7.1339 China further argues that in the Supplementary Report, the USITC was required to assess the injury caused by imports from Mexico and Canada and to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. China argues that it did not do so. China further argues that the USITC provided no explanation whatsoever that injury caused by imports from Mexico and Canada was not attributed to increased imports and there is no reason to believe that injury caused by imports from Mexico and Canada were not in fact attributed to increased imports.[3160]

7.1340 In this regard, the European Communities argues that a proper analysis of imports from Canada and Mexico would have been important because imports from Canada and Mexico represented, taking 2000 as an example, 45.9% of all imports. However, the European Communities submits that the USITC analysis is unclear because two Commissioners concluded that Canadian and Mexican imports "contribute importantly" to the threat of serious injury, two Commissioners concluded that Canadian and Mexican imports did not "contribute importantly" to the threat, one Commissioner found serious injury for welded products (i.e. OCTG and non-OCTG welded tubular products) and that Canadian imports "contributed importantly", while the sixth Commissioner classed the products in the same manner and found serious injury but that Canadian imports did not "contribute importantly". Since this was taken as a tie vote, the President decided that imports from Canada do not contribute importantly to the serious injury or threat thereof.[3161] The European Communities argues that, however, the mere fact that Canadian and Mexican imports were overall considered not to "contribute importantly" does not mean that they are not having an effect on the domestic industry, and should not be factored into the causal analysis which must also form part of a threat determination. In order to find that NAFTA imports did not "contribute importantly", the USITC must find that the growth rate in such imports is appreciably lower than that of other imports. Thus, a simple finding that, according to United States law, NAFTA imports did not contribute importantly does not mean that they had no effect on the domestic industry. Imports of the magnitude involved here evidently affect the domestic industry.[3162]

7.1341 The European Communities argues that a competent authority is required to assess the effect of such excluded imports on the domestic industry, to separate and distinguish those effects, and to make sure those effects are not attributed to increased imports from other sources. Consequently, China and the European Communities submit that the United States has acted inconsistently with Article 4.2(b) of the Agreement on Safeguards. It is hardly conceivable that 45.9% of imports (again based on 2000), which, in the case of Mexican imports consistently undersold domestic products, could have no effect on a domestic industry.[3163] The European Communities further argues that a case where NAFTA imports represent 45.9% of all imports provides a very good example of why the non-attribution analysis in respect of excluded imports is necessary.[3164]

7.1342 For the United States' response, see paragraph 7.1066 *et seq*.

Factors not considered by the USITC

7.1343 According to the European Communities, there are a number of other factors, some of which have been ignored, which were having an effect on the domestic industry. Also, because these factors have not been properly analysed, the USITC has failed to provide a reasoned and adequate

[3160] China's first written submission, para. 454.
[3161] European Communities' first written submission, para. 529.
[3162] European Communities' second written submission, para. 410.
[3163] European Communities' first written submission, para. 530; China's first written submission, para. 454.
[3164] European Communities' second written submission, para. 410.

explanation of its findings.[3165] In particular, the European Communities argues that there were notable increases in "other factory costs" and SG&A expenses in 1999 and 2000, and of raw materials in 2000 which also must have had an effect on the domestic industry but which are not explained.[3166]

7.1344 In response, the United States submits that the European Communities' argument is not persuasive. It is true, as the European Communities contends, that the industry did experience some increase in its unit other factory costs and unit SG&A expenses between the first three years of the period of investigation and the last two years of the period. However, as can be seen from the USITC's Report, the increases in these costs were more than offset by declines in the industry's unit raw materials costs and its unit direct labour costs during this same period. As a result, the industry's overall unit costs of goods sold declined substantially between the first three years and the last two years of the period of investigation, falling from a range of US$537 to US$545 per ton during the three-year period from 1996 to 1998 to a range of US$502 to US$515 per ton in 1999 and 2000. Even with the increases in its other factory and SG&A expenses, therefore, the industry's overall costs of goods sold declined during the two years in which imports made their largest inroads into the market. The United States submits that, given this, it is clear why the USITC placed little weight on the changes in the industry's other factory and SG&A costs when assessing whether imports had caused the declines in the industry's profitability levels in the latter part of the period of investigation.[3167]

7.1345 In counter-response, the European Communities notes[3168] that, in fact, the unit values for the individual items for COGS do not add up to total COGS on which the USITC based itself. This is illustrated below:

Table 17: Welded Pipe Products – COGS Data 2000[3169]

	As recorded in USITC Report	Consistent with reported unit values
Raw materials	340	340
Direct labor	51	51
Other factory costs	106	106
Total COGS	515	**497**
Gross profit (unit)	76	**94**
SG&A expenses	51	51
Operating Income (unit)	25	**43**
Operating income (total)	118,464,000	**202,183,893**

