguard, it determines, as directed by the Appellate Body in *Argentina – Footwear (EC)*, whether the increase in imports was recent enough, sudden enough, and significant enough to cause or threaten serious injury to the relevant domestic producers.

(b) Full-year 2001 data

10.172 The complainants argue that the USITC ignored import trends in the most recent past, i.e. the full-year data for 2001 (including the last six months that followed the end of the period of investigation) insisting that the import data for the full-year of 2001 were available when the USITC updated its Report and completed its determination in February 2002. According to the United States, fundamental legal and practical considerations should lead the Panel to reject the complainants' attempts to expand the period of investigation to encompass full-year 2001 data that are not on the record of the USITC's investigation that began in early July 2001.

[5031] *See* Appellate Body Report, *US – Wheat Gluten* paras. 73-74: "We believe that Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards* must be given a mutually consistent interpretation, particularly in light of the explicit textual connection between these two provisions. According to the opening clause of Article 4.2(b) – "The determination referred to in subparagraph (a) shall not be made unless …" – *both* provisions lay down rules governing a *single* determination, made under Article 4.2(a)".

10.173 The Panel agrees with the United States that a competent authority cannot be requested to take into account data and evidence that is not available at the time it made its determination.[5032] In this case, the determination in the sense of Article 2.1 of the Agreement on Safeguards, i.e the determination on increased imports, causation and serious injury, was made by the USITC in October 2001. At that time, data for the full-year of 2001 could not possibly have been available. Furthermore, such data related to events (at least partially) occurring *after* the determination. The fact that new data becomes public after a determination has been made does not result in an obligation to make a new determination that replaces the one already made. What the President did in 2002 was not a "determination" within the meaning of Article 2 of the Agreement on Safeguards because the President made no determination that increased imports were causing serious injury to the relevant domestic producers. Therefore, data for import volumes for the second half of 2001 was not relevant for the question whether there were relevant "increased imports" with respect to determinations made by the USITC in October 2001.

10.174 The Panel will, therefore, proceed to evaluate the USITC's findings on increased imports for each product at issue on the basis of the data that was available to the USITC at the end of the entire period of investigation, i.e. by the end of June 2001. The Panel will thus not take into account data relating to the second half of 2001.[5033]

(c) The recent period in the present investigation

10.175 The Panel notes again that the Agreement on Safeguards does not specify how long the period of investigation in a safeguards investigation should be, or whether or how that period should be segmented for purposes of analysis. In light of the Panel's above conclusion that the competent authority must have determined that imports increased suddenly and recently, the Panel will generally focus its analysis on the situation of imports in the more recent period that preceded the end of the period of investigation, keeping in mind that the situation of imports in the earlier part of the period of investigation may also shed light on the movements of imports.

(d) Standard of review

10.176 Finally, with regard to the assessment of the factual aspects of the USITC's determination of an increase in imports, the Panel recalls that the standard of review to be applied is whether the

[5032] See Appellate Body Report, *US – Cotton Yarn*, at para. 77: "The exercise of due diligence by a Member cannot imply, however, the examination of evidence that did not exist and that, therefore, could not possibly have been taken into account when the Member made its determination. The demonstration by a Member that a particular product is being imported into its territory in such increased quantities as to cause serious damage (or actual threat thereof) to the domestic industry can be based only on facts and evidence which existed at the time the determination was made. The urgent nature of such an investigation may not permit the Member to delay its determination in order to take into account evidence that might be available only at a future date. Even a determination on the existence of threat of serious injury must be based on projections extrapolating from *existing* data." *See* also Appellate Body Report, *US – Lamb*, paras. 150 and 172.

