10.553 In conclusion, the Panel considers that the USITC's conditions of competitions analysis provided a compelling explanation that a causal link existed between increased imports and serious injury caused to the relevant domestic industry.

(ii) Non-attribution

USITC findings

10.554 The USITC's findings read as follows:

> "In fact, the declines in the industry's production, shipment and market share levels occurred despite the fact that the industry added significant amounts of capacity during a period of reasonably strong growth in demand for stainless bar. Even with this increased capacity, the industry was unable to take advantage of the growth in demand for stainless bar as imports obtained an increasingly larger share of the domestic market for bar over the period of investigation. In particular, while apparent consumption of stainless bar grew by 48 thousand short tons between 1996 and 2000, the quantity of imports grew at a more accelerated rate, increasing by nearly 53 thousand short tons during this same period. This growth in imports effectively foreclosed the domestic industry from participating in the growth in demand during the period of investigation. In sum, the import increases that occurred during the period clearly had a serious adverse impact on the production volumes, sales levels, sales revenues, and market share of the industry during the period.
>
> …
>
> In sum, we find that increased quantities of imports of stainless bar during the period were a substantial cause of the declines in the industry's trade and financial condition during the period. In making this finding, we considered the argument of the respondents that the adverse changes in the industry's condition during the latter half of the period were caused primarily by a downturn in the demand for stainless steel bar in late 2000 and in interim 2001, as well as an increase in energy costs during the same period.[5574] Although we agree with Eurofer that there was a downturn in demand for stainless bar and an increase in energy costs in late 2000 and interim 2001, the record indicates that there were substantial declines in the industry's production, sales, and profitability levels during the years prior to 2000 and 2001. In particular, we note that the industry's market share, production volumes, employment levels and profitability levels all declined considerably during the period from 1996 to 1999 in the face of increasing import volumes. Given this, we find that imports were a more important cause of the declines in the industry's condition in 2000 and interim 2001 than demand declines and energy cost increases, especially given that import volumes and market share both increased significantly in 2000. In fact, we find that the industry's inability to maintain its operating profits in the face of these demand and energy cost changes is a direct result of the increasing share of the market obtained by imports and their consistent underselling of domestic merchandise during the period.
>
> In addition, we have considered respondents' argument that the industry's condition during the period was affected significantly by the poor operations of the domestic producers AL Tech/Empire and Republic, whose stainless bar operations suffered

[5574] (original footnote) Eurofer Prehearing Brief on Injury at 3.

during the period of investigation -- they assert -- for reasons having little to do with imports.[5575] We note, however, that ***.[5576] We further note that, even if these two producers were excluded from our analysis, the record indicates that the remaining domestic producers of stainless bar also experienced substantial declines in their operating income levels, net commercial sales values, unit sales values, and employment levels during the period.[5577]

Finally, we note that antidumping duty orders were put in place against imports of stainless bar from Brazil, India, Japan, and Spain in 1995.[5578] While these orders are intended to offset dumping margins on sales of these imports, we note that the record of this investigation indicates that the orders did not limit the ability of producers in these countries to continue shipping substantial, and even increasing, volumes of stainless bar to the United States during the period of investigation.[5579]

In light of the foregoing, we conclude that increased imports of stainless steel bar are an important cause, and a cause not less important than any other cause, of serious injury to the domestic industry producing stainless steel bar. Accordingly, we find that the increased imports are a substantial cause of serious injury to the domestic industry."[5580]

Factors considered by the USITC

Downturn in demand

Claims and arguments of the parties

10.555 The arguments of the parties are set out in Section VII.H.3(b)(viii) *supra*.

Analysis by the Panel

10.556 The Panel considers that the USITC acknowledged that declines in demand played a role in causing the injury that was suffered by the domestic industry. In particular, the USITC stated that: "Although we agree with Eurofer that there was a downturn in demand for stainless bar … in late 2000 and interim 2001, the record indicates that there were substantial declines in the industry's production, sales, and profitability levels during the years prior to 2000 and 2001." In our view, had the decline in demand not been a cause of injury at all, the USITC would have stated as much. Instead, it stated that: "we find that imports were a more important cause of the declines in the industry's condition in 2000 and interim 2001 than demand declines."

[5575] (original footnote) Eurofer Prehearing Brief on Injury at 10-17.
[5576] (original footnote) ***.
[5577] (original footnote) Finally, we also note that, although the statute directs us to assess whether a significant number of producers have been able to operate at reasonable levels of profits, it ultimately requires us to assess whether increased imports have been a substantial cause of serious injury to the industry "as a whole". 19 U.S.C. §2252(c)(6).
[5578] (original footnote) CR and PR at Table OVERVIEW-1. We also note that antidumping order were put in place against imports of stainless steel angle from Japan, Korea, and Spain in May 2001. We note that it is too early to assess whether these orders will significantly reduce the level of imports from these countries.
[5579] (original footnote) INV-Y-180 at G25 – Stainless Bar and Light Shapes.
[5580] USITC Report, Vol. I, pp. 211-213.

10.557 The Panel notes that the USITC considered demand trends during the period of investigation. It noted that while demand increased between 1996 and 1997, it declined again in 1998 and 1999. Demand picked up again in 2000 but declined again during interim 2001. More particularly, in the section containing its analysis of the conditions of competition, the USITC found that:

> "First, demand for stainless bar fluctuated somewhat but grew overall during the five full-years of the period of investigation. Apparent US consumption of stainless bar increased from 276.6 thousand short tons in 1996 to 294.4 thousand short tons in 1997 but then declined to 280.3 thousand short tons in 1998 and to 265.5 thousand short tons in 1999. In 2000, however, apparent consumption of bar increased by 22.2 percent, growing to 324.2 thousand short tons.[5581] This level of consumption was 17.2 percent larger than in 1996.[5582] As the overall economy declined in 2001, apparent consumption of bar declined by 13 percent between interim 2000 and interim 2001.[5583],[5584]

10.558 Although the USITC acknowledged that declines in demand played a role in the injury that was suffered by the domestic industry, it appeared to dismiss this factor in its non-attribution analysis stating that "We find that the industry's inability to maintain its operating profits in the face of these demand and energy cost changes is a direct result of the increasing share of the market obtained by imports and their consistent underselling of domestic merchandise during the period." In our view, this is not a reasoned and adequate explanation. While the Panel is reluctant to prescribe what may amount to a reasoned and adequate explanation, the Panel considers that the USITC could have, for example, demonstrated that there was no linkage between demand declines during the period of investigation and injury suffered in this particular case. More particularly, the USITC could have explained that operating margin, perhaps the most relevant injury factor in this regard, declined irrespective of demand trends. This analysis could have been bolstered by an explanation that declines in operating margin coincided with increases in imports rather than declines in demand.

10.559 We note that the USITC stated that "[a]lthough we agree with Eurofer that there was a downturn in demand for stainless bar … in late 2000 and interim 2001, the record indicates that there were substantial declines in the industry's production, sales, and profitability levels during the years *prior* to 2000 and 2001. In particular, we note that the industry's market share, production volumes, employment levels and profitability levels all declined considerably during the period from 1996 to 1999 in the face of increasing import volumes." In our view, the fact that injury occurred prior to the point at which a factor comes into play does not detract from the conclusion that that factor may still play a role in causing injury beyond that point.

10.560 By dismissing downturn in demand in its non-attribution analysis, the Panel finds that the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by this factor, together with other factors, was properly separated and distinguished and not attributed to increased imports.

[5581] (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.
[5582] (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.
[5583] (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.
[5584] See para. 10.538.

Increases in energy costs

Claims and arguments of the parties

10.561 The arguments of the parties are set out in Section VII.H.3(b)(viii) *supra*.

Analysis by the Panel

10.562 The Panel considers that the USITC acknowledged that increases in energy costs played a role in causing the injury that was suffered by the domestic industry. In particular, the USITC stated that: "Although we agree with Eurofer that there was … an increase in energy costs in late 2000 and interim 2001, the record indicates that there were substantial declines in the industry's production, sales, and profitability levels during the years prior to 2000 and 2001". In our view, had energy costs not been a cause of injury at all, the USITC would have stated as much. Instead, it stated that "we find that imports were a more important cause of the declines in the industry's condition in 2000 and interim 2001 than energy cost increases".

10.563 We note that the USITC discussed changes in energy costs during the period of investigation. In particular, it stated that there was "an increase in energy costs in late 2000 and interim 2001". However, having acknowledged that this factor played a role in causing the injury that was suffered by the domestic industry, the USITC appeared to dismiss this factor in its non-attribution analysis on the basis of the assertion that "We find that the industry's inability to maintain its operating profits in the face of these demand and energy cost changes is a direct result of the increasing share of the market obtained by imports and their consistent underselling of domestic merchandise during the period." As we stated in relation to declines in demand, the Panel considers that the USITC could have demonstrated that there was no linkage between increases in energy costs during the period of investigation and injury suffered in this particular case. More particularly, the USITC could have explained that operating margin declined irrespective of energy cost trends. This analysis could have been bolstered by an explanation that declines in operating margin coincided with increases in imports rather than increases in energy costs.

10.564 We note that the USITC stated that "[a]lthough we agree with Eurofer that there was … an increase in energy costs in late 2000 and interim 2001, the record indicates that there were substantial declines in the industry's production, sales, and profitability levels during the years *prior* to 2000 and 2001. In particular, we note that the industry's market share, production volumes, employment levels and profitability levels all declined considerably during the period from 1996 to 1999 in the face of increasing import volumes." In our view, the fact that injury occurred prior to the point at which a factor comes into play does not detract from the conclusion that that factor may still play a role in causing injury beyond that point.

10.565 In our view, by dismissing increases in energy costs in its non-attribution analysis, the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by this factor, together with other factors, was properly distinguished and not attributed to increased imports.

Conclusions

10.566 The Panel considers that, with respect to stainless steel bar, the USITC failed to comply with its non-attribution obligation contained in the second sentence of Article 4.2(b). In particular, we consider that the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of factors other than increased imports that were causing injury to the domestic

industry. This, to us, is clear from the fact that the USITC dismissed a number of factors (namely, downturn in demand and increases in energy costs) in its non-attribution analysis even though it acknowledged that those factors were causing injury to the industry.

10.567 The Panel also recalls that the USITC disregarded the effect of downturn in demand and increases in energy costs because "imports were a more important cause of the declines." The Panel considers that such an approach is problematic because the cumulative effect of individual other factors was not analyzed or assessed despite the fact that the USITC had acknowledged that, individually, each of the factors caused some injury to the relevant domestic industry. Therefore, by discarding factors that individually caused injury to the industry, the USITC failed to distinguish and assess the nature and extent of the injurious effects of these other factors taken together, as distinct from the effects caused by increased imports.

(iii) Overall conclusion on USITC's determination of a causal link

10.568 In conclusion it is the Panel's view, that while the Panel was unable to come to a definitive conclusion as to whether, overall, coincidence existed, we, nevertheless, found that the USITC's conditions of competition analysis provided a compelleing explanation indicating that a causal link existed between increased imports and serious injury subject to fulfilment of the non-attribution requirement. In this regard, the Panel found that the USITC's non-attribution analysis for stainless steel bar failed to separate, distinguish and assess the nature and extent of the injurious effects of declines in demand and increases in energy costs so that the injury caused by these factors, together with other factors, was not attributed to increased imports. Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

10.569 Therefore, the Panel concludes that the USITC's finding that a causal link existed between imports of stainless steel bar and injury caused to the relevant domestic producers is inconsistent with Articles 4.2(b), 2.1 and 3.1 of the Agreement on Safeguards.

(i) Stainless steel wire

10.570 As we did in relation to our findings on causation for tin mill products (see paragraphs 10.420-10.422 above), the Panel needs to address the issue of divergent findings made by individual commissioners for stainless steel wire. The Panel notes that, in its defence, the United States relies not only on the causation findings made by Commissioner Koplan, but also on those made by Commissioners Bragg and Devaney. The former made affirmative findings on stainless steel wire as a separate product whereas the latter two made affirmative findings with regard to a broader product category than stainless steel wire, namely, stainless steel wire and rope. In this regard, the situation is equivalent to that encountered in the context of tin mill products, because the Commissioners who defined stainless steel wire as a separate product, did not reach an affirmative result.

10.571 In the March Proclamation, the President did not select any of the various affirmative determinations as the basis of the decision to impose the safeguard measure on stainless steel wire. 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 be the determination of the USITC".[5585] It is, therefore, apparent that the President based his determination on the findings of all three Commissioners (Bragg, Devaney and Koplan), although

[5585] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.

those three Commissioners did not perform their respective analyses on the basis of the same like product definition.

10.572 For the reasons set out above in relation to the USITC's determination(s) on tin mill[5586], the Panel believes that the Agreement on Safeguards does not permit the combination of findings reached on the basis of differently defined products. Such findings cannot be reconciled with each other and they cannot simultaneously form the basis of a determination. In conclusion, the Panel finds that an explanation that consists of alternative explanations which, given the different products upon which such explanations are based, cannot be reconciled as a matter of substance, amounts to a violation of the obligations under Articles 2.1, 4.2(b) and 3.1 to provide a reasoned and adequate explanation of how the facts support the determination of causation.

10.573 Therefore, it is our view that the USITC Report did not contain a a reasoned and adequate explanation of how the facts support the determination that increased imports of stainless steel wire *caused* serious injury to the relevant domestic industry as required by Articles 2.1, 4.2(b), and 3.1 of the Agreement on Safeguards.

(j) Stainless steel rod

(i) Coincidence and conditions of competition

USITC findings

10.574 The USITC's findings read as follows:

> "We find that the increased imports of stainless rod are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of stainless rod are a substantial cause of serious injury to the domestic stainless rod industry.
>
> a. Conditions of Competition
>
> 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. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestically-produced or imported articles.
>
> First, demand for stainless rod remained essentially stable during the period of investigation. Apparent US consumption of stainless rod was *** thousand short tons in 1996, *** thousand short tons in 1997, *** thousand short tons in 1998 and 1999, and *** thousand short tons in 2000.[5587] With the overall decline in the economy in interim 2001, apparent consumption of stainless rod also declined, falling by *** percent between interim 2000 and interim 2001.[5588]

[5586] See paras. 10.420-10.422.
[5587] (original footnote) CR and PR at Tables STAINLESS-68 and STAINLESS-C-5.
[5588] (original footnote) CR and PR at Tables STAINLESS-68 and STAINLESS-C-5.

Second, stainless rod is primarily used in the production of stainless steel wire but may also be fabricated into various downstream products, like industrial fasteners, springs, medical and dental instruments, automotive parts, and welding electrodes.[5589] The large majority of market participants indicate that there are no known substitutes for stainless steel rod.[5590]

Third, the domestic stainless rod industry became increasingly concentrated during the period of investigation. Only four domestic firms reported producing stainless steel rod in 2000.[5591] In 1997, Carpenter Technology, the dominant domestic producer of stainless rod in 2000[5592], purchased Talley, the *** largest producer of stainless rod.[5593] In addition, Empire Specialty Steel, the *** largest rod producer in 2000, shut down its stainless rod operations in June 2001.[5594] With the acquisition of Talley by Carpenter in 1997 and the exit of Empire from the market, Carpenter/Talley remains the only large domestic producer of stainless rod in the market.