7.1346 The European Communities submits that, thus, when correctly added up, the total COGS is US$497 per unit rather than US$515. This means that the gross profit is US$94 per unit and not US$76, and that operating income is US$43 per unit and not US$25 as is presently reported in the USITC Report. Applying this to the volume of commercial sales, operating income almost doubles, and indicates a minor fall from the 1999 level of US$246,626,000 and not the fairly substantial fall which the data used in the USITC Report suggests (operating income per unit in 1999 was US$49 as against US$43 in 2000 if the USITC Report is corrected). Thus, either the USITC Report has failed

[3165] European Communities' first written submission, para. 531.
[3166] European Communities' first written submission, para. 534.
[3167] United States' first written submission, para. 626.
[3168] European Communities' second written submission, para. 408.
[3169] European Communities' second written submission, para. 408; USITC Report, Vol. II p. TUBULAR-22, table TUBULAR 18. Figures in bold indicate differences with the data actually recorded in the USITC Report.

to show some development in costs which might have a material bearing on any causation analysis, or its data on operating income is entirely inaccurate, meaning that the findings based on operating income are not a reasoned and adequate explanation supported by the facts. The USITC's determination of the existence of a threat of serious injury is brought into question if there was only a minor fall in profits in 2000 compared to the substantial fall which the USITC alleges actually took place.[3170]

Relevance of like product analysis for welded pipe

7.1347 Korea argues that in the case of welded pipe, the USITC failed to properly consider the effect of demand trends because they simply "added together" increases for LDLP and declines for all other welded pipe and concluded that the increases did not offset the decreases since LDLP was a small part of the overall category of other welded pipe. This led to incorrect conclusions regarding causation. If the like product of LDLP had been examined then the decreases in imports in an expanding market might have led to a different conclusion regarding causation.[3171]

7.1348 For a summary of the United States' position on this issue, see paragraph 7.1324 above.

Failure to provide a reasoned and adequate explanation

7.1349 Switzerland submits that if the investigating authority believes that an alleged factor is not threatening to cause injury, it must, likewise, explicitly, clearly, and unambiguously, state that such a factor is not threatening to cause injury and explain the reasons why. The explanation must be straightforward. To proceed otherwise would not ensure that alleged factors have been examined closely enough to establish that they are not contributing to the threat of injury. As a result, there would be no guarantee that threat of injury due to other factors has not been wrongfully attributed to increased imports.[3172]

7.1350 Switzerland argues that since the injurious effects of the two factors that were threatening to cause injury at the same time as the increased imports had not been properly assessed by the USITC, it is impossible to determine whether the USITC properly separated the injurious effects of these factors from the injurious effects of the increased imports.[3173] China and Switzerland argue that as a result, the the USITC failed to adequately evaluate the complexity of the alleged injury factors. It also failed to provide a sound, clear and straightforward explanation of how it ensured that injury caused by other factors was not attributed to increased imports. Therefore, China and Switzerland believe that the USITC acted inconsistently with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3174]

7.1351 The United States argues that the USITC performed a thorough and objective analysis of the record. It established that there was a genuine and substantial causal link between trends in the volume and market share of imports of certain welded pipe and the significant declines in the condition of the welded pipe industry during the last years of the period of investigation and how serious injury by such imports was imminent. Moreover, it thoroughly assessed the nature and scope of the effects of other factors and ensured that it did not attribute the effects of these factors to imports.[3175] The United States also argues that, a "reasoned and adequate" explanation of the

[3170] European Communities' second written submission, para. 409.
[3171] Korea's written reply to Panel question No. 80 (a) at the first substantive meeting.
[3172] Switzerland's first written submission, para. 305.
[3173] Switzerland's first written submission, para. 303.
[3174] China's first written submission, para. 449; Switzerland's first written submission, paras. 304 and 307.
[3175] United States' first written submission, para. 639.

injurious effects of imports and non-import factors will properly take into account the manner in which the interplay of various factors (both import and non-import) have caused injury to an industry. The United States believes that the USITC's analysis of the injurious effects of imports and non-import factors identified the nature and extent of the injury attributable to all non-import factors, and therefore adequately assured that injury caused by other factors was not attributed to the imports.[3176]

(vii) FFTJ

Factors considered by the USITC

Increased capacity

7.1352 China argues that the USITC acknowledged that the increase in capacity exercised some pressure on prices.[3177]

7.1353 In response, the United States argues that it is wrong to say that USITC acknowledged capacity to be an alternative source of injury to the domestic industry. The USITC found that increased capacity could not have been a source of injury to the domestic industry, because over the period of investigation capacity increased less than United States' apparent consumption. Moreover, from 1999 to 2000, when imports had their largest annual increase in volume and market share during the period of investigation and the domestic industry ceased to operate profitably, United States capacity actually declined to its lowest level since 1996. Having found that increased capacity was not an alternative cause of the serious injury it observed, the USITC satisfied its non-attribution obligation under Article 4.2(b).[3178]