[5033] The Panel recalls that a Member can only impose a safeguard measure to the extent and for the duration necessary to remedy the serious injury caused by increased imports. Delays between the determination that increased imports were causing serious injury and the imposition of the safeguard measure will generally affect the decision pursuant to Articles 5 and 7 of the Agreement on Safeguard. If too long a delay exists between the determination by a competent authority and the actual imposition of the safeguard measure such importing Member may be faced with a situation where the application of a safeguard measure is no longer necessary to remedy serious injury.

published report on the investigation contains an adequate and reasoned explanation of how the facts before the USITC support the determination made with respect to increased imports.[5034]

10.177 The Panel now proceeds to examine the USITC findings on increased imports for each of the products at issue.

4. Measure-by-measure analysis

(a) CCFRS

(i) The USITC's findings

10.178 As regards increased imports of CCFRS, the USITC determined:

> "We find that the statutory criterion of increased imports is met.[5035] We find that total imports of certain carbon flat-rolled steel, including slabs, plate, hot-rolled, cold-rolled, and coated steel increased in both actual terms and relative to domestic production. In actual terms, total imports increased from 18.4 million short tons in 1996 to 20.9 million short tons in 2000, an increase of 13.7 percent.[5036] Total imports declined from 11.5 million short tons in interim 2000 to 6.9 million short tons in interim 2001.[5037] The ratio of imports to domestic production (including production for captive consumption) also increased during the POI, from 10.0 percent in 1996 to 10.5 percent in 2000.[5038] Imports also increased relative to domestic commercial shipments. Total imports were equivalent to 32.6 percent of domestic commercial shipments in 2000, up from 31.5 percent in 1996.[5039] In interim 2001 total imports were equivalent to 22.7 percent of domestic commercial shipments.[5040]
>
> We note that in 1998, the midpoint of the full five-year period examined, there was a rapid and dramatic increase in imports, as import volumes both in absolute terms and as a percentage of US production peaked. Imports of certain carbon flat-rolled steel were 25.3 million short tons, an increase of 37.5 percent over 1996 levels. While the volume of imports declined in 1999 and 2000 from this peak, the absolute volume and ratio of imports to US production were still significantly higher in 1999 and 2000 than at the beginning of the period. The significance of this trend in imports to the domestic industry's performance is discussed below under Substantial Cause of Serious Injury."[5041]

[5034] *See* Panel Report, *US – Wheat Gluten*, para. 8.5; Panel Report, *US – Line Pipe*, para. 7.194.

[5035] (original footnote) Commissioner Devaney joins in the analysis of the majority, related to increased imports, as presented here. He further finds that if the analysis is performed over the entire industry as he has defined it, the result is the same, *i.e.*, the statutory criterion of increased imports is met.

[5036] (original footnote) INV-Y-209 at Table FLAT-ALT7.

[5037] (original footnote) INV-Y-209 at Table FLAT-ALT7.

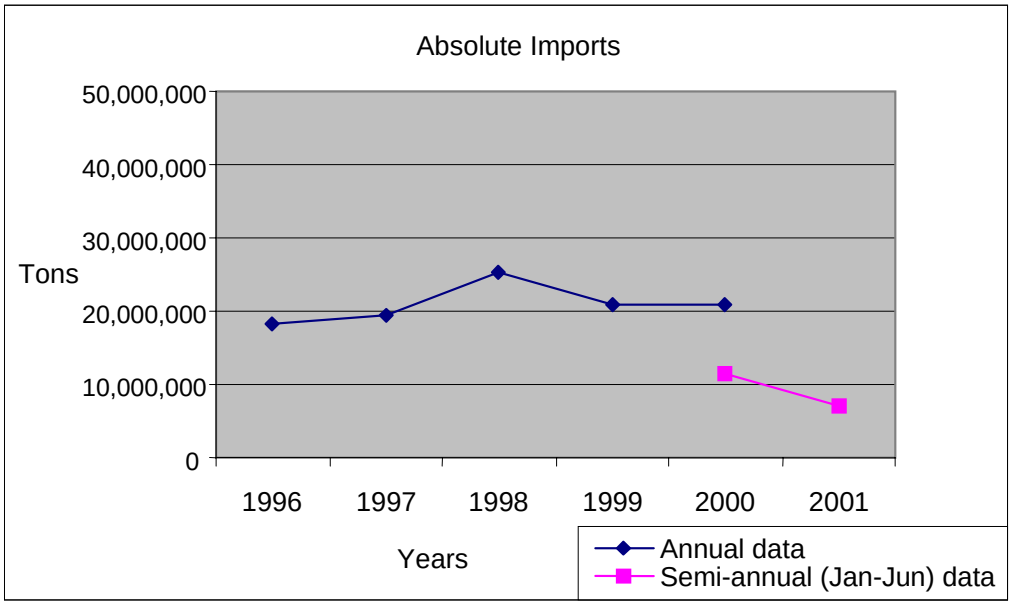
[5038] (original footnote) INV-Y-209 at Table FLAT-ALT7.