The industry's aggregate capacity level increased during the period of investigation, growing by *** percent from 1996 to 2000.[5595] Domestic capacity was *** percent higher in interim 2001 than in interim 2000.[5596] The industry's capacity utilization rate declined from *** percent in 1996 to *** percent in 1999, and then to *** percent in 2000. Capacity utilization also declined between interim periods, dropping from *** percent to *** percent.[5597] Moreover, the stainless rod industry captively consumes more than *** of its stainless rod production in the downstream production of wire and other stainless products.[5598]

Fourth, price is an important factor in purchasing decisions for stainless rod. Although quality was generally ranked by the majority of responding purchasers as the most important factor in the purchasing decision for stainless rod, the large majority of purchasers reported price as being one of the three most important factors in the purchase decision.[5599]

Fifth, like many stainless steel products, the price of stainless rod is related to the price of nickel.[5600] To account for fluctuations in the cost of nickel, stainless steel rod producers impose a surcharge on the price of their products whenever the price of nickel reaches a certain level.[5601] Generally, after declining during the first three

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[5589] (original footnote) CR and PR at STAINLESS-3.
[5590] (original footnote) EC-Y-046 at Table STAINLESS-6.
[5591] (original footnote) CR and PR at Table STAINLESS-1.
[5592] (original footnote) Carpenter accounted for *** percent of reported domestic production of stainless rod in 2000. CR and PR at Table STAINLESS-1.
[5593] (original footnote) Eurofer Prehearing Brief on Injury at 2. Talley accounted for *** percent of reported domestic production of stainless rod in 2000. CR and PR at Table STAINLESS-1.
[5594] (original footnote) Empire Specialty Steel, Inc. Questionnaire Response at August 6, 2001 Attachment.
[5595] (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.
[5596] (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.
[5597] (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.
[5598] (original footnote) CR and PR at Table STAINLESS-19.
[5599] (original footnote) INV-Y-212 at 95.
[5600] (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.
[5601] (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.

years of the period of investigation, nickel prices increased significantly throughout 1999 and the first half of 2000. Nickel prices fell thereafter, declining through interim 2001.[5602] The price of domestic stainless rod generally followed this trend during the period of investigation, with the average unit values of domestic rod shipments and sales declining through the end of 1999, recovering in 2000, and then declining again in interim 2001.[5603]

Sixth, during the period of investigation, there were imports of stainless rod from over 30 countries, although not every country exported stainless rod in every year.[5604] The quantity of imports of stainless steel rod from sources other than Canada and Mexico increased by 36 percent from 1996 to 2000 but fell by 31 percent between interim 2000 and interim 2001.[5605] The record indicates that purchasers generally perceive domestically-produced and imported stainless rod to be comparable in most respects, which indicates that they are at least reasonably substitutable.[5606] The level of substitutability is reduced somewhat by the significant degree of captive consumption of stainless rod by the domestic industry.[5607]

The aggregate capacity of foreign producers of stainless steel rod from sources other than Mexico and Canada increased by 16.5 percent during the period of investigation. The capacity utilization rates of these producers increased from 70.8 percent in 1996 to 83.7 percent in 1997 and remained essentially stable thereafter, with capacity utilization being 84.3 percent in 2000 and 82.2 percent in interim 2001.[5608]

Seventh, antidumping and countervailing duty orders were imposed against imports of stainless rod from Brazil, France, India, Italy, Japan, Korea, Spain, Sweden, and Taiwan in 1993, 1994, and 1998.[5609]

b. Analysis

We find that the increased quantities of stainless rod imports during the period of investigation had a direct and serious adverse impact on the production levels, shipments, commercial sales, and market share of the domestic industry. With demand remaining essentially flat during the period of investigation[5610], the increases in import volumes during the period (particularly the surge that occurred in the last year of the period) resulted in a dramatic increase in the market share of stainless rod imports.[5611] With the growth in the quantity and market share of imports during the

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[5602] (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.

[5603] (original footnote) CR and PR at Tables STAINLESS-19, STAINLESS-88, & STAINLESS-C-5.

[5604] (original footnote) INV-Y-180, Table G26- Stainless Steel Rod.

[5605] (original footnote) CR and PR at Tables STAINLESS-6 & STAINLESS-C-4.

[5606] (original footnote) EC-Y-046 at Table STAINLESS-25; *see generally* EC-Y-046 at STAINLESS-14-28..

[5607] (original footnote) EC-Y-046 at STAINLESS-31.

[5608] (original footnote) CR and PR at Table STAINLESS-47.

[5609] (original footnote) CR and PR at Table OVERVIEW-1.

[5610] (original footnote) We note that apparent consumption fell by *** percent between interim periods.

[5611] (original footnote) CR and PR at Tables STAINLESS-68 & STAINLESS-C-5. The market share of imports increased from *** percent in 1996 to *** percent in 1997, declined in 1998 to *** percent, but then increased to *** percent in 1999 and *** percent in 2000. Id. It then declined slightly to *** percent in interim 2001. Id.

period of investigation, especially during the last year of the period, the industry's production levels, shipment volumes, net commercial sales, and net commercial sales revenues all fell considerably, especially in the last full-year of the period. In particular, the industry's production levels declined by *** percent during the period from 1996 to 2000, its US shipment volumes fell by *** percent during the period, its net commercial sales fell by *** percent during the period, and its net commercial sales revenues fell by *** percent.[5612] Moreover, the industry's capacity utilization rates were impacted as well, falling from *** percent in 1996 to *** percent in 2000, and then to *** percent in interim 2001.[5613] Further, as import quantity and market share increased during the period of investigation, the share of the market held by the domestic industry declined dramatically as well, falling from *** percent in 1996 to *** percent in 1999 and to *** percent in 2000.[5614]

Indeed, the most serious adverse impact of imports in quantity terms occurred during the last full-year of the period of investigation, when import quantities reached their highest level during the period, growing by 25.0 percent from the previous year.[5615] With growth in imports in that year, the market share of the industry fell by *** percentage points, its production volumes fell by *** percent, its US shipment levels fell by *** percent, and its net commercial sales quantities fell by *** percent from the prior year's levels.[5616] Moreover, partly as a direct result of these volume declines[5617], the industry's profitability levels declined by *** percentage points in that year from the previous year's level.[5618] In our view, the increases in import quantities during the period of investigation, particularly its last full-year, have had a serious and adverse impact on the sales revenue and production volumes of the industry.

The record also indicates that imports had a negative effect on domestic prices of stainless rod during the period of investigation. Purchasers generally consider domestic and imported stainless rod to be comparable in most respects, [5619] which indicates that there is a high degree of substitutability between the products. Moreover, the record shows that price is an important part of the purchasing decision[5620] and that imports consistently and significantly undersold the domestic merchandise throughout the period of investigation. [5621] In addition to causing

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[5612] (original footnote) CR and PR at Tables STAINLESS-19, STAINLESS-31 & STAINLESS-C-5. Declines in these indicators continued in interim 2001, as well, when demand for stainless rod fell considerably from its prior levels. Id.

[5613] (original footnote) CR and PR at Tables STAINLESS-19 and STAINLESS-C-5. As noted earlier, we are cognizant of the fact that the industry increased its capacity during the period. Nonetheless, despite this increase, the industry's production volumes fell by *** percent during the period from 1998 to 2000 and by an additional *** percent in interim 2001. *Id.* Thus, the industry's capacity utilization rates would have declined substantially even in the absence of these capacity increases.

[5614] (original footnote) CR and PR at Tables STAINLESS-68 & STAINLESS-C-5.

[5615] (original footnote) CR and PR at Tables STAINLESS-7, STAINLESS-68, & STAINLESS-C-5.

[5616] (original footnote) CR and PR at Tables STAINLESS-19, STAINLESS-68, & STAINLESS-C-5.

[5617] (original footnote) As we describe below, the decline in the industry's profitability was also the result of price-suppression and depression by imports during the period of investigation.

[5618] (original footnote) CR and PR at Tables STAINLESS-31 & STAINLESS-C-5.

[5619] (original footnote) INV-Y-212 at 96.

[5620] (original footnote) INV-Y-212 at 96.

[5621] (original footnote) CR and PR at Tables STAINLESS-88, STAINLESS-100, & Figure STAINLESS-11. The price comparison data indicate that imports undersold the domestic merchandise in every

purchasers to shift a significant volume of their purchases from domestic to imported product, we find that this underselling also depressed and suppressed domestic prices during the period of investigation.

In this regard, although trends in the price of stainless rod are expected to follow trends in the price of nickel, prices of domestic stainless rod failed to keep pace with movements in the cost of nickel during the second half of the period of investigation, particularly during the latter half 1999 and 2000, when the price of nickel (and the nickel surcharge) increased substantially.[5622] For example, in 1999, the average unit values of the industry's net commercial sales fell by *** percent although its unit cost of goods sold fell by only *** percent.[5623] Similarly, in 2000, the average unit values of the industry's net commercial sales increased by *** percent despite the fact that its unit cost of goods sold increased by *** percent.[5624] Finally, in interim 2001, the unit value of the industry's net commercial sales fell by *** percent, despite the fact that its unit cost of goods sold increased by *** percent.[5625] In sum, during the latter half of the period, the record indicates that consistent and significant price underselling by imports managed to suppress and depress domestic prices. This resulted in the inability of the industry to effectuate changes in the price of its stainless rod sales that would cover increases (or keep pace with declines) in the price of its raw materials. Accordingly, the price-suppression and depression caused by imports resulted in the continuing depression and suppression of the industry's operating income levels.[5626]

Finally, the record shows a clear and direct correlation between changes in the volume of imports and the overall condition of the industry. In particular, the operating income margins of the industry declined in 1997, 1999, and 2000, all of which were years in which import quantities increased from their level in the prior year.[5627] The only full-year in which the industry's operating income margin actually increased from the prior year's level was 1998, when import quantities decreased by 21.5 percent.[5628]

…

In light of the foregoing, we conclude that increased imports of stainless rod are an important cause, and a cause no less important than any other cause, of serious injury to the domestic industry producing stainless rod. Accordingly, we find that

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possible price comparison, at margins ranging from 6.5 percent to 23 percent. Id. These consistent underselling figures are supported by an examination of the average unit value for domestic and imported merchandise, which also show imports being priced at consistently lower levels than domestic merchandise during the period. CR and PR at Table STAINLESS-C-5.

[5622] (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71 & Tables STAINLESS-7, STAINLESS-19, STAINLESS-31, & STAINLESS-C-5.

[5623] (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.

[5624] (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.

[5625] (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.

[5626] (original footnote) CR and PR at Table STAINLESS-31.

[5627] (original footnote) CR and PR at Tables STAINLESS-7, STAINLESS-31, STAINLESS-68, & STAINLESS-C-5.

[5628] (original footnote) CR and PR at Tables STAINLESS-7, STAINLESS-31, STAINLESS-68, & STAINLESS-C-5.

> imports of stainless rod are a substantial cause of serious injury to the domestic industry producing stainless rod."[5629]

Claims and arguments of the parties

10.575 The arguments of the parties are set out in Section VII.H.2 (i) *supra*.

Analysis by the Panel

10.576 At the outset, the Panel notes that the USITC undertook a coincidence analysis for stainless steel rod and concluded that coincidence existed. However, the Panel notes that it is unable to assess the complainants claims regarding the existence or otherwise of coincidence because of the redaction of relevant confidential information.

10.577 The Panel also notes that the United States, in rebutting the European Communities claim in this regard stated that: "In addition, as the USITC clearly explained in its analysis (even with the redaction of confidential data), imports undersold domestic merchandise in every period of the period of investigation, including 1999, which resulted in the suppression and depression of domestic prices during the last two-and-a-half years of the period of investigation, thus preventing the industry from keeping its prices at a level that would allow it to recoup its nickel costs during this period, including 1999."

10.578 We have examined the USITC's condition of competition analysis. We understand that the essential premise of the USITC's finding of a causal relationship between increased imports and serious injury is that imports undersold domestic products. In particular, the USITC stated that "imports consistently and significantly undersold the domestic merchandise throughout the period of investigation.[5630] In addition to causing purchasers to shift a significant volume of their purchases from domestic to imported product, we find that this underselling also depressed and suppressed domestic prices during the period of investigation."

10.579 The Panel notes that the assertion that underselling depressed and suppressed domestic prices is accompanied by the following analysis:

> "In this regard, although trends in the price of stainless rod are expected to follow trends in the price of nickel, prices of domestic stainless rod failed to keep pace with movements in the cost of nickel during the second half of the period of investigation, particularly during the latter half 1999 and 2000, when the price of nickel (and the nickel surcharge) increased substantially.[5631] For example, in 1999, the average unit values of the industry's net commercial sales fell by *** percent although its unit cost of goods sold fell by only *** percent.[5632] Similarly, in 2000, the average unit values of the industry's net commercial sales increased by *** percent despite the fact that

[5629] USITC Report, Vol. I, pp. 217-222.

[5630] (original footnote) CR and PR at Tables STAINLESS-88, STAINLESS-100, & Figure STAINLESS-11. The price comparison data indicate that imports undersold the domestic merchandise in every possible price comparison, at margins ranging from 6.5 percent to 23 percent. Id. These consistent underselling figures are supported by an examination of the average unit value for domestic and imported merchandise, which also show imports being priced at consistently lower levels than domestic merchandise during the period. CR and PR at Table STAINLESS-C-5.

[5631] (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71 & Tables STAINLESS-7, STAINLESS-19, STAINLESS-31, & STAINLESS-C-5.

[5632] (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.

> its unit cost of goods sold increased by *** percent.[5633] Finally, in interim 2001, the unit value of the industry's net commercial sales fell by *** percent, despite the fact that its unit cost of goods sold increased by *** percent.[5634] In sum, during the latter half of the period, the record indicates that consistent and significant price underselling by imports managed to suppress and depress domestic prices. This resulted in the inability of the industry to effectuate changes in the price of its stainless rod sales that would cover increases (or keep pace with declines) in the price of its raw materials. Accordingly, the price-suppression and depression caused by imports resulted in the continuing depression and suppression of the industry's operating income levels.[5635]"

10.580 We note that a footnote to the above excerpt from the USITC Report stated that "The price comparison data indicate that imports undersold the domestic merchandise in every possible price comparison, at margins ranging from 6.5 percent to 23 percent." This statement seems to be supported by Table STAINLESS-100.

10.581 In the Panel's view, although relevant data was redacted from the USITC Report, the USITC nevertheless provided alternative information in Table STAINLESS-100 that sought to substitute the redacted data. In light of the foregoing, the Panel concludes that the facts that are available to us tend to support the USITC's conclusion that there was import underselling during the period of investigation. We note that none of the complainants have challenged the USITC's data indicating that "in every possible price comparison, at margins ranging from 6.5 percent to 23 percent". We recall that it is contrary to our standard of review to reassess the quality of the data contained in the USITC's Report. In our view, given the facts referred to above, the USITC provided a compelling explanation indicating that, subject to the fulfilment of the non-attribution requirement, a causal link existed between increased imports and serious injury.

Conclusions

10.582 In conclusion, the Panel is unable to assess the USITC's coincidence analysis given that essential information has been redacted. As stated above, the Panel agrees that, in some circumstances, Members have the obligation to confidentialize certain information, pursuant to Article 3.2 of the Agreement on Safeguards, although they can base their determination on such confidentialized information but this obligation should not reduce Members' rights to take safeguard actions. Also as mentioned above, in cases where information has been confidentialized, the Panel will examine whether the competent authority provided a reasoned and adequate explanation through means other than full disclosure of that data.[5636] In light of our approach, we reviewed the USITC's conditions of competition analysis and consider that it provided a compelling explanation, subject to fulfillment of the non-attribution requirement, that indicated the existence of a causal link between increased imports of stainless steel rod and serious injury to the relevant domestic producers.