7.1354 In counter-response, China contends its understanding of the USITC's wording is that: "the increase in capacity would not be expected to place substantial pressure on domestic prices", because the capacity increased at a rate less than the increase in apparent consumption. However, according to China, the pressure is present even if it is not substantial. China argues that the capacity increase is to be seen to be an alternative source of injury and it must be subject to a causality/non-attribution analysis.[3179] In light of the foregoing, China argues that the United States' arguments are without merit. The capacity increases were to be treated as an alternative source of injury and non-attribution of this factor should have been explained clearly and unambiguously.[3180]

Purchaser consolidation

7.1355 China argues that it is possible to conclude from the USITC's comments that purchaser consolidation put pressure on domestic prices.[3181]

7.1356 In response, the United States argues that China misunderstands the USITC's discussion of purchaser consolidation. The USITC acknowledged that purchaser consolidation may have had some impact on prices of the domestic FFTJ industry could charge, because fewer purchasers would have relatively greater bargaining power vis-à-vis producers. There was no basis, however, to conclude that purchaser consolidation would reduce demand for FFTJ; to the contrary, United States apparent consumption of the product was generally stable during the latter portion of the period of

[3176] United States' written reply to Panel question No. 32 at the second substantive meeting.
[3177] China's first written submission, para. 459.
[3178] United States' first written submission, paras. 656-657.
[3179] China's second written submission, para. 256.
[3180] China's second written submission, para. 258.
[3181] China's first written submission, para. 460.

investigation. Moreover, many of the indicators of serious injury which the USITC identified were not price based. These included declines in market share, declines in shipments and sales quantities, and declines in employment. By explaining that the serious injury it observed for the FFTJ industry was different in nature and broader in scope than the relatively limited price effects that could be attributed to purchaser consolidation, the USITC satisfied its obligation not to attribute to purchaser consolidation serious injury caused by the increased imports.[3182]

7.1357 China notes in counter-response that the USITC stated that the purchaser consolidations put some pressure on the domestic prices.[3183] In light of the foregoing, China argues that the United States' arguments are without merit. Purchaser consolidation was to be treated as an alternative source of injury and non-attribution of this factor should have been explained clearly and unambiguously.[3184]

NAFTA imports

7.1358 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic FFTJ industry, which is found in the USITC Report was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports' only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[3185]

7.1359 The European Communities argues that while the USITC's position with respect to the alternative causes cited in the domestic investigation is unclear, its findings with respect to Canada and Mexico are unambiguous; imports from both countries caused serious injury. The European Communities asserts that Mexican and Canadian imports were not analysed by the USITC as alternative causes of injury. This was not done either in the Second Supplementary Report. Thus, the USITC did not separate and distinguish the effects of NAFTA imports, and did not make sure that such effects were not attributed to increased imports. The European Communities argues that this is all the more serious because of the importance of imports from these countries on the United States market. As a result, it is argued that the United States has acted inconsistently with Article 4.2(b) of the Agreement on Safeguards.[3186]

7.1360 For the United States' response, see paragraph 7.1066 *et seq*.

Factors not considered by the USITC

7.1361 The European Communities argues that data which the USITC gathered is far from conclusive in proving that any serious injury has been caused by low-priced imports. Indeed, while imports may have increased overall, such increased imports appear to have had little effect on prices.

[3182] United States' first written submission, para. 658.
[3183] China's second written submission, para. 257.
[3184] China's second written submission, para. 258.
[3185] China's first written submission, para. 466; China's second written submission, para. 259.
[3186] European Communities' first written submission, para. 539.

The COGS has, however, increased significantly, as have SG&A expenses.[3187] The European Communities asserts that there is only a substantial increase in imports between 1999 and 2000. However, according to the European Communities, the fall in profitability of the domestic industry occurred between 1997 and 1998 and cannot be explained, therefore, by any sudden, recent, increase in imports. The European Communities argues that the change in profitability would appear to be more closely linked to changes in costs. However, despite the fact that the development in costs was readily apparent on the basis of a simple examination of the data collected, the USITC did not analyse this issue.[3188]

7.1362 The United States submits that the USITC explained that lower production and shipments during the period of investigation contributed to increases in unit costs.[3189] In particular, per unit increases after 1997 in other factory costs and SG&A expenses, both of which are emphasized by the European Communities, can be attributed to the fact that the industry had to spread its costs over a smaller quantity of sales.[3190]