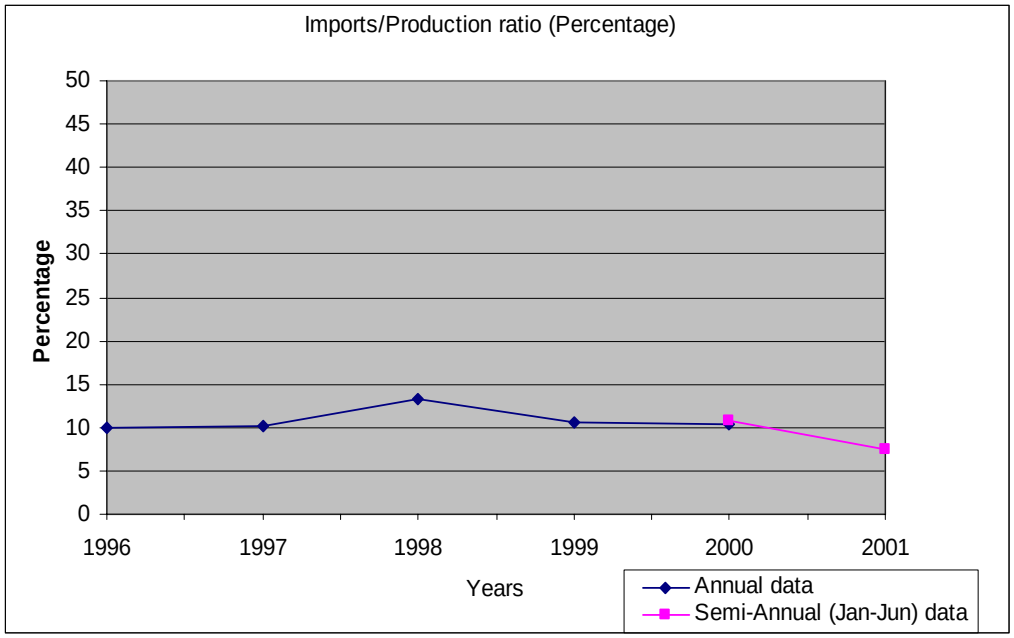
[5039](original footnote) CR and PR at Tables FLAT-12 to FLAT-15, FLAT-17, FLAT-C-2 to FLAT-C-5 and FLAT-C-7.

[5040] (original footnote) CR and PR at Tables FLAT-12 to FLAT-15, FLAT-17, FLAT-C-2 to FLAT-C-5 and FLAT-C-7.

[5041] USITC Report, Vol. I, pp. 49-50

10.179 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5042]





(ii) Claims and arguments of the parties

[5042] The data represented in the following two graphs are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.

10.180 The arguments of the parties regarding the USITC's findings are set out in Sections VII.F.4 and 5(a) *supra*.

(iii) Analysis by the Panel

Absolute imports

10.181 The Panel believes that the USITC's determination on increased imports of CCFRS, as published in its report[5043], does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC recognized that the sharpest increase took place in the period until 1998, and that, since then, imports have decreased, in 1999 and 2000, back to levels nearly as low as the 1996 level. The USITC also noted the significant decrease between interim 2000 and interim 2001 (from 11.5 to 6.9 million short tons)[5044], but it did not seem to focus on, or at least account for, this most recent trend in concluding that imports are "still significantly higher … than at the beginning of the period".[5045] Given the sharpness and significance of this most recent decrease the Panel does not find that the USITC explanation as published in its report[5046] contains an adequate and reasoned explanation of how the facts support the determination CCRFS "is being imported in … increased quantities".