(ii) Non-attribution

USITC findings

10.583 The USITC's findings read as follows:

[5633] (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.
[5634] (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.
[5635] (original footnote) CR and PR at Table STAINLESS-31.
[5636] See our discussions in para. 10.275.

"The industry's aggregate capacity level increased during the period of investigation, growing by *** percent from 1996 to 2000.[5637] Domestic capacity was *** percent higher in interim 2001 than in interim 2000.[5638] The industry's capacity utilization rate declined from *** percent in 1996 to *** percent in 1999, and then to *** percent in 2000. Capacity utilization also declined between interim periods, dropping from *** percent to *** percent.[5639] Moreover, the stainless rod industry captively consumes more than *** of its stainless rod production in the downstream production of wire and other stainless products.[5640]

…

In sum, we find that the increased quantities of imports of stainless rod during the period of investigation were an important cause of the declines in the industry's trade and financial condition during the period. In making this finding, we note that we have considered respondents' argument that adverse changes in the industry's condition during the latter half of the period were caused primarily by a downturn in the demand for stainless steel rod in late 2000 and in interim 2001, as well as an increase in energy costs during the same period.[5641] Although the record does show a downturn in demand for stainless bar [sic] and an increase in energy costs in late 2000 and interim 2001, there were substantial declines in the industry's production, sales, and profitability levels during the years prior to 2000 and interim 2001. In particular, the industry's market share, production volumes, employment levels and profitability levels all declined considerably during the period from 1996 to 1999 in the face of increased import volumes, despite the fact that there were only small changes overall in the amount of stainless rod consumed in the US market and despite the fact that there is little evidence that energy costs were increasing substantially in these periods. Considering this, it is clear that imports had a greater impact on the declines in the industry's condition in 2000 and interim 2001 than demand declines and energy cost increases, especially given the substantial increase in import quantities and market share during the last year-and-a half of the period.

In addition, we also have considered respondents' argument that the industry's condition during the period was affected significantly by the poor operations of the domestic producer AL Tech/Empire.[5642] However, ***.[5643] Moreover, even if this producer were excluded from our analysis, the remaining domestic producers of stainless rod still experienced substantial declines in their operating income margins, production levels, shipments, capacity utilization, and employment levels during the period of investigation.[5644]

[5637] (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.
[5638] (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.
[5639] (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.
[5640] (original footnote) CR and PR at Table STAINLESS-19.
[5641] (original footnote) Eurofer Prehearing Brief on Injury at 2.
[5642] (original footnote) Eurofer Prehearing Brief on Injury at 2.
[5643] (original footnote) Empire Specialty Steel, Inc. Questionnaire Response at August 6, 2001 Attachment; Republic Technologies International Questionnaire Response at p. 54.
[5644] (original footnote) We also note that, although the statute directs us to assess whether a significant number of producers have been able to operate at reasonable levels of profits, it ultimately requires us to assess whether increased imports have been a substantial cause of serious injury to the industry "as a whole". 19 U.S.C. §2252(c)(6).

> Finally, although antidumping and countervailing duty orders were imposed against imports of stainless rod from Brazil, France, India, Italy, Japan, Korea, Spain, Sweden, and Taiwan in 1993, 1994, and 1998[5645], the imposition of these orders appears not to have limited the ability of foreign producers in most of these countries to increase their stainless rod exports to the United States in 1999 and 2000.[5646]
>
> In light of the foregoing, we conclude that increased imports of stainless rod are an important cause, and a cause no less important than any other cause, of serious injury to the domestic industry producing stainless rod. Accordingly, we find that imports of stainless rod are a substantial cause of serious injury to the domestic industry producing stainless rod."[5647]

Factors considered by the USITC

Increases in capacity

Claims and arguments of the parties

10.584 The arguments of the parties are set out in Section VII.H.3(b)(x) *supra*.

Analysis by the Panel

10.585 The Panel notes that while the USITC discussed increases in capacity and declines in capacity utilization in its Report, it did not go so far as to acknowledge that increases in capacity played a role in causing the injury that was suffered by the domestic industry. The United States submits that even with the noted capacity increases, "the industry's actual production levels and shipments actually declined during the period from 1996 through 2000, primarily because imports increased their volumes and market share through price underselling during the period of investigation". In light of the Panel's conclusions above in relation to the USITC's conditions of competition analysis, the Panel considers that the facts that are available to the Panel tend to support the USITC's conclusion that import underselling, rather than capacity increases, caused injury to the industry. Therefore, in the Panel's view, capacity increase was not one of the "other factors" which the USITC should have separated, distinguished and assessed in order to reach a finding that increased imports were causing serious injury to the relevant domestic producers.

(iii) Overall conclusion on USITC's determination of a causal link

10.586 The facts that are available to the Panel tend to support the conclusions reached by the USITC. Accordingly, the Panel finds that the USITC's causation analysis for stainless steel rod was not inconsistent with the requirements of the Agreement on Safeguards.

F. CLAIMS RELATING TO PARALLELISM

1. Claims and arguments of the parties

10.587 The complainants claim that the United States failed to meet the requirement of parallelism with regard to all safeguards at issue. The United States responds that the USITC's analysis in the

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[5645] (original footnote) CR and PR at Table OVERVIEW-1.
[5646] (original footnote) INV-Y-180 at G26 – Stainless Steel Rod.
[5647] USITC Report, Vol. I, pp. 221-222.

Second Supplementary Report, read in conjunction with the initial USITC Report, satisfies the requirement of parallelism.

10.588 The arguments of the parties as regards the legal standard to be applied are set out in Section VII.K.1-3 *supra*.

2. Relevant WTO provisions

10.589 The concept of parallelism has been derived from the parallel language in the first and second paragraphs of Article 2 of the Agreement on Safeguards. Article 2 provides as follows:

> 1. A Member[1] 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 like or directly competitive products.
>
> 2. Safeguard measures shall be applied to a product being imported irrespective of its source.
>
> [1] A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

3. Analysis by the Panel

10.590 The requirement of parallelism was first relied upon by the panel, and endorsed by the Appellate Body, in *Argentina – Footwear (EC)*.[5648] On the basis of the same phrase – "product … being imported" – appearing in both paragraphs of Article 2 of the Agreement on Safeguards, the Appellate Body found, in *US – Wheat Gluten*, that the phrase has the same meaning in both Article 2.1 and Article 2.2. The Appellate Body held, that the phrase would have two different meanings in both paragraphs if imports from all sources were included in the determination that increased imports are causing serious injury, and imports not from all these sources were covered by the measure. [5649]

10.591 The conclusion to be drawn from this is that the imports included in the determination and those covered by the measure should correspond.[5650] If they do not correspond, i.e. if there is a "gap" between imports covered by the determination and imports falling within the scope of the measure,

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[5648] Panel Report, *Argentina – Footwear (EC)*, para. 8.87; Appellate Body Report, *Argentina – Footwear (EC)*, paras. 111-113.

[5649] Appellate Body Report, *US – Wheat Gluten*, para. 96. *See also* Appellate Body Report, *US – Line Pipe*, para. 180.

[5650] Appellate Body Report, *US – Wheat Gluten*, para. 96. *See also* Appellate Body Report, *US – Line Pipe*, para. 181.

the competent authorities must establish explicitly that imports from sources covered by the measure satisfy the conditions for a safeguard measure set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.[5651]

10.592 When the determination and the eventual measure do not correspond, the Panel believes that Members can establish explicitly that imports from sources covered satisfy the conditions for safeguard action, also when the decision to exclude certain sources from the safeguard measure is made *subsequent* to a determination, in the sense of Article 2.1. In such cases, the importing Member is entitled to make and publish these findings subsequent to the publication of the report setting out the determination in the sense of Article 2.1.[5652]

10.593 On that basis, in the present case, both the findings made in the initial USITC Report and those contained in the Second Supplementary Report issued in February 2002, are able to satisfy the requirement of establishing explicitly that imports covered by the measure satisfy the conditions of Articles 2.1 and 4.2. This, of course, assumes that such findings are necessary because there is a gap between sources covered by the ultimate measure and sources covered by the October 2001 determination. Conversely, however, that requirement must be fulfilled before the application of the safeguard measure. An explanation provided after the start of the application of the safeguard measure on 20 March 2002[5653] is not capable of meeting the requirement to establish explicitly that imports from sources covered by the measure meet the requirements for its application.

10.594 The Panel notes that there is some debate between the parties as to what amounts to a finding that does indeed establish explicitly that imports from sources covered by the measure satisfy the conditions for a safeguard measure. The United States maintains that Articles 3 and 4 of the Agreement on Safeguards do not require an "explicit" finding and that the Appellate Body has never related such a requirement to the text of the Agreement on Safeguards. According to the United States, the Appellate Body's use of the term "explicit" is best understood as referring to the competent authorities' formal conclusion as to whether non-FTA imports have caused serious injury, and does not require an "explicit" recitation of the results of each step of the analytical process leading to that conclusion.[5654] In contrast, New Zealand rejects the idea of reducing the requirement for a "reasoned and adequate explanation" to a simple requirement for a conclusion by way of mere assertion that even if FTA imports had not been included, the result would have been the same.[5655] The European Communities stresses that the "parallelism" requirement is clearly discernible from the text and the Appellate Body has clarified that it entails that there must be an explicit finding and a reasoned explanation that imports covered by a measure alone satisfy the requirements of Articles 2 and 4.[5656]

10.595 The Panel recalls that the requirement of parallelism, as developed by panels and the Appellate Body, is that the competent authorities must establish explicitly that imports covered by the safeguard measure satisfy the conditions for its application. This implies that the competent

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[5651] Appellate Body Report, *US – Wheat Gluten*, para. 98. *See also* Appellate Body Report, *US – Line Pipe*, para. 181.

[5652] The Panel notes that some of the complainants have argued that the Unites States has also violated the principle of parallelism in that it has granted so-called "product exclusions" (see paras.7.1680 to 7.1698) Given that, for the reasons discussed below, the Panel has found a violation of the principle of parallelism, there is no need for the Panel to specifically address this further argument.

[5653] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

[5654] United States' first written submission, paras. 752-753.

[5655] New Zealand's second written submission, para. 3.151.

[5656] European Communities' second written submission, paras. 454-457. Japan even argues in its Interim Review comments that the parallelism obligation existed in the wording of Article XIX. The Panel has, however, decided that it need not examine this claim pursuant to Article XIX of the GATT 1994.

authorities must provide a reasoned and adequate explanation of how the facts support their determination.[5657] As the Appellate Body has also clarified, "to be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous."[5658]

10.596 The Panel believes that the requirement of parallelism also exists in the interest of the other Members. The other Members who are facing the safeguard measure should be able to assess its legality on the basis of the determination and explanations provided by the competent authorities. This function would not be fulfilled if the other Members were left with statements such as those to the effect that the exclusion of subsets of all imports would not change the conclusions and, elsewhere in the report, that certain imports are very small.

10.597 Finally, the Panel notes the dispute between the parties as to whether competent authorities must consider imports from sources excluded by the measure as an "other factor" in the sense of Article 4.2(b) of the Agreement on Safeguards, when they perform the exercise of establishing explicitly that imports from sources covered by the measure satisfy the requirements set out in Article 2.1 and elaborated in Article 4.2.

10.598 As clarified by the Appellate Body, if the scope of the measure does not match the scope of the determination, competent authorities must "establish *explicitly* that increased imports from non-[FTA] sources alone"[5659] caused serious injury or threat of serious injury.[5660] Increased imports from sources ultimately excluded from the application of the measure must hence be *excluded* from the analysis. The increase of these imports and their effect on the domestic industry cannot be used to support a conclusion that the product in question "is being imported in such increased quantities so as to cause serious injury". This makes it necessary – whether imports excluded from the measure are an "other factor" or not – to account for the fact that excluded imports may have some injurious impact on the domestic industry. As said, this impact must not be used as a basis supporting the establishment of the Article 2.1 criteria.

4. Measure-by-measure analysis

(a) CCFRS

(i) The USITC's findings

10.599 In the Second Supplementary Report, the USITC reported "that its results would have been the same had imports from Canada and Mexico been excluded from the analysis." The USITC also indicated, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel

[5657] Appellate Body Report, *US – Line Pipe*, para. 181.
[5658] Appellate Body Report, *US – Line Pipe*, para. 194.
[5659] In the view of the Panel, "alone", in this context means: "to the exclusion of increased imports from other sources (i.e. sources excluded from the measure)"; it does not mean: "to the exclusion of other factors, i.e. non-increased imports factors in the sense of Article 4.2(b), second sentence". The Appellate Body has clarified that increased imports precisely need not, by themselves, cause serious injury (Appellate Body Report, *US – Wheat Gluten*, paras. 70 and 79; Appellate Body Report, *US – Lamb*, para. 170). There is no reason why this latter aspect should be any different in the context of parallelism, where the same test of Articles 2 and 4 is applied, only to a narrower base of imports. *See also* Appellate Body Report, *US – Wheat Gluten*, para 98: "establish explicitly that imports from these *same* sources, excluding Canada, satisfied the conditions for the application of a safeguard measure".
[5660] Appellate Body Report, *US – Line Pipe*, para. 194;

and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5661] Specifically as regards CCFRS, the USITC made the following findings:

> "We report that increased imports of certain carbon flat-rolled steel from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing certain carbon flat-rolled steel.
>
> Non-NAFTA imports of certain carbon flat-rolled steel have increased. Imports of certain carbon flat-rolled steel from non-NAFTA sources increased from 14.5 million short tons in 1996 to 21.2 million short tons in 1998, an increase of 46.8 percent. Non-NAFTA imports were lower in 1999 and in 2000 but remained well above 1996 levels.[5662]
>
> In addition, the increase in non-NAFTA imports as a share of domestic production was substantial. Non-NAFTA imports were equivalent to 7.8 percent of domestic production in 1996 and peaked at 11.1 percent of domestic production in 1998. Such imports were equivalent to 8.4 percent of domestic production in 2000, still above the 1996 level.[5663]
>
> The average unit values of non-NAFTA imports followed the same pattern as the average unit values of imports from all sources. The average unit value of non-NAFTA imports peaked at $372 per short ton in 1997, then fell notably in both 1998 and in 1999. The average unit value of non-NAFTA imports rose somewhat in 2000, although average unit values of non-NAFTA imports were lower in interim 2001 than in interim 2000.[5664]
>
> Finally, excluding imports from Canada and Mexico from the database does not appreciably change import pricing trends during the period examined. Our finding that imports were generally priced below domestically-produced certain carbon flat-rolled steel, and that imports led to the decline in domestic prices, also applies to non-NAFTA imports.[5665]
>
> Consequently, the same considerations that led us to conclude that increased imports of certain carbon flat-rolled steel are a substantial cause of serious injury to the domestic industry[5666] are also applicable to increased imports of certain carbon flat-rolled steel from all sources other than Canada and Mexico."[5667]

(ii) Claims and arguments of the parties

10.600 The arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(a) *supra*.

[5661] USITC Second Supplementary Report, p. 4 (footnote omitted).

[5662] (original footnote) Non-NAFTA imports were lower in interim 2001 than in interim 2000. *See* INV-Y-209 at Table ALT7.