7.1363 In counter-response, the European Communities submits that the claim by the United States that the USITC did analyse these costs, because the USITC stated that increases in per unit costs occurred as sales fell, is not borne out by the USITC Report which shows that increases in raw materials cost and other factory costs occurred between 1997 and 1998. According to the European Communities, commercial sales in 1998 were similar in volume to 1996, but higher in value, yet a comparison of costs between 1996 and 1998 shows a substantial increase, the reasons for which are never explained in the USITC Report.[3191] Thus, increases in volume cannot explain the increases in per unit costs. The USITC, despite the United States best efforts, did not therefore provide a reasoned and adequate explanation of its findings on increased costs, and thus failed to properly ensure non-attribution.[3192]

Failure to provide reasoned and adequate explanation

7.1364 The European Communities notes that the USITC used the data it had gathered on sales of Product 22, that is: "Carbon steel butt-weld pipe fitting, 6 inch nominal diameter, 90 degree elbow, long radius, standard weight, meeting ASTM A-234, grade WPB or equivalent specification …". The USITC explained, however, that for the specific products for which it had requested data in the tubular section, of which Product 22 was one, pricing data coverage tended to be very low (usually less than 5%) due to the wide heterogeneity among tubular products in all five categories. The European Communities argues that given that the USITC found that imports were "generally" higher priced than domestic products, even though imports were always higher priced, it was forced to have recourse to other data to show that imports were priced below domestic products, which must be, for a commodity product group, the determinant issue.[3193] The European Communities argues that the data for Product 22 in terms of value, demonstrates that Product 22 is not representative. On the basis of a product representing 1.2% of domestic commercial sales on the whole product category the European Communities argues that such a conclusion cannot be considered reasoned and adequate.[3194]

[3187] European Communities' first written submission, para. 548.
[3188] European Communities' first written submission, para. 550.
[3189] USITC Report, p. 176.
[3190] United States' first written submission, para. 654.
[3191] USITC Report, Vol. II, P. Tubular 24, table Tubular 20
[3192] European Communities' second written submission, para. 412.
[3193] European Communities' first written submission, para. 545.
[3194] European Communities' first written submission, para. 547.

7.1365 In response, the United States argues that by suggesting that the USITC staff chose to collect data on very low volume products, the European Communities ignores and distorts information in the USITC's report. The USITC staff did not seek pricing data on a FFTJ product that it believed would yield low data coverage, as the European Communities implies. The staff stated instead that there was no single FFTJ product on which it could obtain extensive coverage. Indeed, there was not even a combination of products that could provide the type of coverage the European Communities asserts is necessary. In a portion of the report apparently overlooked by the European Communities, the staff explained that "it is difficult to find high-volume pricing products in a heterogenous market such as the steel tubular market". The report, read in context, indicated that the FFTJ product on which the USITC obtained pricing data was a "high volume" product within the group of FFTJ products.[3195] In this regard, the United States submits that the Appellate Body has observed that no provision of the Agreement on Safegaurds specifically addresses the extent to which an investigating authority must collect data. In particular, no provision of the Agreement requires an authority to collect any specific quantum of data, or any data at all, pertaining to pricing. The USITC furthered the goal of conducting a thorough investigation, and acted in an objective manner, by collecting pricing data for a particular FFTJ product that would provide data on a high volume of sales relative to other products on which data could be collected. Such conduct cannot in any way contravene the obligations of the United States under the Agreement on Safeguards.[3196]

7.1366 In counter-response, the European Communities argues that given the importance of the examination of pricing, and the lack of other pricing data showing underselling, pricing for the specific product is evidently an important part of the USITC's finding. The United States defends itself by arguing that the USITC staff did not deliberately seek a low volume product for specific comparison.[3197] The European Communities has no reason to believe that the USITC staff would choose a product deliberately because of its lack of representativeness. However, the European Communities does consider, that if the USITC wanted to make a reasoned and adequate explanation, it might have requested data on several specific products, so that it had several sets of data on which to base its findings. The USITC did not provide a reasoned and adequate explanation of its findings.[3198]

7.1367 The United States submits that the USITC also explained the limited probative value of the average unit value data on which the European Communities apparently believes the USITC should have relied. Average unit value data may serve as a useful proxy for pricing data for some industries. However, in an industry such as the FFTJ industry that is characterized by a wide variety of products, variance between AUV is often indicative of differences in product mix (i.e., the imports are concentrated in higher-value items, while domestic production is concentrated in lower-value items) rather than differences in price. For this reason, while the USITC referred to the average unit value data for the FFTJ industry, it stated that it was cautious of placing undue weight on the data because of concerns with product mix. The USITC thus had an objective basis, which it fully explained, for relying principally on pricing data relating to an individual product, rather than on the average unit value data relating to a mix of products.[3199]

7.1368 China argues that the USITC failed to assess the injurious effects of other factors such as increased capacity and purchaser consolidation since not a word is written on the nature and extent of the injury caused by these two factors. Thus, according to China, it is impossible to determine whether