10.182 It may well be that the increase occurring until 1998 could have qualified at the time as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards, but the Panel need not express itself on that point because that increase, in itself, was no longer recent enough at the time of the determination. In other words, the increase occurring until 1998, taken by itself and with the decrease thereafter, is not a sufficient factual basis for supporting a determination in October 2001 that CCFRS "is being imported in … increased quantities".

Relative imports

10.183 The Panel also considers that the USITC's determination on increased imports of CCFRS relative to domestic production[5047] does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC recognized that the sharpest increase took place in the period until 1998, and that, since then, imports have decreased, in 1999 and 2000, to levels nearly as low as the level in 1996. The USITC noted the significant decrease in interim 2001 only in terms of imports relative to domestic commercial shipments[5048], not in terms of imports relative to domestic production, the criterion stipulated in Article 2.1 of the Agreement on Safeguards.

10.184 As in the situation of absolute imports, the USITC did not seem to focus on, or at least account for, this most recent decline to levels below any point of the investigated period, when it concluded that the ratio of imports to domestic production was "still significantly higher … than at the beginning of the period".[5049] Given the sharpness and significance of this most recent decrease, the Panel does not find the USITC explanation, as published in its Report[5050] to be adequate and reasoned enough to support a conclusion that CCFRS, as a proportion to domestic production, "is being imported in … increased quantities".

[5043] USITC Report, pp. 49–50.
[5044] USITC Report, p. 49.
[5045] USITC Report, p. 50.
[5046] USITC Report, pp. 49–50.
[5047] USITC Report, pp. 49–50.
[5048] USITC Report, p. 50.
[5049] USITC Report, p. 50.
[5050] USITC Report, pp. 49–50.

10.185 The Panel also need not express itself on the question whether the increase of imports, relative to domestic production occurring until 1998 could have qualified as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards because, in any event, that increase, in itself, was no longer recent enough at the time of the determination. In other words, the increase occurring until 1998, taken for itself and with the decrease thereafter, is not a sufficient factual basis for supporting a determination in October 2001 that CCFRS "is being imported in … increased quantities".

Conclusion

10.186 The Panel consequently finds that the USITC Report did not provide an adequate and reasoned explanation of how the facts support the determination that CCFRS was being imported in "increased quantities", contrary to the requirement of Article 2.1 Agreement on Safeguards that the product "is being imported in (such) increased quantities".

10.187 The Panel notes that the parties have also made submissions with regard to the question whether imports of the various products comprised in CCFRS, taken individually, have increased. However, the USITC did not make a determination on individual products within the CCFRS group. The USITC made its determination on increased imports only with regard to a category defined as CCFRS products.[5051] This determination, pursuant to which safeguard action has been taken against imports of CCFRS, is subject to review in this dispute. Therefore, in light of the Panel's standard of review, the Panel will not scrutinize individual items comprised in CCFRS.[5052]

(b) Tin mill products

(i) The USITC's findings

10.188 As regards increased imports of tin mill, the USITC determined:

> "We find that the statutory criterion of increased imports is met. We find that total imports[5053] of tin mill products have increased both in actual terms and relative to domestic production during the POI.[5054] In actual terms, imports increased from 444,684 short tons in 1996 to a peak level of 698,543 short tons in 1999, and while they declined to 580,196 short tons in 2000, the overall increase from 1996 to 2000 was 30.5 percent.[5055] Imports of tin mill products were 263,091 short tons in interim 2001, 11.1 percent lower than in interim 2000.[5056] The ratio of imports to domestic

[5051] USITC Report, Vol. I, p. 49. *See* also USITC Report, Vol. I, p. 25.

[5052] We note the complainants' claims that the tariff quota imposed on slabs constitute a distinct measure from that imposed on the rest of CCFRS. The Panel does not examine these claims and arguments here given that the USITC made its determination on the basis of CCFRS as a single product which included slabs.