[5663] (original footnote) Non-NAFTA imports were equivalent to a smaller share of domestic production in interim 2001 than in interim 2000. *See* INV-Y-209 at Table ALT7.

[5664] (original footnote) *See* INV-Y-209 at Table ALT7.

[5665] (original footnote) *See* USITC Pub. 3479, Vol. II at Table FLAT-77.

[5666] (original footnote) *See* USITC Pub. 3479, Vol. I at 59-65.

[5667] USITC Second Supplementary Report, pp. 4-5

(iii) Analysis by the Panel

10.601 The Panel notes that the safeguard action on CCFRS excludes imports from Canada, Mexico, Israel and Jordan and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.

10.602 The Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question of whether increased imports of CCFRS from non-NAFTA countries are a substantial cause of serious injury to the domestic industry.[5668] In these findings, the USITC established and explained that non-NAFTA imports had increased. The USITC also examined average unit values and pricing trends of imports from non-NAFTA sources and concluded that the statements of underselling and of imports leading to the decline in domestic prices made in relation to all imports (investigated in the USITC Report) were equally applicable to non-NAFTA imports.

10.603 The Panel notes two legal flaws in these findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure. First, with regard to the question of whether imports from non-NAFTA sources caused serious injury, the USITC found that the statements made on all imports as regards average unit values – the fact of underselling and the result of a decline in domestic prices – could also be made with respect to non-NAFTA imports. This is not a reasoned and adequate explanation because one cannot conclude that the fact that all imports and non-NAFTA imports have the same characteristic mean that they have identical effects. This misses out on the important aspect that non-NAFTA imports are, at least in quantity, *less* than all imports. This smaller amount of imports, i.e. imports to the exclusion of Canadian and Mexican imports, may well result in a different impact on the domestic industry than imports including Canadian and Mexican imports. An assessment of this difference was all the more necessary in the present case, given that the USITC had previously established that imports from Canada and equally imports from Mexico represented a substantial share of total imports, and that Mexican imports contributed importantly to serious injury caused by imports.[5669] Therefore, the United States' explanation does not address the possibility that, unlike all imports, non-NAFTA imports are *not* a cause of serious injury in the sense of having a genuine and substantial relationship of cause and effect.

10.604 More specifically, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards, including the requirement of non-attribution, has not been satisfied. In the Second Supplementary Report, the USITC did not address factors other than increased imports which contributed to the causation of serious injury to the domestic CCFRS industry. The United States maintains that there was no need to do so since the "other factors", i.e. the non-import factors remained the same, so that the non-attribution performed in the main USITC Report remains valid.[5670]

10.605 In the view of the Panel, the fact that those other factors were the same, does not mean that new findings on causation did not have to be made. The obligation of non-attribution comprises the obligation to separate and distinguish the respective effects of increased imports and other factors to

[5668] USITC Second Supplementary Report, pp. 4-5.
[5669] USITC Report, Vol. I, pp. 65-66.
[5670] United States' first written submission, paras. 797-804.

discern whether there is a genuine and substantial relationship of cause and effect between increased imports and serious injury. It may be unnecessary to repeat the exercise of separating and distinguishing the effects of other factors. However, the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports or the effects of only some increased imports with the effects of other factors.

10.606 Hence, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and serious injury. The United States' proposition could be maintained only if those two groups of imports had the same effects. At least for quantitative reasons and the fact that increased NAFTA imports undoubtedly had *some* effect, this proposition cannot be upheld in this case. The competent authority is under an obligation to account for the fact that excluded (FTA) imports contributed to the serious injury suffered by the domestic industry in establishing whether imports from sources covered by the measure satisfy the requirement of causing serious injury.

10.607 Second, the Panel notes that the sources excluded from the measure are not only Canada and Mexico, but also Israel and Jordan.[5671] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.608 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be necessary for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made, it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5672] The Panel recognizes that if, as established elsewhere in the report of the competent authorities, imports from an excluded source were "small and sporadic" and those of another excluded source "virtually non-existent"[5673], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

(iv) Conclusion

10.609 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on CCFRS, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

[5671] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5672] USITC Second Supplementary Report, p. 4.
[5673] USITC Report, Vol. I, p. 366 and footnote 69.

(b) Tin mill products

(i) Claims and arguments of the parties

10.610 The complainants assert that the determination made by the USITC in October includes all imports. Neither the initial USITC Report nor the Second Supplementary Report establishes explicitly that imports from sources covered by the measure satisfy the conditions of Articles 2.1 and 4.2 of the Agreement on Safeguards. The Second Supplementary Report does not even mention tin mill products specifically. The claims and arguments of the complainants as regards the USITC's findings on tin mill products are set out in more detail in Sections VII.K.2, 3(b) and 4(b) *supra*.

10.611 The United States contends that, when performing the analysis of all imports, Commissioner Miller made the necessary findings on non-NAFTA imports of tin mill products and Commissioner Bragg on non-NAFTA imports of CCFRS, comprising tin mill products. The claims and arguments of the United States as regards the USITC's findings on tin mill products are set out in more detail in Sections VII.K.2, 3(b) and 4(b) *supra*.

(ii) Analysis by the Panel

Split findings

10.612 The Panel first notes that imports from Canada, Mexico, Israel and Jordan have been excluded from the safeguard measure on tin mill products.[5674] Second, the October 2001 determination by the USITC covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. In this regard, the United States relies, before the Panel, on findings made by Commissioners Miller[5675] and Bragg[5676] in the USITC Report.

10.613 The Panel recalls that Commissioner Bragg made her findings on a product category much broader than, and comprising, tin mill products, as Commissioner Devaney did.[5677] The Panel also recalls that the United States has imposed a safeguard measure on tin mill products and this measure has been challenged by the complainants. Three Commissioners have made an affirmative determination *with regard to tin mill products*, as is apparent from the very first paragraph of the actual USITC determination.[5678] They *supported* this determination with findings that are based on different product categories. However, it remains that for the purpose of WTO law the USITC has actually made a determination on tin mill as a separate product. The Panel notes that this is confirmed by the Proclamation of the President of 5 March 2001, in which 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 be the determination of the [US]ITC".[5679]

[5674] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5675] USITC Report, Vol. I, pp. 307-308 and footnotes 28 and 29 on p. 310.
[5676] USITC Report, Vol. I, pp. 15-17.
[5677] USITC Report, Vol. I, p. 71, footnote 368. The Panel notes that the United States does not rely on findings made by Commissioner Devaney in defence against the claim of violation of parallelism, possibly because this Commissioner appears not to have reached any conclusions about imports other than excluded imports. See USITC Report, Vol. I, p. 317.
[5678] USITC Report, Vol. I, p. 25.
[5679] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.

10.614 According to the Panel, this means that if there is a gap between the sources covered by a measure *on tin mill products* and a determination *on tin mill products*, the competent authority must, pursuant to the requirement of parallelism, establish explicitly that *tin mill products* from sources covered by the measure satisfy the conditions of Articles 2.1 and 4.

10.615 The Panel does not believe that findings on a product category other than tin mill products are able to support a measure relating to tin mill products as a separate product category, unless there is a reasoned and adequate explanation relating the two product categories. If it was necessary to establish explicitly certain conditions with regard to tin mill products, then these conditions cannot be established with findings on a different (broader) product category. Such findings would not be specific to the product to which the USITC determination and the United States' safeguard measure related. Hence, the views of Commissioners Bragg and Devaney, who reached no findings on tin mill but reached findings on the broader category of CCFRS, do not meet the requirements of parallelism. Therefore, the Panel will review the findings reached by Commissioner Miller who defined tin mill products as a separate product.

Commissioner Miller's and the USITC's findings

10.616 In the initial USITC Report, in two footnotes, Commissioner Miller, the only Commissioner making an affirmative determination with regard to tin mill products as a separately defined product, made the following statements:

> "I note that in my analysis of whether increased imports as a whole are a substantial causes of serious injury, I would have reached the same result had I excluded imports from Mexico. The quantity of imports from Mexico was so minuscule – 57 tons in 1996, 21 tons in 1997, 286 tons in 1998, 156 tons in 1999, 39 tons in 2000, and no imports in 2001 – that it accounted for zero percent of US market share in each year of the period examined. At their highest, in 1998, imports from Mexico represented 0.1 percent of imports, and zero percent in all other years. Therefore, the results with respect to increases in imports, their share of apparent US consumption, and their ratio to US production are virtually the same whether imports from Mexico are included in total imports or not. CR/PR at Table FLAT-10, Table FLAT-C-8.[5680]
>
> I further note that I would have found imports of tin mill products to be a substantial cause of serious injury had I excluded imports from Canada. Imports from all other sources increased by a significant amount – 22.4 percent – over the period, despite an overall decline in consumption. In addition, the US market share held by these imports increased by 2.9 percentage points over the period, while imports from Canada as a share of the US market increased by only 1.3 percentage points. CR/PR at Table-FLAT-C-8. The pricing data collected by the Commission show no underselling by imports from Canada. CR/PR at Table-FLAT-75. Also, while the AUVs of imports from Canada declined overall during the period, the rate of decline – 3.5 percentage points – was significantly lower than that of all other imports – 13.1 percentage points, and toward the end of the period, in 1999, 2000, and interim 2001, the AUVs of imports from Canada were higher than those of the other imports. CR/PR at Table-FLAT-C-8."[5681]

10.617 In her recommendation on remedy, Commissioner Miller stated:

[5680] USITC Report, Vol. I, p. 310, footnote 28.
[5681] USITC Report, Vol. I, p. 310, footnote 29.

> "I also recommend that the President not include imports from Israel and from beneficiary countries under the Caribbean Basin Economic Recovery Act and the Andean Trade Preference Act in any remedy action.[5] The only imports of tin mill products from these countries during the period of investigation were small and sporadic."[5682]
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> [5] The U.S.-Jordan Free Trade Area Implementation Act became effective on December 17, 2001, two days before submission of this report on our findings and recommendations in investigation No. TA-201-73, Steel, to the President. There have been no imports of tin mill products from Jordan during the period of investigation, and they are therefore not a substantial cause of serious injury or threat of serious injury. Therefore, to the extent that section 221(a) of the Jordan FTA applies to this investigation, I recommend that such imports not be subject to the additional tariff described above."

10.618 On that basis, the USITC reported in the Second Supplementary Report, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5683]

Panel's Assessment

10.619 The Panel is unable to identify in these statements any finding that establishes explicitly, with a reasoned and adequate explanation, that imports from other sources than Canada, Mexico, Israel and Jordan satisfy the conditions of Article 2.1 as elaborated by Article 4.2 of the Agreement on Safeguards. In particular, none of the footnotes relied upon by the United States addresses the consequences of excluding imports from Canada, Mexico, Israel and Jordan. They only address the exclusion of imports from one Member, respectively.

10.620 Further, these findings do not account for the fact that imports other than those from an excluded source are less than those from all sources and that the effects on the domestic producers are, therefore, not the same. Commissioner Miller did not address factors other than increased imports which contributed to serious injury to the domestic tin mill industry.

10.621 In the view of the Panel, the fact that those other factors were the same, does not mean that new findings on causation did not have to be made. The non-attribution obligation comprises the obligation of separating and distinguishing the respective effects of increased imports and other factors to discern whether there is a genuine and substantial relationship of cause and effect between increased imports and serious injury. It may be unnecessary to repeat the exercise of separating and distinguishing the effects of other factors. However, the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports or the effects of only some increased imports with the effects of other factors. For that reason, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-Canadian sources and serious injury.

10.622 Second, it may well be that imports from Mexico, Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-Canadian

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[5682] USITC Second Supplementary Report, p. 529
[5683] USITC Second Supplementary Report, p. 4 (footnote omitted).

imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5684] The Panel recognizes that if imports from an excluded source were "small and sporadic", "(virtually) non-existent"[5685] or "miniscule"[5686], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.623 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on tin mill products, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(c) Hot-rolled bar

(i) The USITC's findings

10.624 In the Second Supplementary Report, the USITC reported "that its results would have been the same had imports from Canada and Mexico been excluded from the analysis." The USITC also indicated, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5687] Specifically as regards hot-rolled bar, the USITC made the following findings:

> "We report that increased imports of carbon and alloy hot-rolled bar and light shapes ('hot-rolled bar') from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing hot-rolled bar.
>
> Non-NAFTA imports of hot-rolled bar have increased. The quantity of these imports rose from 584,126 short tons in 1996 to 644,577 short tons in 1997 and to 1.1 million short tons in 1998. Non-NAFTA imports then declined to 925,711 short tons in 1999 and increased to 1.2 million short tons in 2000. Non-NAFTA imports increased by 107.9 percent from 1996 to 2000, and had major increases from 1997 to 1998 (when they increased by 70.4 percent) and from 1999 to 2000 (when they increased by 31.2 percent). These were the same years that imports from all sources increased most rapidly. Non-NAFTA imports, however, increased at a greater rate than imports from all sources.[5688]

[5684] USITC Second Supplementary Report, p. 4.
[5685] USITC Report, Vol. I, p. 529 and footnote 5; United States' first written submission, para. 754.
[5686] USITC Report, Vol. I, footnote 28 on p. 310.
[5687] USITC Second Supplementary Report, p. 4 (footnote omitted).
[5688] (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-3. The quantity of non-NAFTA imports was lower in interim 2001, when it was 403,165 short tons, than in interim 2000, when it was 630,673 short tons.

> The ratio of non-NAFTA imports of hot-rolled bar to domestic production also increased significantly during the period examined, growing from 6.8 percent in 1996 to 13.2 percent in 2000. The ratio increased most notably from 1997 to 1998 and from 1999 to 2000.[5689]
>
> In our analysis of causation with respect to imports from all sources, we observed that increased imports caused domestic hot-rolled bar producers to lose market share at the same time prices were falling, leading to poor operating results and plant closures.[5690] This is also applicable to non-NAFTA imports.
>
> With respect to market share measured by quantity, hot-rolled bar imports from sources other than Canada and Mexico declined from 5.8 percent in 1996 to 5.7 percent in 1997, increased to 9.4 percent in 1998, declined to 8.4 percent in 1999, and then increased to 10.8 percent in 2000. Like imports from all sources, non-NAFTA imports posted their greatest increases in market share between 1997 and 1998 and between 1999 and 2000. Moreover, the bulk of the increased market share that all imports captured from the domestic industry during the period examined was attributable to non-NAFTA imports.[5691]
>
> Average unit values of non-NAFTA imports declined during every full-year of the period examined, as did average unit values of imports from all sources. However, the average unit values of non-NAFTA imports declined by a greater proportion from 1996 to 2000 than did imports from all sources. The average unit values of non-NAFTA imports fell from $679 in 1996 to $478 in 2000, a decline of 29.6 percent. By contrast, the average unit value of imports from all sources fell 13.5 percent over the same period.[5692]
>
> In our analysis of import competition, we placed particular emphasis on underselling by imports from all sources during 1998 and the first half of 2000.[5693] During these periods, non-NAFTA imports undersold domestically produced hot-rolled bar by substantial margins.[5694] Indeed, non-NAFTA imports were priced lower than imports from all sources during these periods.[5695]
>
> Consequently, the same considerations that led us to conclude that increased imports of hot-rolled bar are a substantial cause of serious injury are also applicable to increased imports of hot-rolled bar from all sources other than Canada and Mexico."[5696]

[5689] (original footnote) USITC Pub. 3479, vol. II at Table LONG-5. The ratio was lower in interim 2001, at 10.4 percent, than it was in interim 2000, when it was 12.7 percent.