[3195] United States' first written submission, para. 650.
[3196] United States' first written submission, para. 651.
[3197] United States' first written submission, para. 650.
[3198] European Communities' second written submission, para. 414.
[3199] United States' first written submission, para. 652.

the USITC properly separated the injurious effects of these factors from the injurious effects of the increased imports. China agues, in sum, that the USITC failed to adequately evaluate the complexity of the alleged injury factors. It also failed to provide a sound, clear and straightforward explanation of how it ensured that injury caused by other factors was not attributed to increased imports. Therefore, China believes that the USITC acted inconsistently with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3200]

7.1369 The United States argues that the USITC conducted a reasoned and adequate examination of the injury purportedly caused by these factors and ensured that any injury caused by these other factors was not attributed to imports. In particular, the USITC found that increased capacity was not an explanation for the serious injury experienced by the domestic industry. It stated that capacity increased during the period of investigation at a rate less than the increase in US apparent consumption and thus should not have placed substantial pressure on domestic prices. The USITC also acknowledged that purchaser consolidation would be expected to place some pressure on domestic prices. The USITC found, however, that demand for FFTJ was generally stable to increasing during the latter portion of its period of investigation. Moreover, the USITC did not rely solely on price effects in finding that the domestic FFTJ industry was seriously injured but also cited declines in non-price indicators, such as market share, domestic production, shipments, and employment. The USITC stated that purchaser consolidation could not explain the declines that occurred in these non-price indicators.[3201]

(viii) Stainless steel bar

Factors considered by the USITC

Downturn in demand

7.1370 China argues that the USITC acknowledged that the downturn in demand in late 2000 and interim 2001 was causing injury at the same time as increased imports. China submits that if imports had a greater impact than demand declines it was necessarily because this factor also had an impact on the declines in the industry's conditions.[3202] China argues that concerning declining demand in 2000 and interim 2001, all that the USITC explained was that there had already been changes in the industry's condition prior to 2000. It did not explain anything concerning 2000 and 2001. China argues that, clearly, this is insufficient.[3203]

7.1371 The European Communities suggests that the USITC's conclusion that decreased demand was a less important cause than imports is far from clear. In any event, it argues that the USITC does not attempt to distinguish the effect of decreased demand from the effects of imports and other factors and, thus, does not ensure that the effect of such developments was not attributed to increased imports.[3204]

7.1372 The European Communities notes[3205] that for demand declines the USITC stated no more than:

[3200] China's first written submission, para. 465.
[3201] United States' first written submission, para. 656.
[3202] China's first written submission, para. 475.
[3203] China's first written submission, para. 481
[3204] European Communities' first written submission, para. 556.
[3205] European Communities' second written submission, para. 426.

> "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 during the period from 1996 to 1999 in the face of increase import volumes, despite the fact that there were only small changes overall in the amount of stainless rod consumed in the United States 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 increased, especially given the substantial increase in import quantities and market share during the last year and a half of the period."[3206]

7.1373 The European Communities and China argue that quite apart from the fact that the only increased imports which could potentially satisfy the requirements of the Agreement on Safeguards took place in 2000, and that therefore increased imports could not, even potentially, be held responsible under the Agreement on Safeguards for the injury suffered by the industry up to 2000, this statement of the USITC clearly recognizes that demand declines caused some injury.[3207] However, the USITC goes no further in its analysis, and thus does not establish explicitly, in a reasoned and adequate manner, how it has separated and distinguished such injury and ensured it was not attributed to increased imports.[3208]

7.1374 The United States argues that the USTIC properly ensured that that it did not attribute any injury caused by late period demand declines to imports. It asserts that the ITC recognised that, after growing 1996 to late 2000, demand for stainless steel bar did decline in late 2000 and interim 2001. However, the USITC correctly noted that the industry had been experiencing serious declines in its market share, production volumes, sales levels, employment levels, and profitability levels during the years prior to 2000 and 2001, when imports had been increasing as well. Indeed, it specfically found that the industry's in ability to maintain its operating profits in the face of demand changes in late 2000 and 2001 were the "direct result of the increasing share of the market obtained by imports and their continued underselling of domestic merchandise during the period," not the result of demand declines.[3209]

7.1375 The United States asserts that the USITC closely examined the effects that were attributable to demand declines during the period. In particular, the USITC properly noted that demand declines had become evident only during the final three quarters of the period of investigation. However, it also correctly noted that these late-period demand declines could not possibly have contributed to thes serious declines in the condition of the industry during the three years prior to this period, when demand was, in fact, increasing. Moreover, given that demand actually increased, substantially on a full year basis in 2000 as well, it is clear that demand declines were not a cause of injury to the industry in that year as well. Given the foregoing, the USITC reasonably concluded that the declines

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[3206] USITC Report, Vol. I, p. 221.