[5053] (original footnote) Including imports from NAFTA countries.

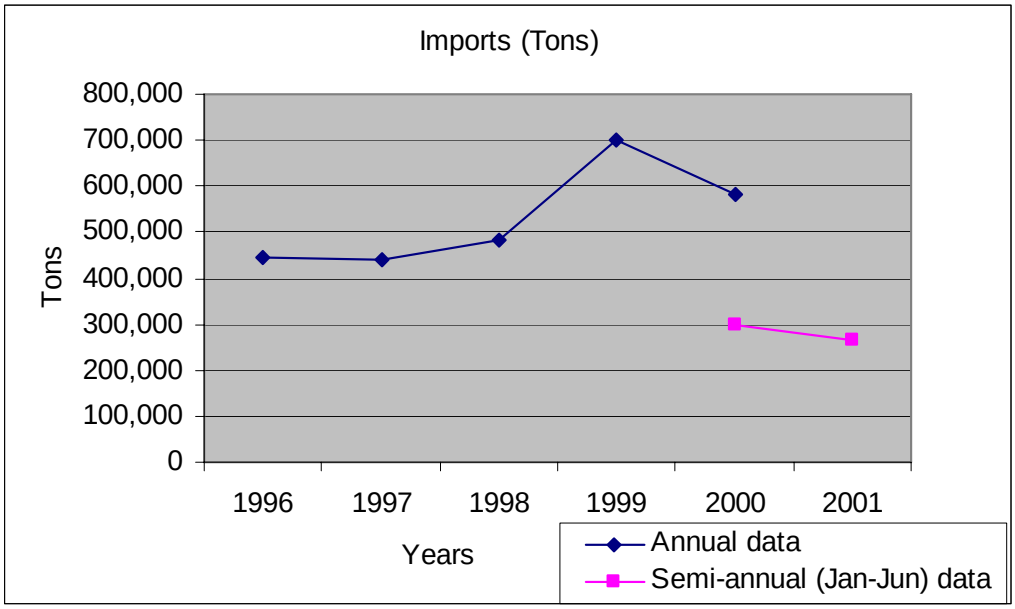
[5054] (original footnote) We recognize that the official import data for tin mill products, which is used in our discussion, overstate the imports subject to this investigation to some degree because it includes tin mill products specifically excluded from the request. For example, using Joint Respondents' data, imports of tin mill products increased from 414,013 short tons in 1996 to a peak level of 642,353 short tons in 1999, and declined to 491,836 short tons in 2000. The overall increase from 1996 to 2000 was 18.8 percent. *See* Appendix 2 to Request and Joint Respondents' Tin Mill Prehearing Brief at 5-7.

[5055] (original footnote) CR and PR at Tables FLAT-10 and FLAT-C-8.

[5056] (original footnote) CR and PR at Tables FLAT-10 and FLAT-C-8.

production increased during the POI, from 12.0 percent to 17.4 percent in 2000.[5057] The ratio of imports to production was 20.1 percent during the import volume peak in 1999. "[5058] [5059]

10.189 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5060]