[5690] (original footnote) USITC Pub. 3479, vol. I at 96.

[5691] (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-3. The market share of non-NAFTA imports was lower in interim 2001, when it was 8.2 percent, than in interim 2000, when it was 10.4 percent.

[5692] (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-3. Average unit values of imports from sources other than Canada and Mexico were higher in interim 2001 than in interim 2000.

[5693] (original footnote) *See* USITC Pub. 3479, vol. I at 96-97.

[5694] (original footnote) USITC Pub. 3479, vol. II at Table LONG-90

[5695] (original footnote) *Compare* USITC Pub. 3479, vol. II at Table LONG-90, with Confidential Report (CR), Table LONG-ALT-90.

[5696] USITC Second Supplementary Report, pp. 5-6.

(ii) Claims and arguments of the parties

10.625 The arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(c) *supra*.

(iii) Analysis by the Panel

10.626 The Panel notes that the safeguard measure on hot-rolled bar excludes imports from Canada, Mexico, Israel and Jordan[5697] and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.

10.627 The Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question whether increased imports of hot-rolled bar from non-NAFTA countries are a substantial cause of serious injury to the domestic industry.[5698] In these findings, the USITC established and explained that non-NAFTA imports had increased. The USITC also examined market shares, average unit values and underselling of imports from non-NAFTA sources and found that non-NAFTA imports captured the bulk of the market share lost by domestic producers, that their average unit values declined more sharply and that they were priced lower than was the case for all imports.[5699]

10.628 The Panel notes two legal flaws in these findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure. First, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards, including the requirement of non-attribution, has not been satisfied. In the Second Supplementary Report, the USITC did not address factors other than increased imports which contributed to the causation of serious injury to the domestic hot-rolled bar industry. The United States maintains that there was no need to do so since the "other factors", i.e. the non-import factors either did not cause the serious injury or were unrelated to the specific source of imports, so that the non-attribution performed in the main USITC Report remains valid.[5700]

10.629 In the view of the Panel, the fact that those other factors were the same, does not mean that new findings on causation did not have to be made. The obligation of non-attribution comprises the obligation of separating and distinguishing the respective effects of increased imports and other factors to discern whether there is a genuine and substantial relationship of cause and effect between increased imports and serious injury. It may be unnecessary to repeat the exercise of separating and distinguishing the effects of other factors. However, the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports or the effects of only some increased imports with the effects of other factors.

[5697] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5698] USITC Second Supplementary Report, pp. 4-6.
[5699] Second Supplementary Report, p. 6.
[5700] United States' first written submission, para. 834.

10.630 For that reason, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and serious injury. The United States' proposition could be maintained only if those two groups of imports had the same effects. At least for quantitative reasons and the fact that increased NAFTA imports undoubtedly had *some* effect, this proposition cannot be upheld in this case. The competent authority is under an obligation to account for the fact that excluded (FTA) imports contributed to the serious injury suffered by the domestic industry in establishing whether imports from sources covered by the measure satisfy the requirement of causing serious injury.

10.631 Second, the Panel notes that the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan.[5701] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.632 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5702] The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"[5703] or, as the USITC found, "at very low levels" and non-existent[5704], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.633 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on hot-rolled bar after including imports from all sources in its determination and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(d) Cold-finished bar

(i) The USITC's findings

10.634 In the Second Supplementary Report, the USITC reported "that its results would have been the same had imports from Canada and Mexico been excluded from the analysis." The USITC also indicated, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel

[5701] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5702] USITC Second Supplementary Report, p. 4.
[5703] United States' first written submission, para. 754.
[5704] USITC Report, Vol. I, p. 376 and footnote 117.

and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5705] Specifically, as regards cold-finished bar, the USITC made the following findings:

> "We report that increased imports of carbon and alloy cold-finished bar ("cold-finished bar") from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing cold-finished bar.
>
> Non-NAFTA imports of cold-finished bar have increased. The quantity of these imports rose from 137,834 short tons in 1996 to 167,256 short tons in 1997 and then to 201,473 short tons in 1998. Non-NAFTA imports then declined to 154,971 short tons in 1999 and increased to 233,940 short tons in 2000. Non-NAFTA imports had a major increase from 1999 to 2000, when they rose by 51.0 percent. This was the same year that imports from all sources increased most sharply. Non-NAFTA imports, however, increased at a greater rate than imports from all sources both from 1999 to 2000 and over the entire period examined.[5706]
>
> The ratio of non-NAFTA imports of cold-finished bar to domestic production also increased significantly during the period examined, growing from 11.8 percent in 1996 to 17.6 percent in 2000. The ratio increased most notably from 1999 to 2000, when it rose by 6.4 percentage points.[5707]
>
> In our analysis of causation with respect to imports from all sources, we stated that aggressive pricing by imports during the latter portion of the period examined caused the industry to lose market share and revenues.[5708] This observation is applicable as well to non-NAFTA imports.
>
> With respect to market share measured by quantity, cold-finished bar imports from non-NAFTA sources increased from 9.8 percent in 1996 to 10.5 percent in 1997 and then to 12.1 percent in 1998. The market share of these imports then declined to 9.6 percent in 1999 and increased to 14.3 percent in 2000. Like imports from all sources, non-NAFTA imports posted a significant increase in market share between 1999 and 2000. Indeed, non-NAFTA imports were responsible for the entire increase in import market share both during this period and the period between 1996 and 2000.[5709]
>
> Average unit values of cold-finished bar imports from sources other than Canada and Mexico declined during every full-year of the period examined, falling from $919 in 1996 to $758 in 2000. The 17.6 percent decline in average unit values for non-

[5705] Second Supplementary Report, p. 4 (footnote omitted).

[5706] (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-4. The quantity of non-NAFTA imports was lower in interim 2001, when it was 99,082 short tons, than in interim 2000, when it was 122,028 short tons.

[5707] (original footnote) USITC Pub. 3479, vol. II at Table LONG-6. The ratio was higher in interim 2001, at 17.5 percent, than it was in interim 2000, when it was 17.0 percent.

[5708] (original footnote) *See* USITC Pub. 3479, vol. I at 105.

[5709] (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-4. The market share of non-NAFTA imports was higher in interim 2001, when it was 14.2 percent, than in interim 2000, when it was 13.5 percent.

> NAFTA imports from 1996 to 2000 was greater than the decline in average unit values for imports from all sources over the same period.[5710]
>
> In our analysis of import competition, we discussed pricing trends and underselling of one-inch round C12L14 during 1999 and 2000.[5711] For imported C12L14 from non-NAFTA sources, there were significant price declines during 1999. Prices declined further during 2000, particularly during the final quarter of the year. Between the second quarter of 1999 and the fourth quarter of 2000, non-NAFTA imports of C12L14 undersold the domestically-produced product by margins ranging from ***.[5712] Both the pricing trends and the underselling data for non-NAFTA imports are similar to those for imports from all sources on which we relied in our injury determination.[5713]
>
> Consequently, the same considerations that led us to conclude that increased imports of cold-finished bar are a substantial cause of serious injury are also applicable to increased imports of cold-finished bar from all sources other than Canada and Mexico."[5714]

(ii) Claims and arguments of the parties

10.635 The arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(d) *supra*.

(iii) Analysis by the Panel

10.636 The Panel notes that the safeguard measure on cold-finished bar excludes imports from Canada, Mexico, Israel and Jordan[5715] and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.

10.637 The Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question of whether increased imports of cold-finished bar from non-NAFTA countries are a substantial cause of serious injury to the domestic industry.[5716] In these findings, the USITC established and explained that non-NAFTA imports had increased. The USITC also examined the market share, average unit values and pricing data concerning imports from non-NAFTA sources. It concluded that non-NAFTA imports were responsible for the entire increase in import market share from 1999 to 2000 and from 1996 to 2000, that the average unit values of such imports declined during every full year of the period

[5710] (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-4. The average unit values of non-NAFTA imports were higher in interim 2001 than in interim 2000.
[5711] (original footnote) *See* USITC Pub. 3479, vol. I at 106-07.
[5712] (original footnote) CR, Table LONG-92.
[5713] (original footnote) *Compare* USITC Pub. 3479 at 105-07.
[5714] USITC Second Supplementary Report, pp. 6-7.
[5715] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5716] USITC Second Supplementary Report, pp. 4, 6-7.

examined, and that non-NAFTA imports of the C12L14 product undersold the domestically producer product between the second quarter of 1999 and the fourth quarter of 2000.[5717]

10.638 The Panel notes two legal flaws in these findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure. First, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards, including the requirement of non-attribution, has not been satisfied. In the Second Supplementary Report, the USITC did not address other factors than increased imports which contributed to the causation of serious injury to the domestic cold-finished bar industry. The United States maintains that there was no need to do so, since of the two "other factors", i.e. the non-import factors identified, one did not cause the serious injury observed and the other one was discussed in the analysis pertaining to all imports. Hence, in the view of the United States, the non-attribution performed in the main USITC Report remains valid.[5718]

10.639 In the Panel's view, the fact that those other factors were the same, does not mean that no new findings on causation had to be made. The obligation of non-attribution comprises the obligation of separating and distinguishing the respective effects of increased imports and other factors to discern whether there is a genuine and substantial causal relationship between increased imports and serious injury. It may be unnecessary to repeat the exercise of separating and distinguishing the effects of other factors. However, the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports or the effects of only some increased imports with the effects of other factors.

10.640 For that reason, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and serious injury. The United States' proposition could be maintained only if those two groups of imports had the same effects. At least for quantitative reasons and the fact that increased NAFTA imports undoubtedly had *some* effect, this proposition cannot be upheld in this case. The competent authority is under an obligation to account for the fact that excluded (FTA) imports contributed to the serious injury suffered by the domestic industry in establishing whether imports from sources covered by the measure satisfy the requirement of causing serious injury.

10.641 Second, the Panel notes that the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan.[5719] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.642 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports

[5717] See para. 10.634.
[5718] United States' first written submission, paras. 838-846.
[5719] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding (establishing explicitly) to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5720] The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"[5721] or non-existent[5722], it is very likely that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.643 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on cold-finished bar, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(e) Rebar

(i) The USITC's findings

10.644 Before the Panel, the United States relies on footnote 704 of the USITC Report. This footnote states:

> "We find that our injury analysis would not be affected in any way by the exclusion of rebar imports from Canada and Mexico.
>
> Exclusion of imports from Canada and Mexico only makes the increase in imports during the period examined more dramatic. Imports of rebar from all sources other than Canada and Mexico increased from 302,217 tons in 1996 to 403,881 tons in 1997, to 1.1 million tons in 1998, and then to 1.7 million tons in 1999. Imports then decreased to 1.6 million tons in 2000. Imports from sources other than Mexico and Canada were lower in interim 2001, at 778,779 tons, than in interim 2000, when they were 960,625 tons. Imports from sources other than Mexico and Canada increased by 434.8 percent from 1996 to 2000, and had major increases both from 1997 to 1998 (183.5 percent) and from 1998 to 1999 (50.2 percent). *See* CR and PR, Table LONG-7.
>
> Excluding Canada and Mexico also serves to accentuate the increase in market share of imports from other sources. The market share of rebar imports from sources other than Canada and Mexico increased from 5.5 percent in 1996 to 21.4 percent in 1999, its peak level of the period examined, and then declined to 19.9 percent in 2000. The market share of imports from sources other than Mexico and Canada was lower in interim 2001 than interim 2000. *See* CR and PR, Table LONG-72.
>
> Average unit values of imports from sources other than Canada and Mexico followed the same pattern as average unit values of imports from all sources. The average unit value of imports from sources other than Canada and Mexico from $300 in 1996 to

[5720] USITC Second Supplementary Report, p. 4.
[5721] United States' first written submission, para. 754.
[5722] USITC Report, Vol. I, p. 376 and footnote 117.

> $275 in 1998, then plummeted to $207 in 1999, and increased slightly to $215 in 2000. These average unit values were $210 in interim 2000 and $224 in interim 2001. *See* CR and PR, Table LONG-7.
>
> Finally, excluding imports from Canada and Mexico from the database does not appreciably change import pricing trends during the period examined. There were no pricing observations for imports from Canada, and imports from Mexico were sold at higher prices than imports from all other sources during every quarter for which pricing data were collected except the fourth quarter of 1996 and the first quarter of 1997. Consequently, for periods after 1998, exclusion of Mexican imports increases the magnitude of underselling margins somewhat. *See* CR and PR, Table LONG-93.
>
> Consequently, the conclusions we have made concerning the effects of increased imports are equally applicable whether or not imports from Canada and Mexico are included among the imports evaluated."[5723]

10.645 The USITC also reported in the Second Supplementary Report, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners".[5724]

(ii) Claims and arguments of the parties

10.646 The complainants assert that neither the USITC Report nor the USITC Supplementary Report contain any particular findings establishing "explicitly" that increased imports from non-NAFTA sources satisfy the conditions set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. The claims and arguments of the complainants as regards the USITC's findings on rebar are set out in more detail in Sections VII.K.2, 3(b) and 4(e) *supra*.

10.647 The United States relies on footnote 704 of the USITC's analysis of all imports, which provides a detailed analysis of non-NAFTA rebar imports. In that footnote, the USITC expressly found that "the conclusions we have made concerning the effects of increased imports are equally applicable whether or not imports from Canada and Mexico are included among the imports evaluated".[5725] The claims and arguments of the United States as regards the USITC's findings on rebar are set out in more detail in Sections VII.K.2, 3(b) and 4(e) *supra*.

(iii) Analysis by the Panel

10.648 The Panel first notes that imports from Canada, Mexico, Israel and Jordan have been excluded from the safeguard measure on rebar.[5726] The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.

[5723] USITC Report, Vol. I, p. 116, footnote 704.
[5724] USITC Second Supplementary Report, p. 4 (footnote omitted).
[5725] USITC Report, p. 116, footnote 704.
[5726] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

10.649 The Panel notes two legal flaws in the USITC's findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure.

10.650 First, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards has not been satisfied. In the view of the Panel, the USITC failed to consider adequately the fact that it was dealing with a smaller amount of increased imports. In order to establish the existence of a genuine and substantial relationship of cause and effect between increased imports (covered by the measure) and serious injury, the injury caused by excluded imports must be accounted for. The USITC did not sufficiently do so by noting the similarity of average unit value patterns between all imports and non-NAFTA imports and that non-NAFTA import undersold domestic goods even more strongly than all imports (on average) did.[5727] This approach does not account for the possibility that serious injury caused by non-NAFTA imports is but a part of serious injury caused by all imports and does not establish that there is a genuine and substantial relationship of cause and effect. In other words, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and serious injury.

10.651 Second, the Panel notes that the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan.[5728] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.652 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5729] The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"[5730] or non-existent[5731], it is very likely that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.653 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on rebar, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

[5727] USITC Report, Vol. I, p. 116, footnote 704.
[5728] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5729] Second Supplementary Report, p. 4.
[5730] United States' first written submission, para. 754.
[5731] USITC Report, Vol. I, p. 376 and footnote 117.