[3207] United States' first written submission, paras. 709 and 712 talks of injury being "primarily caused" by imports.

[3208] European Communities' second written submission, para. 427; China's first written submission, paras. 492 and 498.

[3209] United States' first written submission para. 679

in the industry's condition that occures during interim 2001 were primarily caused by imports, even with the decline in demand in that period.[3210]

7.1376 In counter-response, the European Communities argues that the USITC recognized that demand declines had an effect on the domestic industry – by concluding that this cause is less important than increased imports, the USITC did not separate and distinguish the effects of alternative causes and increased imports.[3211]

Increases in capacity

7.1377 The European Communities argues that the USITC did not examine the effect of capacity increases greater than increases in demand on the operations of the domestic industry. According to the European Communities, it is immediately obvious that such capacity increases must have had an effect on the United States industry's performance.[3212] In particular, the European Communities argues that substantial increases in capacity were made in a period during which demand for stainless bar dropped away. According to the European Communities, price developments mirrored developments in demand and were obviously affected by developments in capacity. However, the effect of developments in demand allied to increased capacity were not assessed in the USITC Report and, thus, no effort was made to separate and distinguish the effect of these factors from the effect of imports.[3213] The European Communities argues further that the domestic industry continued to increase capacity well in excess of the rate of domestic demand during the investigation period. While the USITC did not deal with this issue, the European Communities argues that this would tend to suggest that serious injury has not been caused by imports but, rather, by developments in the domestic industry.[3214]

7.1378 In response, the United States submits that it is factually wrong to argue that the USITC failed to consider that the industry's capacity "continued to increase" well in excess of the rate of domestic demand during the period and it mischaracterizes the USITC's opinion. It is factually wrong because the industry's capacity increases did not, in fact, exceed the growth in demand during the period. More specifically, the industry's capacity levels only increased by 5.5% between 1996 and 2000. Apparent US consumption grew by 17.2% between those years. In fact, because of this differential, the industry's total capacity was slightly lower than total demand in 2000. Thus, although there were fluctuations in demand during the period, the record does not indicate that the industry's capacity increases were in excess of the growth in market demand.[3215]

7.1379 The United States argues further that the USITC clearly did discuss the industry's capacity increases during the period, noting specifically that industry capacity had grown during the period and that capacity utilization had declined. Moreover, the USITC directly addressed the relationship of these capacity increases to demand changes in the market and their impact on the condition of the industry. In particular, it found that the industry's capacity increases had not enabled the industry to take advantage of the growth in the market during the period. Given this discussion, it is unclear how the European Communities could possibly believe that the USITC ignored the relationship between the industry's capacity increases and the growth in demand. The USITC clearly considered the

[3210] United States' first written submission, para. 680.
[3211] European Communities' second written submission, para. 420.
[3212] European Communities' first written submission, para. 558.
[3213] European Communities' first written submission, para. 559.
[3214] European Communities' first written submission, para. 568.
[3215] United States' first written submission, para. 671.

growth in industry capacity in its analysis and reasonably explained why it was not a factor in the decline in market prices or in the industry's condition.[3216]

7.1380 In counter-response, the European Communities refers to the United States attempts to rebut the European Communities' arguments by comparing capacity and consumption on an end to end basis.[3217] However, since the causation analysis is essentially about identifying trends, it is insufficient to analyse this issue in such a superficial manner. Indeed, the coincidence of increases in capacity, decreases in demand, and decreases in operating income should have alerted the USITC to the possibility that capacity increases, allied with demand developments, might well have been responsible for the situation of the industry. The USITC failed to examine this issue in the detail which it clearly merited, and in so failing, did not provide a reasoned and adequate explanation of how the facts support its findings.[3218]

Increases in energy costs

7.1381 China argues that the USITC acknowledged that the increase in energy costs in late 2000 and interim 2001 was causing injury at the same time as increased imports. If imports had a greater impact than energy costs increases, it was necessarily because this factor also had an impact on the declines in the industry's conditions.[3219] China argues that concerning the increase in energy costs in 2000 and interim 2001, all that the USITC explained was that there had already been changes in the industry's condition prior to 2000. It did not explain anything concerning 2000 and 2001. China argues that, clearly, this is insufficient.[3220]

7.1382 The European Communities suggests that the USITC's conclusion that increased energy costs was a less important cause than imports is far from clear. In any event, it argues that the USITC does not attempt to distinguish the effect of increased energy prices from the effects of imports and other factors and, thus, does not ensure that the effect of such developments was not attributed to increased imports.[3221]

7.1383 The European Communities notes[3222] that for increased energy costs, the USITC stated no more than:

> "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 during the period from 1996 to 1999 in the face of increase import volumes, despite the fact that there were only small changes overall in the amount of stainless rod consumed in the United States 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 increased, especially given the substantial

[3216] United States' first written submission, para. 672.
[3217] United States' first written submission, para. 671.
[3218] European Communities' second written submission, para. 421.
[3219] China's first written submission, para. 475.
[3220] China's first written submission, para. 481.
[3221] European Communities' first written submission, para. 556.
[3222] European Communities' second written submission, para. 426.