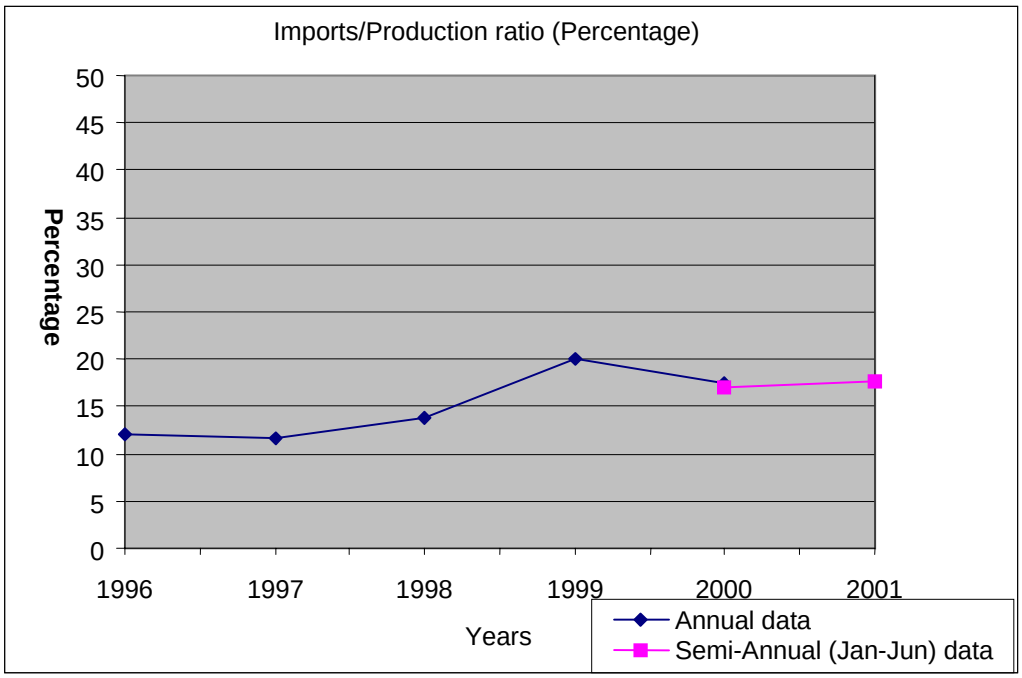


[5057] (original footnote) CR and PR at Table FLAT-10. Tin mill product imports were 17.7 percent of domestic production in interim 2001, compared to 17.1 percent in interim 2000. *Id.* Joint Respondents alleged that if the tin mill products excluded from the request were subtracted from the official import data, the ratio of subject imports to domestic production would increase from 11.2 percent in 1996 to a peak of 18.5 percent in 1999 and decline to 14.8 percent in 2000. Joint Respondents' Tin Mill Prehearing Brief at 7.

[5058] (original footnote) CR and PR at Table FLAT-10.

[5059] USITC Report, p. I-71.

[5060] The data represented in the following two graphs are contained in the USITC Report, in particular in Table FLAT-10 at FLAT-14 and Table FLAT C-8. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.



(ii) Claims and arguments of the parties

10.190 The arguments of the parties regarding the USITC's findings are set out in Sections VII.F.4 and 5.(b) as well as O.1 and 3 *supra*.

(iii) Analysis by the Panel

10.191 Before being able to review the USITC's determination on increased imports of tin mill the Panel needs to address the issue of the divergent findings made by individual USITC Commissioners: four of the six Commissioners made findings on tin mill as a separate product[5061], but the two other Commissioners (Bragg and Devaney) treated tin mill products as part of the larger CCFRS category.[5062] The four who examined tin mill as a separate product made a common affirmative finding on increased imports and on serious injury, but later diverged on the question of causation, for which only Commissioner Miller made an affirmative determination.[5063] Ultimately, therefore, only Commissioner Miller reached positive findings regarding tin mill as a separate product. The two Commissioners who treated tin mill as part of CCFRS, reached a positive conclusion on that larger category. Despite the divergent product definitions, the USITC Report concludes that three Commissioners have made "an affirmative determination regarding imports of carbon and alloy tin mill products."[5064]

10.192 In the March Proclamation, the President did not select any of the various affirmative determinations on tin mill as the basis of the decision to impose the safeguard measure on tin mill. Rather, pursuant to domestic law, the President "decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to [tin mill products and stainless steel wire] to

[5061] USITC Report, pp. I-71 et seq.
[5062] USITC Report, p. I-71, footnote 368 and p. 279.
[5063] USITC Report, pp. I-307-309.
[5064] USITC Report, p. I-25.

be the determination of the [US]ITC".[5065] Therefore, it is apparent that the President based his determination on the findings of all three Commissioners (Bragg, Devaney and Miller), although those three commissioners did not perform their analysis on the basis of the same like product definition.