(f) Welded pipe

(i) The USITC's findings

10.654 In the Second Supplementary Report, the USITC reported "that its results would have been the same had imports from Canada and Mexico been excluded from the analysis." The USITC also indicated, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5732] Specifically as regards welded pipe, the USITC made the following findings:

> "We report that increased imports of welded tubular products other than OCTG from non-NAFTA countries are a substantial cause of the threat of serious injury to the domestic industry producing welded tubular products other than OCTG.
>
> Non-NAFTA imports of welded tubular products other than OCTG have increased. Imports from sources other than the NAFTA countries increased from 786,151 short tons in 1996 to 1,420,685 short tons in 2000, and from 724,859 short tons in interim 2000 to 870,944 short tons in interim 2001. Non-NAFTA imports had major increases of 20-30 percent in every year of the period examined except 1999.[5733] Similarly, the ratio of non-NAFTA imports of such welded tubular products to US production increased in each year except 1999 during the period examined; the ratio rose from 16.9 percent in 1996 to 29.7 percent in 2000, and was 34.5 percent in interim 2001 compared to 28.6 percent in interim 2000.[5734]
>
> Similarly, with respect to market share, measured by quantity, non-NAFTA imports increased from 13.1 percent in 1996 to 19.8 percent in 2000, and were 22.7 percent of the market in the first half of 2001, compared to 18.9 percent in the first half of 2001 [sic].[5735]
>
> Moreover, prices for standard pipe and mechanical pipe from non-NAFTA sources undersold comparable domestic products in all but one quarter (32 of 33 quarters) for which data were available. For both products, the prices of pipe from non-NAFTA countries fell over the period examined, including during the most recent quarter or quarters for which data are available.[5736]
>
> Finally, excluding Canada and Mexico from the database does not appreciably alter projections for foreign production, capacity, and exports to the United States. Indeed, capacity, production, and exports to the United States from non-NAFTA countries are all projected to reach new peaks during the period 2001-2002.[5737]
>
> Consequently, the same considerations that led us to conclude that increased imports of welded tubular products (other than OCTG) are a substantial cause of the threat of

[5732] Second Supplementary Report, p. 4 (footnote omitted).
[5733] (original footnote) USITC Pub. 3479, vol. III, at Table TUBULAR C-4.
[5734] (original footnote) USITC Pub. 3479, vol. II, at Table TUBULAR-6.
[5735] (original footnote) USITC Pub. 3479, vol. III, at Table TUBULAR C-4.
[5736] (original footnote) USITC Pub. 3479, vol. II, at Table TUBULAR-58-59.
[5737] (original footnote) USITC Pub. 3479, vol. II, at Tables TUBULAR-30-32.

> serious injury are also applicable to increased imports of welded tubular products (other than OCTG) from all sources other than Canada and Mexico."[5738]

(ii) Claims and arguments of the parties

10.655 The claims and arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(f) *supra*.

(iii) Analysis by the Panel

10.656 The Panel notes that the safeguard measure on welded pipe excludes imports from Canada, Mexico, Israel and Jordan[5739] and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. In this regard, the Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question whether increased imports of welded pipe from non-NAFTA countries are a substantial cause of the threat of serious injury to the domestic industry.[5740]

10.657 The Panel notes two legal flaws in these findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure. First, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards has not been satisfied. In the view of the Panel, the USITC failed to consider adequately the fact that it was dealing with a smaller amount of (increased) imports. In order to establish the existence of a genuine and substantial relationship of cause and effect between increased imports (covered by the measure) and the threat of serious injury to the domestic industry, the threat of serious injury caused by excluded imports must be accounted for. The USITC did not adequately do so by stating that standard and mechanical pipe from non-NAFTA countries undersold domestic goods.[5741] This does not account for the fact that the threat of serious injury caused by non-NAFTA imports is but a part of the threat of serious injury caused by all imports and does not establish that there is a genuine and substantial relationship of cause and effect. In other words, a genuine and substantial relationship of cause and effect between all increased imports and threat of serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and threat of serious injury.

10.658 Second, the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan.[5742] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

[5738] USITC Second Supplementary Report, pp. 10-11.
[5739] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5740] USITC Second Supplementary Report, pp. 4, 10-11.
[5741] USITC Second Supplementary Report, p. 10.
[5742] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

10.659 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5743] The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"[5744] or below one per cent and non-existent[5745], it is very likely that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.660 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on welded pipe, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(g) FFTJ

(i) The USITC's findings

10.661 In the Second Supplementary Report, the USITC reported "that its results would have been the same had imports from Canada and Mexico been excluded from the analysis." The USITC also indicated, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5746] Specifically as regards FFTJ, the USITC made the following findings:

> "We report that increased imports of carbon and alloy fittings from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing carbon and alloy fittings.
>
> Non-NAFTA imports of carbon and alloy fittings have increased. Imports from sources other than the NAFTA countries increased from 76,079 short tons in 1996 to 100,592 short tons in 2000; non-NAFTA imports increased in each year of the period examined except 1997.[5747] Similarly, the ratio of non-NAFTA imports to US production increased in each year of the period examined except 1997; the ratio rose from 37.1 percent in 1996 to 51.8 percent in 2000, and was 69.0 percent in interim 2001 compared to 43.9 percent in interim 2000.[5748]

[5743] USITC Second Supplementary Report, p. 4.
[5744] United States' first written submission, para. 754.
[5745] USITC Report, Vol. I, p. 385 and footnote 155.
[5746] USITC Second Supplementary Report, p. 4 (footnote omitted).
[5747] (original footnote) USITC Pub. 3479, vol. III, at Table TUBULAR C-6.
[5748] (original footnote) USITC Pub. 3479, vol. II, at Table TUBULAR-8.

> With respect to market share, measured by quantity, non-NAFTA imports increased from 25.7 percent in 1996 to 31.0 percent in 2000, and were 36.3 percent of the market in the first half of 2001, compared to 28.8 percent in the first half of 2001 [sic].[5749]
>
> Average unit values of non-NAFTA imports were similar to the average unit values of imports from all sources and generally were above domestic average unit values.[5750] ***.[5751] ***.
>
> Consequently, the same considerations that led us to conclude that increased imports of carbon and alloy fittings are a substantial cause of serious injury are also applicable to increased imports of carbon and alloy fittings from all sources other than Canada and Mexico.
>
> The conclusion would not be different if only Mexico was excluded, or if only Canada was excluded."[5752]

(ii) Claims and arguments of the parties

10.662 The claims and arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(g) *supra*.

(iii) Analysis by the Panel

10.663 The Panel notes that the safeguard measure on FFTJ excludes imports from Canada, Mexico, Israel and Jordan[5753] and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. In this regard, the Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question whether increased imports of FFTJ from non-NAFTA countries are a substantial cause of serious injury to the domestic industry.[5754]

10.664 The Panel notes two legal flaws in these findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure. First, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards has not been satisfied. In the view of the Panel, the USITC failed to consider adequately the fact that it was dealing with a smaller amount of (increased) imports. In order to establish the existence of a genuine and substantial relationship of cause and effect between increased imports (covered by the measure) and serious injury, the injury caused by excluded imports must be accounted for. The USITC did not adequately do so by stating that average unit values of non-NAFTA imports were similar to those of all

[5749] (original footnote) USITC Pub. 3479, vol. III, at Table TUBULAR C-6. Non-NAFTA imports increased from 45,537 short tons in interim 2000 to 63,226 short tons in interim 2000 [sic]. *Id*.
[5750] (original footnote) USITC Pub. 3479, Vol. I, at 176.
[5751] (original footnote) USITC Pub. 3479, Vol. II, at Table TUBULAR-61.
[5752] Second Supplementary Report, p. 8.
[5753] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5754] USITC Second Supplementary Report, pp. 4, 8.

imports.[5755] This does not account for the fact that serious injury caused by non-NAFTA imports is but a part of serious injury caused by all imports and does not establish that there is a genuine and substantial relationship of cause and effect.

10.665 Moreover, when discussing non-NAFTA imports in the Second Supplementary Report, the USITC did not address other factors than increased imports which contributed to the causation of serious injury to the domestic FFTJ industry. The United States maintains that there was no need to do so since of the five "other factors" identified in the analysis of all imports, four were found not to cause the serious injury and one, purchaser consolidation, focused exclusively on domestic industry data.[5756]

10.666 In the view of the Panel, the fact that those other factors were the same, does not mean that no new findings on causation had to be made. The non-attribution obligation comprises the obligation of separating and distinguishing the respective effects of increased imports and other factors to discern whether there is a genuine and substantial causal relationship between increased imports and serious injury. It may be unnecessary to repeat the exercise of separating and distinguishing the effects of other factors. However, the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports or the effects of only some increased imports with the effects of other factors.

10.667 For that reason, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and serious injury. The United States' proposition could be maintained only if those two groups of imports had the same effects. At least for quantitative reasons and the fact that increased NAFTA imports undoubtedly had *some* effect, this proposition cannot be upheld in this case. As already stated, the competent authority is under an obligation to account for the fact that excluded (FTA) imports contributed to the serious injury suffered by the domestic industry in establishing whether imports from sources covered by the measure satisfy the requirement of causing serious injury.

10.668 Second, the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan.[5757] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.669 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, be they about all imports, be they about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard

[5755] USITC Second Supplementary Report, p. 8.
[5756] United States' first written submission, para. 882.
[5757] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

measure.[5758] The Panel recognizes that if imports from an excluded source were "small and sporadic"[5759] or below one per cent and "virtually non-existent"[5760], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.670 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on FFTJ, after including imports from all sources in its determination and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(h) Stainless steel bar

(i) The USITC's findings

10.671 In the Second Supplementary Report, the USITC reported "that its results would have been the same had imports from Canada and Mexico been excluded from the analysis." The USITC also indicated, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5761] Specifically as regards stainless steel bar, the USITC made the following findings:

> "We report that increased imports of stainless bar and light shapes ("stainless bar") from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing stainless bar.
>
> Non-NAFTA imports of stainless bar have increased. In terms of quantity, imports of stainless bar and light shapes from non-NAFTA countries increased by 61.1 percent during the five full-years of the period of investigation, growing from 81,426 short tons in 1996 to 131,184 short tons in 2000.[5762] Although the quantity of non-NAFTA imports fluctuated somewhat during the period (remaining essentially stable in 1998 and declining somewhat in 1999 from its level in 1997 and 1998), a rapid and dramatic increase in the quantity of non-NAFTA imports occurred during the last full-year of the period of investigation, when non-NAFTA imports of stainless bar grew by 38,843 short tons.[5763]
>
> The ratio of non-NAFTA imports of stainless steel bar to domestic production also increased significantly during the period, growing from 43.1 percent in 1996 to 73.3

[5758] USITC Second Supplementary Report, p. 4.
[5759] United States' first written submission, para. 754.
[5760] USITC Report, Vol. I, p. 390 and footnote 180.
[5761] USITC Second Supplementary Report, p. 4 (footnote omitted).
[5762] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-6 & STAINLESS-C-4.
[5763] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-6 & STAINLESS-C-4. The quantity of these imports declined between interim 2000 and interim 2001, dropping from 73,738 short tons to 57,584 short tons. USITC Pub. 3479, Vol. III at Tables STAINLESS-6 & STAINLESS-C-4.

percent in 2000, with the largest single percentage increase in the ratio (17.1 percentage points) occurring in 2000.[5764]

In sum, non-NAFTA imports of stainless bar increased significantly, both in quantity terms and as a ratio to domestic production, between 1996 and 2000, with the largest single increase in imports occurring during the last full-year of the period. Although there was a decline in non-NAFTA imports in terms of quantity and as a ratio to domestic production between interim 2000 and interim 2001, we report that non-NAFTA imports of stainless bar have increased.

As we concluded with respect to imports of stainless bar from all sources, we report that increases in non-NAFTA import volumes between 1996 and 2000 had a serious adverse impact on the production levels, shipments, commercial sales and market share of the domestic industry. During the period from 1996 to 2000, the quantity of non-NAFTA imports increased by 61.1 percent and the market share of those imports increased by 11 percentage points as well.[5765] Although these import increases occurred during a period of growing demand, the industry's production volumes, shipment levels and sales revenues all declined significantly as a result of increases in non-NAFTA import volume during the period between 1996 and 2000[5766], with the industry's production levels falling by 5.3 percent[5767], its net commercial sales falling by *** percent[5768], and the value of its net commercial sales falling by *** percent during the period.[5769] Moreover, the industry's share of the market also fell considerably, dropping from 64.6 percent in 1996 to 59.8 percent in 1999 and then to 53.5 percent in 2000, with imports from non-NAFTA sources accounting for all of the industry's market share loss during that period.[5770] Accordingly, we report that the increasing imports from non-NAFTA sources had a serious adverse impact on the production, shipment, sales and market share levels of the industry during the period of investigation.

Excluding imports from Canada and Mexico from our analysis also would not affect our conclusion that imports affected domestic prices of stainless bar negatively during the period of investigation. There were no reported prices for the price comparison products with respect to imports from Mexico and the exclusion of the reported price comparisons for Canadian imports results in an increase in the percentage of price comparisons in which underselling by imports occurred during the period.[5771] In particular, after excluding the data for Canada, the record indicates that imports from other sources undersold the domestic merchandise throughout the period of investigation in 40 of 43 possible quarterly comparisons at underselling margins of up

[5764] (original footnote) USITC Pub. 3479, Vol. III at Table STAINLESS-6. The ratio of non-NAFTA imports to domestic production declined from 77.7 percent in interim 2000 to 70.4 percent in interim 2001. USITC Pub. 3479, Vol. III at Table STAINLESS-6.

[5765] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-67 & STAINLESS-C-4.

[5766] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-18, STAINLESS-30, & STAINLESS-C-4.

[5767] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-18 & STAINLESS-C-4.

[5768] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-30 & STAINLESS-C-4.

[5769] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-30 & STAINLESS-C-4.

[5770] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-67 & STAINLESS-C-4.

[5771] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-86, STAINLESS-87, STAINLESS-98, STAINLESS-99, & Figures STAINLESS-7 & STAINLESS-8.

> to 51 percent.[5772] Given these underselling trends and taking into account the analysis set forth in our pricing analysis for imports of stainless bar from all sources, we report that this underselling by non-NAFTA imports depressed and suppressed domestic prices during the period of investigation and led to declines in the sales revenues and operating profits of the industry.
>
> Consequently, the same considerations that led us to conclude that increased imports of stainless bar from all sources are a substantial cause of serious injury to the domestic industry are also applicable to increased imports of stainless bar from all sources other than Canada and Mexico."[5773] [5774]

(ii) Claims and arguments of the parties

10.672 The claims and arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(h) *supra*.

(iii) Analysis by the Panel

10.673 The Panel notes that the safeguard measure on stainless steel bar excludes imports from Canada, Mexico, Israel and Jordan[5775] and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. In this regard, the Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question whether increased imports of stainless steel bar from non-NAFTA countries are a substantial cause of serious injury to the domestic industry.[5776]

10.674 The Panel notes two legal flaws in these findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure. First, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards has not been satisfied. In the view of the Panel, the USITC failed to consider adequately the fact that it was dealing with a smaller amount of (increased) imports. In order to establish the existence of a genuine and substantial relationship of cause and effect between increased imports (covered by the measure) and serious injury, the injury caused by excluded imports must be accounted for. In assessing the injurious impact of non-NAFTA imports on the domestic industry, the USITC found that frequent underselling by non-NAFTA imports at high margins depressed and suppressed domestic prices during the period

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[5772] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-87, STAINLESS-99, & Figure STAINLESS-9.