> increase in import quantities and market share during the last year and a half of the period."[3223]

7.1384 The European Communities argues that quite apart from the fact that the only increased imports which could potentially satisfy the requirements of the Agreement on Safeguards took place in 2000, and that therefore increased imports could not, even potentially, be held responsible under the Agreement on Safeguards for the injury suffered by the industry up to 2000, this statement of the USITC clearly recognizes that increased energy costs caused some injury.[3224] However, the USITC goes no further in its analysis, and thus does not establish explicitly, in a reasoned and adequate manner, how it has separated and distinguished such injury and ensured it was not attributed to increased imports.[3225]

7.1385 The United States argues in response that the USITC closely examined the effects of energy cost increases on the industry during the period of investigation. In particular, the USITC properly noted that energy cost issues had been become evident only during the final three quarters of the period of investigation.[3226] It also correctly noted that these late-period energy cost increases did not significantly contribute to the decline in the condition of the industry during the three years prior to this period, when there was no evidence of significant changes in energy costs.[3227] By performing an analysis that assessed whether imports appeared to be causing injury to the industry during a period without substantial energy cost increases, the USITC was able to distinguish the effects of these increases in the final three quarters of the period of investigation from those attributable to imports during prior periods. As a result, the USITC was able to ensure that did not attribute any injury caused by energy costs to imports. Moreover, even for the period 2000 and interim 2001, the USITC qualitatively assessed whether imports had a more substantial impact on the condition of the industry than did energy cost increases. By doing so, and by concluding that even the injury suffered by the industry in 2000 and interim 2001 was primarily caused by imports and not energy costs, the USITC appropriately assessed the extent of the injury attributable to imports even in those periods.[3228] In sum, the USITC properly separated and distinguished the effects of increases in energy costs from those of imports in its analysis, despite the complainants' arguments to the contrary.[3229]

7.1386 China notes in counter–response that the United States states that it qualitatively assessed that imports had a more substantial impact than energy cost increase. The United States claims that by doing so it appropriately assessed the extent of the injury attributable to imports.[3230] China questions how the United States was able to define the extent of the injury caused by imports by a mere comparison of two factors. China argues that the misleading interpretations in the submissions of the United States cannot prove that a proper assessment of the extent and nature of the injurious factors, and their non-attribution to the imports effects took place.[3231]

[3223] USITC Report, Vol. I, p. 221.

[3224] United States' first written submission, paras. 709 and 712 talks of injury being "primarily caused" by imports.

[3225] European Communities' second written submission, para. 427; China's first written submission, para. 492.

[3226] USITC Report, p. 221.

[3227] USITC Report, p. 221.

[3228] It bears repeating that, since demand did not decline on an overall basis in 2000, there was clearly no injurious impact of a demand decline in that year on the industry on an overall basis.

[3229] United States' first written submission, para. 711.

[3230] China's second written submission, para. 267.

[3231] China's second written submission, para. 268.

7.1387 The United States responds by arguing that the USITC considered whether energy cost increases during the last months of that period of investigation were a source of injury to the domestic industry. In its analysis, the USITC recognized that there was an increase in energy costs during late 2000 and interim 2001. However, the USITC correctly noted that there was no record evidence of specific energy cost increases in the period prior to late 2000 and 2001, and that the industry had been experiencing serious declines in its market share, production volumes, sales levels, employment levels, and profitability levels as a result of increasing import volumes in the years prior to 2000 and 2001 as well. Indeed, the USITC specifically found that the industry's inability to maintain its operating profits in the face of energy cost increases in late 2000 and 2001 were the "direct result of the increasing share of the market obtained by imports and their consistent underselling of domestic merchandise during the period."[3232]

7.1388 The United States also argues that the USITC closely examined the effects of energy cost increases in the condition of the industry during the period of investigation. In particular, the USITC properly noted that energy cost issues had become evident only during the final three quarters of the period of investigation. However, it is also correctly noted that these late-period energy cost increases could not possibly have contributed to serious declines in the condition of the industry during the three years prior to this period, when there was no evidence of significant changes in energy costs. As a result, it reasonably concluded that the declines in the industry's condition that occurred during 2000 and interim 2001 were substantially caused by imports, even though energy costs increased during the latter months of 2000 and in interim 2001.[3233]

7.1389 In counter-response, the European Communities argues that the USITC recognizes that energy costs had an effect on the domestic industry – by concluding that this causes is less important than increased imports, the USITC did not separate and distinguish the effects of alternative causes and increased imports.[3234]