10.193 The Panel recalls that a Member can impose a safeguard measure only after it has published a report that demonstrates that the WTO pre-requisites for the imposition of a safeguard are satisfied. The Panel agrees with the United States that there must always be a "connection" between the investigation by a Member's competent authorities and the Member's decision to take a safeguard measure.[5066] In fact, the measure ultimately imposed must be based on a determination and the underlying investigation, as published in the report. This report must thus provide a reasoned and adequate explanation of how the WTO requirements relating to the imposition of safeguard measures are satisfied. In application of its standard of review, a panel must review whether these requirements are satisfied.

10.194 On its face, the USITC (the three Commissioners voting in the affirmative) made divergent findings relating to tin mill and these different findings are impossible to reconcile, given that they are based on differently defined products. Whatever flexibility the Agreement on Safeguards accords to WTO Members as regards the structure of their internal decision-making processes[5067], it is clear from Articles 2.1 and 3.1 of the Agreement on Safeguards, Article 11 of the DSU and our standard of review that the competent authorities must always provide a reasoned and adequate explanation of their determinations and demonstrations. If they do not, a Panel cannot uphold the measure. The Panel fails to see how the USITC Report, as it stands, can provide a logical explanation of the measure imposed on tin mill and of why the conditions for its imposition, here, increased imports, are satisfied. There is no indication of how interested parties (and the Panel for that matter) can identify which of the various and inconsistent findings by various Commissioners is the basis for the imposition of the safeguard measure on tin mill.

10.195 The Panel notes that the issue at hand is not one where a Member publishes dissenting opinions and where these dissents depart from the findings which serve as the basis of a measure. In the instant case, the three various individual findings all served as the basis of the "determination of the [US]ITC".[5068] The Panel believes that a Member is not permitted under Articles 2.1 and 3.1 of the Agreement on Safeguards to base a safeguard measure on a determination supported by a set of explanations each of which is different and impossible to reconcile with the other. Such findings cannot simultaneously form the basis of a determination. For the purposes of the Agreement on Safeguards, with regard to, for instance, the question of whether imports have increased, it makes a difference whether the product at issue is tin mill or a much broader category called CCFRS and containing tin mill products. The difference is that the import numbers for different product definitions will not be the same.

10.196 The Panel believes that this is not the situation that was at issue in *US – Line Pipe* where the Appellate Body held that no violation of the Agreement on Safeguards had occurred. The question in *US – Line Pipe* was whether a *determination* could leave open the question whether there was serious injury or threat of serious injury. From the perspective of the Agreement on Safeguards, the conditions of Article 2.1 are satisfied equally by serious injury and by threat of serious injury.[5069] The

[5065] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.
[5066] United States' First Written Submission, para. 207.
[5067] *See* Appellate Body Report, *US – Line Pipe*, para. 158.
[5068] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.
[5069] Appellate Body Report, *US – Line Pipe*, para. 170.

challenge was not that the *underlying report* was split and contained different reasonings that could not be reconciled one with another and that, therefore, there was a violation of Articles 2.1 and 3.1 of the Agreement on Safeguards.

10.197 The Panel adheres to the Appellate Body's statements made in *US – Line Pipe* on the Members' discretion regarding their internal decision-making process. Specifically, the Appellate Body found:

> "[W]e are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or – as here – six individual decision-makers under the municipal law of that WTO Member. What matters to us is whether the determination, however it is decided domestically, meets the requirements of the *Agreement on Safeguards*."[5070]

10.198 Against this background, the Panel is not concerned with the fact that, as in the present case, only the findings of one commissioner making an affirmative determination relate to tin mill as a separate product, while the United States' domestic law requires at least three affirmative determinations. It is for each Member to determine, in their domestic law, how many affirmative decisions are necessary in a collegial decision-making body, be it one, three, four (a majority) or six (unanimity). Obviously, the question of consistency or inconsistency with domestic law is not relevant to the question of WTO consistency. Therefore, the Panel sees no inconsistency with WTO law in the fact itself that only one commissioner reached affirmative findings with regard to tin mill products as a separate product.

[5070] Appellate Body Report, *US – Line Pipe*, para. 158.