[5773] (original footnote) In this regard, we note that we would make this finding whether imports of stainless bar and light shapes from Mexico are included in the analysis outlined above or not. Imports of stainless bar and light shapes from Mexico accounted for a minuscule and declining share of the market and imports during the period of investigation and there was no reported price comparison data for imports from Mexico. Consequently, the analysis set forth above would apply whether or not the President chose to include imports from Mexico in any remedy imposed against imports of stainless bar and light shapes.

[5774] USITC Second Supplementary Report, pp. 8-10.

[5775] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

[5776] USITC Second Supplementary Report, pp. 4, 8-10.

of investigation and led to declines in the sales revenues and operating profits of the industry.[5777] This approach is inadequate because it does not account for the fact that serious injury caused by non-NAFTA imports is but a part of serious injury caused by all imports and does not establish that there is a genuine and substantial relationship of cause and effect.

10.675 Moreover, when discussing non-NAFTA imports in the Second Supplementary Report, the USITC did not address other factors than increased imports which contributed to the causation of serious injury to the domestic stainless steel bar industry. The United States maintains that there was no need to do so since of the three "other factors" identified and investigated in the analysis of all imports (changes in demand during late 2000 and 2001, increases in energy costs, and the poor operating results of two producers during the period) were found not to cause the serious injury observed.[5778]

10.676 As the Panel understands, the USITC rather concluded, about the first two of the three "other factors" that they were not a more important cause of serious injury than imports.[5779] In other words, there were other factors and they also did cause some injury. In the view of the Panel, this made it necessary to make adjusted new findings on whether there is a genuine and substantial causal relationship between increased imports (from covered sources) and serious injury. It may be unnecessary to repeat the exercise of separating and distinguishing the effects of other factors. However, the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports, or the effects of only some increased imports with the effects of other factors.

10.677 For that reason, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and serious injury. The United States' proposition could be maintained only if those two groups of imports had the same effects. At least for quantitative reasons and the fact that increased NAFTA imports undoubtedly had *some* effect, this proposition cannot be upheld in this case. As already stated, the competent authority is under an obligation to account for the fact that excluded (FTA) imports contributed to the serious injury suffered by the domestic industry in establishing whether imports from sources covered by the measure satisfy the requirement of causing serious injury.

10.678 Second, the sources excluded from the measure are not only Canada and Mexico, but also Israel and Jordan.[5780] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.679 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports

[5777] USITC Second Supplementary Report, p. 9. See para. 10.671.
[5778] United States' first written submission, para. 893.
[5779] USITC Report, Vol. I, p. 212.
[5780] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5781] The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"[5782] or "small or non-existent" and "non-existent"[5783], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.680 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on stainless steel bar after including imports from all sources in its determination and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(i) Stainless steel wire

(i) Claims and arguments of the parties

10.681 The complainants assert that the determination made by the USITC in October includes all imports. Neither the initial USITC Report nor the Second Supplementary Report establishes explicitly that imports from sources covered by the measure satisfy the conditions of Articles 2.1 and 4.2 of the Agreement on Safeguards. The Second Supplementary Report does not even mention stainless steel wire specifically. The claims and arguments of the complainants as regards the USITC's findings on stainless steel wire are set out in more detail in Sections VII.K.2, 3(b) and 4(i) *supra*.

10.682 The United States contends that, when performing the analysis of all imports, Commissioners Bragg and Koplan made the necessary findings on non-NAFTA imports of stainless steel wire. The claims and arguments of the United States as regards the USITC's findings on stainless steel wire are set out in more detail in Sections VII.K.2, 3(b) and 4(i) *supra*.

(ii) Analysis by the Panel

Split findings

10.683 The Panel first notes that imports from Canada, Mexico, Israel and Jordan have been excluded from the safeguard measure on stainless steel wire.[5784] Second, the October 2001 determination by the USITC covered imports from all sources. Hence, the requirement of parallelism requires that the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports of stainless steel wire from sources other than Canada, Mexico, Israel and Jordan satisfy the requirements for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. In this regard, before the Panel, the United States relies on findings made by Commissioners Koplan and Bragg in the USITC Report.

[5781] USITC Second Supplementary Report, p. 4.
[5782] United States' first written submission, para. 754.
[5783] USITC Report, Vol. I, p. 399 and footnote 225.
[5784] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

10.684 The Panel recalls that Commissioner Bragg made her findings on a product category broader than, and comprising, stainless steel wire (stainless steel wire and stainless steel wire rope), as Commissioner Devaney did.[5785] The Panel also recalls that stainless steel wire is not only the product category for a separate remedy imposed by the United States, but also the product for which the three Commissioners were reported to have made the affirmative determination[5786] which later served as the basis for the safeguard measure.[5787] Those three Commissioners *supported* this determination with findings that are based on different product categories. However, for the purposes of WTO law, the USITC has actually made a determination on stainless steel wire as a separate product. The Panel notes that this is confirmed by the Proclamation of the President of 5 March 2001, in which 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 be the determination of the [US]ITC".[5788]

10.685 Therefore, and for the reasons elaborated in the context of tin mill products[5789], the Panel does not believe that findings on a product category other than stainless steel wire are able to support a measure relating to stainless steel wire, unless there is a reasoned and adequate explanation relating the two product categories. If it was necessary to establish explicitly certain conditions with regard to stainless steel wire, then these conditions cannot be established with findings on a different (broader) product category. Such findings would not be specific to the product to which the USITC determination and the United States' safeguard measure related. Hence, the views of Commissioners Bragg[5790] and Devaney[5791], who reached no findings on stainless steel wire but did reach findings on a broader category including stainless steel wire, do not meet the requirements of parallelism. Therefore, in the remainder of this section, the Panel will review the findings reached by Commissioner Koplan which relate to stainless steel wire as a separate product.

Commissioner Koplan's and the USITC's findings

10.686 Commissioner Koplan made the following findings:

> "Additionally, I conclude that increased imports from all sources other than Canada and Mexico are a substantial cause of the threat of serious injury to the domestic industry. Imports of stainless steel wire from Canada and Mexico accounted for a small and decreasing share of domestic apparent consumption over the period of investigation. Imports from Canada and Mexico accounted for 3.8 percent of apparent consumption in 1996, 3.6 percent in 1997, 1.5 percent in 1998, 0.4 percent in 1999, and 0.3 percent in 2000. Imports from Canada and Mexico accounted for 0.3 percent of apparent consumption in interim 2000 and in interim 2001. Imports from all sources other than Canada and Mexico accounted for an increasing share of apparent consumption over the period of investigation, increasing from 20.1 percent in 1996 to 22.8 percent in 2000. Between the interim periods, imports from all other sources other than Canada and Mexico increased from 20.7 percent in interim 2000 to 27.8 percent in interim 2001. CR and PR at Table STAINLESS-C-7. Consequently,

[5785] USITC Report, Vol. I, p. 277 (Commissioner Bragg) and p. 335 (Commissioner Devaney).
[5786] USITC Report, Vol. I, p. 27.
[5787] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.
[5788] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.
[5789] *Supra* paras. 10.613-10.614.
[5790] USITC Second Supplementary Report, pp. 22-23.
[5791] The Panel notes that the United States does not rely on findings made by Commissioner Devaney in defence, possibly because this Commissioner appears not to have reached any conclusions about imports other than excluded imports. See USITC Report, Vol. I, p. 347.

> the conclusions I have made concerning the effects of increased imports are equally applicable whether or not imports from Canada and Mexico are included among the imports evaluated."[5792]

10.687 The USITC also reported in the Second Supplementary Report, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5793]

Panel's assessment

10.688 The Panel does not believe that these statements establish explicitly, with a reasoned and adequate explanation, that increased imports from sources other than Canada, Mexico, Israel and Jordan, alone, satisfy the requirements of Article 2.1 as elaborated in Article 4.2 of the Agreement on Safeguards. The findings relied upon by the United States do not take account of the portion of the threat of serious injury caused by NAFTA imports. They do not establish a genuine and substantial relationship of cause and effect between non-NAFTA imports and the threat of serious injury in the light of the threat attributable to other factors. They examine an increase in imports merely in a rudimentary fashion and otherwise focus on market share developments before stating that the conclusions made concerning the effects of increased imports are equally applicable even when NAFTA imports are excluded.

10.689 Second, the Panel recalls that the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan.[5794] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.690 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5795] The Panel recognizes that if imports from an excluded source were "small and sporadic"[5796] or "small or non-existent" and "virtually non-existent"[5797], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.691 These findings, finally, relate only to non-NAFTA imports, not to imports from sources other than Canada, Mexico, Israel and Jordan. They do not establish explicitly, with a reasoned and

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[5792] USITC Report, p. 260, footnote 36.
[5793] USITC Second Supplementary Report, p. 4 (footnote omitted).
[5794] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5795] Second Supplementary Report, p. 4.
[5796] United States' first written submission, para. 754.
[5797] USITC Report, Vol. I, p. 405 and footnote 268.

adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards.

10.692 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on stainless steel wire, after including imports from all sources in its determination and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(j) Stainless steel rod

(i) The USITC's findings

10.693 Before the Panel, the United States relies on footnote 1437 of the USITC's analysis of all imports. This footnote states:

> "We also have considered whether the exclusion of imports of stainless rod from Mexico or Canada from our injury analysis would have affected our finding that imports were a substantial cause of serious injury to the stainless rod industry. Because imports of stainless rod from Mexico and Canada each accounted for an extremely small percentage of total imports during the period of investigation, INV-Y-180 at Table G-25, we find the exclusion of these volumes does not change our volumes or pricing analysis in a significant manner. Accordingly, our injury analysis would not be changed in any way by their exclusion."[5798]

10.694 The USITC also reported in the Second Supplementary Report, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5799]

(ii) Claims and arguments of the parties

10.695 The claims and arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(j) *supra*.

(iii) Analysis by the Panel

10.696 The Panel first notes that imports from Canada, Mexico, Israel and Jordan have been excluded from the safeguard measure on stainless steel rod.[5800] Second, the October 2001 determination by the USITC covered imports from all sources. Hence, the requirement of parallelism requires that the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports of stainless steel rod from sources other than Canada, Mexico, Israel and Jordan satisfy the requirements for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.

10.697 The Panel agrees with the United States that in a case where excluded imports account for less than 0.08% of total imports, it would normally be possible to reach the conclusion that imports

[5798] USITC Second Supplementary Report, p. 223, footnote 1437.
[5799] USITC Second Supplementary Report, p. 4 (footnote omitted).
[5800] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

from other sources satisfy the same requirements as all imports do.[5801] However, the Panel is unable to identify in the statements contained in footnote 1437 the required findings that establishes explicitly, with a reasoned and adequate explanation, that imports from other sources than Canada, Mexico, Israel and Jordan satisfy the conditions of Article 2.1 as elaborated by Article 4.2 of the Agreement on Safeguards. In particular, the rather implicit statement made that imports other than Canadian and Mexican imports have increased and that they have caused serious injury to the domestic industry, does not relate to imports covered by the measure which are imports from sources other than Canada, Mexico, Israel and Jordan.

10.698 Also, it may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5802] The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"[5803] or "small and non-existent" and "non-existent"[5804], it is very likely that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.699 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on stainless steel rod, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

G. ADDITIONAL FINDINGS

1. Judicial economy

10.700 The Panel has not addressed each and every claim raised by the complainants. Relying on judicial economy, the Panel refrains from ruling on several claims and sub-claims, including those relating to the proper definition of the imported product, the like product and the domestic industry; claims relating to serious injury; claims relating to the consistency of product exclusions with the principle of parallelism; claims relating to Articles 5, 7, 8 and 9 of the Agreement on Safeguards as well as claims relating to Articles I, X, XIII, XIX (except insofar as the latter deals with the unforeseen developments requirement) and XXIV of GATT 1994.

10.701 The principle of judicial economy is recognized in WTO law. In *US – Wool Shirt and Blouses*, the Appellate Body made clear that panels are not required to address all the claims made by

[5801] The Panel recalls in this regard that it has found the USITC's finding on increased imports of stainless steel rod to be legally inconsistent with WTO law since the facts did not show that stainless steel rod was being imported in increased quantities and therefore the USITC failed to provide a reasoned and adequate explanation of how the facts support the conclusion.

[5802] USITC Second Supplementary Report, p. 4.

[5803] United States' first written submission, para. 754.

[5804] USITC Report, Vol. I, p. 405 and footnote 268.

a complaining party. The Appellate Body relied on the explicit aim of the dispute settlement mechanism which is to secure a positive solution to a dispute (Article 3.7) or a satisfactory settlement of the matter (Article 3.4). Thus, the basic aim of dispute settlement in the WTO is to settle disputes and not to develop jurisprudence. The Appellate Body stated:

> "[G]iven the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[5805]" [5806]

10.702 In its supporting reasoning, the Appellate Body also explored Article 11 of the DSU, the provision setting out the mandate of panels and found nothing in this provision that would require panels to examine all legal claims made by a complaining party. The Appellate Body relied on previous dispute settlement practice, *inter alia*, under the GATT 1947. Specifically, it stated: "if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated."[5807]

10.703 Yet, the Panel is aware of the limits to its discretionary right to exercise judicial economy. As the Appellate Body stated in *Australia – Salmon*, the right to exercise judicial economy could not be exercised where only a partial resolution of a dispute would result:

> "The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"[5808]

10.704 The Panel believes that these principles are applicable in the present dispute. The complainants have raised a large number of legal claims, arguing that each of the safeguard measures at issue in this dispute violates various obligations contained in the Agreement on Safeguards and GATT 1994. The Panel has concluded that each safeguard measure is inconsistent with various provisions of the Agreement on Safeguards or the GATT 1994. The Panel need not to examine whether each of the same safeguard measures also violates other provisions of the Agreement on Safeguards or the GATT 1994 that were raised by the complainants.

10.705 In addressing several of the claims raised in this dispute (those relating to unforeseen developments, increased imports, causation and parallelism), the Panel believes that it has effectively resolved the dispute in finding inconsistencies that result in the absence of the right of the United States to take the safeguard measures at issue in this dispute. Since the safeguard measures at issue

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[5805] (original footnote) The "matter in issue" is the "matter referred to the DSB" pursuant to Article 7 of the *DSU*.

[5806] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, 323 at 340.

[5807] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, 323 at 340 (footnote omitted).

[5808] Appellate Body Report, *Australia – Salmon*, para. 223.

were deprived of a legal basis, the United States could not impose such safeguard measures against any WTO Members, Thus, the Panel does not need to examine the remaining claims, a number of which, have been raised only by some of the complainants and sometimes only for some of the measures at issue.

10.706 Since the Panel's conclusions mean that the United States had not complied with the requirements to exercise the right to apply safeguard measures, there is no need to address those claims relating to the alleged breaches of obligations regarding the *application* of such safeguard measures. For the same reasons, we believe that the Panel need not examine whether the tariff quota on slabs constitutes a distinct measure from that applied on the rest of CCFRS. Since the basis for that safeguard measure on slabs was a determination made on CCFRS which we concluded lacked legal basis, such determination could not provide any legal basis for a tariff quota on a sub-group of CCFRS, namely on slabs. Moreover, the Panel does not have to address the legal questions of whether the United States, in applying its safeguard measures, acted inconsistently with Articles 5.1 and 7 (relating to the necessary extent and duration), Article 5.2 of the Agreement on Safeguards and Article XIII of the GATT (quota allocation), Article 8 of the Agreement on Safeguards (maintenance of an equivalent level of concessions) or Article 9.1 of the Agreement on Safeguards (exemption of *de minimis* developing country exporters).

10.707 The Panel finds support for its exercise of judicial economy in the practice of panels and the Appellate Body in previous dispute settlement proceedings relating to safeguard measures. In *US – Wheat Gluten*, the Appellate Body upheld the panel's exercise of judicial economy by not ruling on claims relating to Article XIX (unforeseen developments), Article I of GATT 1994 and Article 5 of the Agreement on Safeguards.[5809] In *US – Lamb*, the Appellate Body upheld the panel's exercise of judicial economy by not ruling on a claim relating to Article 5 of the Agreement on Safeguards.[5810] In fact, the panel had exercized judicial economy in relation to claims under Articles 2.2, 3.1, 5.1, 8, 11 and 12 of the Agreement on Safeguards and Articles II and XI of GATT 1994.[5811]

10.708 In the two mentioned cases, the Appellate Body accepted as basis for the panels' exercise of judicial economy the fact that the panels had reached the conclusion that inconsistencies with Articles 2.1 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994 deprived the safeguard measures at issue of a legal basis.[5812] According to the Appellate Body, the panels were, therefore, entitled to exercise judicial economy and not to address further claims relating to alleged inconsistencies with further provisions of the same safeguard measures. The Appellate Body also observed that additional findings (on Article I of GATT 1994 or Article 5.1 of the Agreement on Safeguards) would not have enhanced the ability of the DSB to make sufficiently precise

[5809] Appellate Body Report, *US – Wheat Gluten*, paras. 183-184.

[5810] Appellate Body Report, *US – Lamb*, paras. 193-195. In *US – Lamb* (para. 192), the Appellate Body also referred to *Argentina – Footwear (EC)* and stated that the panel in that case had, like the panel in *US – Wheat Gluten*, "acted within its discretion in declining to address the issue of 'unforeseen developments' under Article XIX:1(a) of the GATT 1994." As a matter of fact, the panel considered Article XIX:1(a) to be of no independent relevance (see Panel Report, *Argentina – Footwear Safeguard (EC)*, para. 8.69). However, the Appellate Body itself, after reversing the panel's conclusion, saw no need to complete the analysis on the claim under Article XIX of the GATT 1994 (unforeseen developments) because violations of Articles 2 and 4 already deprived the measure of a legal basis. See Appellate Body Report, *Argentina – Footwear*, para. 98 and Appellate Body Report, *US – Wheat Gluten*, paras. 181-182.

[5811] Panel Report, *US – Lamb*, para. 7.280.

[5812] Appellate Body Report, *US – Wheat Gluten*, para. 183; Appellate Body Report, *US – Lamb*, para. 193.

recommendations and rulings in the dispute.[5813] The Panel believes that the circumstances in the present dispute are similar.

10.709 Two further claims on which the Panel exercises judicial economy are, on the one hand, under Articles 2.1 and 4.1(c) of the Agreement on Safeguards relating to the allegedly incorrect definition of the imported product, like product and the domestic industry and, on the other hand, under Articles 2.1 and 4.2(a) relating to serious injury. These claims are also concerned with the question of whether the United States has complied with the WTO requirements that must be satisfied for the right to apply a safeguard measure to exist. According to the Panel's conclusions, each of the safeguard measures lacked a legal basis under WTO law. There is, therefore, no need to address further claims which also relate to the question of whether the United States satisfied the conditions for the right to apply these measures.

10.710 All of the determinations on which the safeguard measures challenged in this dispute are based have been found to be inconsistent with several of the requirements of Article 2.1 and 4 of the Agreement on Safeguards. There is, therefore, also no need to address the claim made under Article X of GATT 1994 in relation to the decision-making process leading to the relevant determinations.

10.711 Finally, since the Panel has found that the exemption of imports from Canada, Mexico, Israel and Jordan in this case was inconsistent with the requirement of parallelism, there was no need to address the question whether this exemption in departure of Article I of GATT 1994 and Article 2.2 of the Agreement on Safeguards was justified by Article XXIV of GATT 1994. As the Appellate Body has stated, the question of whether Article XXIV of GATT 1994 can serve as an exception to Article 2.2 of the Agreement on Safeguards becomes relevant only when the requirement of parallelism has been complied with.[5814]

10.712 With reference to China and Norway's claims under Article 9.1 of the Agreement on Safeguards, the Panel recalls the provisions of Article 12.11 of the DSU pursuant to which where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for that developing country.

10.713 The Panel is aware of the crucial importance of the provisions on special and differential treatment in the WTO Agreement in general, and of Article 9.1 of the Agreement on Safeguards as one such provision.[5815] Article 9.1 of the Agreement on Safeguards, under certain circumstances, requires importing Members to exempt developing country Members from the application of safeguard measures. Those developing country Members, accordingly, are intended to enjoy the benefit of continued access to the market of the importing Member without facing the restrictions imposed by the safeguard measure. A Member imposing a safeguard measure is under an obligation to accord these advantages to every Member which is a developing country. We note that China's Protocol of Accession to the WTO makes reference to China's status in the WTO context.

[5813] Appellate Body Report, *US – Wheat Gluten*, para. 184; Appellate Body Report, *US – Lamb*, para. 194.

[5814] Appellate Body Report, *US – Line Pipe*, paras. 198-199.

[5815] It is not without reason that the Doha Ministerial Declaration contains a mandate to review all special and differential treatment provisions with a view to strengthening them and making them more precise, effective and operational. See Ministerial Declaration, WT/MIN(01)/DEC/1, adopted on 14 November 2001, para. 44.

10.714 Nevertheless, the Panel believes that the principle of judicial economy also applies to a claim such as that made under Article 9.1 of the Agreement on Safeguards. The Panel, therefore, believes that it is not necessary to examine the additional specific claim raised under Article 9.1 and that China is not prejudiced in its asserted rights under Article 9.1, by the Panel's exercise of judicial economy. Since there was no legal basis to impose *any* of the safeguard measures at issue in this dispute against *any* other WTO Member, there was obviously also no legal basis to apply any of these measures to China. For this Panel, the recommendations and rulings of the DSB on claims relating to Article 9.1 would not have had any different practical effects on the WTO-compatibility of these safeguard measures.

10.715 Finally, in resorting to judicial economy, the Panel has been aware of the need for a "prompt settlement" of disputes, including the expeditious issuance of its report, as called for by Article 3.3 of the DSU.

2. The United States' request for the issuance of separate panel reports

10.716 The Panel recalls that in accordance with Article 6 of the DSU, the DSB originally established multiple panels to examine similar matters raised by the various complainants. Pursuant to two procedural agreements (one concluded on 27 June 2002 between, on the one hand, the European Communities, Japan, Korea, China, Switzerland, Norway and New Zealand and, on the other hand, the United States[5816] and the other concluded on 18 July 2002 between Brazil and the United States[5817]), the United States accepted, *inter alia*, the establishment of a single panel under Article 9.1 of the DSU. Pursuant to the two agreements and in accordance with Article 9.1 of the DSU, the DSB agreed that the various disputes would proceed on the basis of a single panel.[5818]

10.717 On 28 January 2003, the Panel received a request from the United States pursuant to Article 9.1 of the DSU that the Panel issue eight separate panel reports rather than one single report. The basis for the United States' request was to protect its DSU rights including the right to seek a solution with one or more of the individual complaints without adoption of a report or without an appeal, in case this right depended on the existence of separate reports.

10.718 On 30 January 2003, the complainants opposed that request for a number of reasons, notably because the request had not been made in a timely fashion, that complying with the request would result in additional delays and that had the complainants known that multiple reports would be issued, they would have presented their arguments differently.

10.719 A series of communications between the parties followed.[5819] On 3 February 2003, the Panel wrote to the parties that a decision on the United States' request would be issued with the Interim Panel Report but that, in any case, should the United States' request be accepted by the Panel, all such separate Panel Reports would have the same Descriptive Part. The content of this letter is reproduced in paragraph 2.18 of the Descriptive Part. On Thursday, 6 February 2003, the Panel issued a single draft Descriptive Part. On 19 February 2003 the Panel received consolidated comments from the complainants as well as comments from the United States.[5820]

[5816] WT/DS248/13, WT/DS249/7, WT/DS251/8, WT/DS252/6, WT/DS253/6, WT/DS254/6, WT/DS258/10.

[5817] WT/DS259/9.

[5818] See para. 10.1.

[5819] See paras. 2.6-2.19.

[5820] The Panel notes also that complainants co-ordinated their comments on the Panel's Interim Findings (of 9 April) as well as their comments on the United States' comments (of 16 April).

10.720 The Panel will now examine the United States' request for the issuance of separate Panel Reports. We recall that our working procedures do not address this issue as such.[5821] As a starting-point, we refer to Article 9.2 of the DSU, which deals with the issue of requests for separate reports in cases involving multiple complainants. Article 9.2 provides in relevant part that:

> "The … panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned."

10.721 The Appellate Body in *US – Offset Act (Byrd Amendment)* acknowledged that, by its terms, Article 9.2 accords to the requesting party a broad right to request a separate report, which is not made dependent on any conditions.[5822] The Appellate Body also noted that the text of Article 9.2 of the DSU contains no requirement for the request for a separate panel report to be made *by a certain time*, but also observed that the text does not explicitly provide that such requests may be made *at any time*.[5823] The Appellate Body went on to observe that Article 9.2 must not be read in isolation from other provisions of the DSU and without taking into account the overall object and purpose of that Agreement, namely that expressed in Article 3.3 of that Agreement, the prompt settlement of disputes.[5824] On the basis of the foregoing, the Appellate Body concluded that the right contained in Article 9.2 is not unqualified. In particular, it cannot justify a request for a separate panel report *at any time during the panel proceedings*.[5825]

10.722 We note also that the United States did express a reason for its request for separate Panel Reports – that is, to protect its right to seek a solution to one or more of the individual complaints without adoption of a report (or without an appeal) and, thus, claimed that it might otherwise suffer prejudice.

10.723 As for the timing of the United States' request, in the Panel's view, the United States' request for separate Panel Reports was *not necessarily* made in an *untimely* fashion. The Panel finds that the United States' request did not come too late in order to adopt the approach that we have chosen in the issuance of this report. We use the word "necessarily" because we consider that despite the fact that the request was made when the Panel's process was quite advanced – that is, three days before the draft Descriptive Part was due to be issued[5826], this did not necessarily prevent the Panel from settling the dispute in a prompt fashion. Indeed, for the reasons mentioned in the Panel's letter dated 3 February 2003[5827] and with a view to expediting the process, while respecting all the parties' rights, the Panel decided to issue a single draft Descriptive Part. The question remains, however, as to whether separate Panel Reports should be issued, of which the common Descriptive Part will form a part, to address the concerns expressed by the United States in requesting the issuance of separate Panel Reports.

10.724 In this regard, the Panel notes that the Appellate Body in *US – Offset Act* interpreted the meaning of the first sentence in Article 9.2, which provides that it is for the panel to "organize its

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[5821] See para. 6.1.
[5822] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 310.
[5823] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 310.
[5824] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 311.
[5825] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 311.
[5826] The draft Descriptive Part was, however, not issued on 31 January 2003 but rather on 6 February 2003; the United States' request for separate reports was made on 28 January 2003.
[5827] See para. 2.18.

examination and present its findings in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired."[5828] In so doing, the Appellate Body, referred to its comments in *EC – Hormones* about panels' discretion in dealing with procedural issues, which it said were pertinent in the context of Article 9.2 of the DSU:

> "[T]he DSU and in particular its Appendix 3, leave panels a *margin of discretion* to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling." [5829] (emphasis added)

10.725 In exercising our "margin of discretion" under Article 9.2 of the DSU, and taking into account the particularities of this dispute, the Panel decides to issue its Reports in the form of one document constituting eight Panel Reports. For WTO purposes, this document is deemed to be eight separate reports, each of the reports relating to each one of the eight complainants in this dispute. The document comprises a common cover page and a common Descriptive Part. This reflects the fact that the eight steel safeguard disputes were reviewed through a single panel process. This single document also contains a common set of Findings in relation to each of the claims that the Panel has decided to address. In our exercise of judicial economy, we have mainly addressed the complainants' common claims and on that basis, we were able to issue a common set of Findings which, we believed, resolved the dispute. Finally, this document also contains Conclusions and Recommendations that are particularised for each of the complainants, with a separate number (symbol) for each individual complainant.

10.726 In coming to this solution, which is specific to the present dispute, the Panel is aware that it must, in exercising its discretion under Article 9.2 of the DSU, bear in mind that "the rights which [*all*] the parties would have enjoyed had separate panels examined the complaints are in no way impaired". In fact, the approach seeks to protect the rights of both sides to the dispute. In particular, we consider that the approach protects the rights of the complainants who, in the present dispute, with the apparent agreement of the United States, referred to and relied upon each other's arguments and demonstrations, cross-referenced each other's written submissions[5830] and written answers, and explicitly stated as much. From the initiation of the panel process, parties have recognized[5831] that the complainants would act together on some common claims and that the United States would respond once to such common claims while responding as well to claims specific to some of the complainants. The complainants coordinated their presentations to the Panel, 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 often provided one response addressing collectively the arguments made by the complainants. We are aware that some complainants may not

[5828] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 315.
[5829] Appellate Body Report, *EC – Hormones*, footnote 138 to para. 152.
[5830] 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 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 complainant was speaking on a specific matter on behalf of the other complainants.
[5831] See para. 5 of the Panel's working procedures quoted in para. 6.1 of the Descriptive Part

have developed much argumentation in relation to one or more of the measures at issue.[5832] Yet, all complainants challenged the WTO-compatibility of all measures and decided to argue their case together; this was encouraged by the Panel and seemed to have been accepted by the United States.

10.727 Therefore, in organizing its examination of the various claims at issue, at the outset, the Panel understood that since all complainants made (some) similar violation claims against the USITC's Report for all measures at issue and since such claims were to be examined through a single panel process, complainants would rely upon each other's arguments and demonstrations when making their case. On the basis of our findings on common claims, we were able to conclude that the United States' safeguard measures lack legal basis.

10.728 We are aware that panels are not entitled to make the case for the complainants.[5833] 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.[5834] We believe that in the present case, each of the complainant has made a prima facie case that the safeguard measures at issue were inconsistent with the WTO provisions listed in our Recommendations, through its own and together with each other's demonstration. In addition, we consider that this approach also protects, the right of the United States, by allowing it to respond to all arguments and allegations made with regard to each measure in a more coherent and comprehensive manner and to seek a solution with one or more of the individual complaints without adoption of that complainant's report or without an appeal, should this right at all depend on the existence of separate reports. Accordingly, we are of the view that the approach we adopted respects the principles of judicial economy and the rights of all parties.

10.729 Finally, in considering the United States' request for separate panel reports, and throughout this Panel process, the Panel has been aware of its duty to make all efforts to ensure, as far as possible, a *prompt and effective* resolution of the dispute, while respecting the rights of all parties. We believe this is essential to the functioning of the WTO.[5835]

[5832] We note in this regard that, in fact, some of the complainants may not have much trade interest in relation to some of the measures at issue, which would have a direct impact on these complainants' rights pursuant to Article 22.4 of the DSU.

[5833] Appellate Body Report, *Japan – Agricultural Products II*, paras. 126-130.

[5834] 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.

[5835] The Panel notes that Members are now negotiating amendments to the DSU, Ministerial Declaration, WT/MIN(01)/DEC/1 adopted on 14 November 2001, para. 30. Members may want to address the issue of the legal consequences of the establishment of a single panel during these negotiations.