Increases in nickel prices

7.1390 The European Communities submits that the USITC acknowledged that stainless steel bar prices "track the price of nickel" and that nickel prices rose in 1999 and 2000. Yet, according to the European Communities, it baldly concluded that price underselling by imports "suppressed and depressed prices to a serious degree" without attempting to separate the effect of developments in the nickel price on prices and not to attribute it to increased imports. The European Communities submits that, in fact, the industry's poor performance broadly coincides with decreases in the prices of nickel.[3235] The European Communities further argues that given the close correlation in prices and the collapse of the price of nickel from 1995 to 1998, it seems likely that, with the price of nickel falling, forcing down the price of stainless bar, the United States domestic industry had difficulty covering its fixed costs.[3236]

7.1391 In response, the United States notes that price is an important factor in purchasing decisions for stainless steel bar. Price is directly affected by the price of nickel. Indeed, to account for fluctuations in the price of nickel, producers impose a surcharge on the price of stainless steel bar

[3232] United States' first written submission, para. 682
[3233] United States' first written submission, para. 683.
[3234] European Communities' second written submission, para. 420.
[3235] European Communities' first written submission, para. 555.
[3236] European Communities' first written submission, para. 568.

when nickel prices increase to a specified level. Nickel prices fell through 1998 but then increased significantly in 1999 and the first half of 2000. Nickel prices then fell through interim 2001.[3237]

7.1392 The United States also questions the European Communities' assertion that the USITC "baldly conclude[d]" that imports suppressed or depressed prices in the market "without attempting to separate the effects of developments in the nickel price" on domestic prices in light of the fact that the USITC discussed this issue at length in its opinion.[3238] In its analysis, the USITC examined the relationship between nickel price movements and movements in the price of stainless steel bar in its opinion and concluded that nickel price movements had not caused the price suppression in the market. In particular, the USITC specifically found that market participants expect stainless prices to move in tandem with nickel prices because of the importance of nickel in the production of stainless steel bar. As a result, it specifically analysed whether movements in the industry's net unit prices for stainless steel bar and its costs had tracked the price of nickel during the period. Although it found that stainless bar prices had tracked nickel prices somewhat during the first years of the period, it also stated that the industry's net sales revenues and unit sales prices failed to keep pace with movements in nickel prices during the second half of the period of investigation, which resulted in decreasing unit profitability margins for the industry during this period. Moreover, the USITC found, the decreasing spread between its unit costs and unit prices – the result of price declines exceeding declines in its COGS, including nickel costs – directly caused declines in the industry's net sales values and its operating income margins during the last two-and-a-half years of the period of investigation, even as nickel prices increased.[3239] The United States argues that clearly, then, the USITC did examine this issue in detail and correctly concluded that nickel prices had not caused the declines in the industry's profitability levels during the period. The European Communities' argument concerning the USITC's discussion of nickel prices has no merit whatsoever.[3240]

7.1393 The United States argues that by focusing on the change in spread between the industry's costs (which included its nickel costs) and its sales values in its discussion of the impact of nickel costs on domestic pricing, the USITC was clearly able to assess the extent to which the industry was unable to increase its prices to fully recover its nickel costs because of import competition. Accordingly, the USITC clearly separated and distinguished the effects of imports from the effects of nickel cost changes in its analysis.[3241]

Poor operations of Al Tech/Empire and Republic

7.1394 The European Communities argues that the USITC did not explain what it determined with respect to arguments raised on the poor operations of Al Tech/Empire and Republic. This information was kept confidential. However, the USITC implied that these operations were also a source of injury to the domestic industry since it claimed that the trends it had identified would have continued even if the operations of those two companies were factored out of the data analysed.[3242]

7.1395 The United States responds by arguing that the USITC considered whether the poor performance of two particular domestic producers was a possible source of injury to the industry during the period of investigation. Although the specific information on these producers' problems and their operating results are confidential, the USITC's discussion of the issue makes clear that it

[3237] USITC Report, p. 209; United States' first written submission, para. 663.
[3238] United States' first written submission, para. 673.
[3239] United States' first written submission, para. 674.
[3240] United States' first written submission, para. 675.
[3241] United States' first written submission, para. 688.
[3242] European Communities' first written submission, para. 557.

examined the record evidence relating to these issues and discussed the nature and extent of these producers' difficulties in detail.[3243] In this regard, it specifically noted that it took into account the arguments made by the foreign producers and rejected their assertions that the industry's operating results had been skewed by the non-import problems of the producers. Moreover, the USITC considered whether exclusion of the two companies from the industry data would substantially alter the downward trends in the industry's condition in those years, and found that it did not. By engaging in this analysis, the USITC clearly separated and distinguished the impact of imports on the industry from the effects of these producers operations and found that the industry's problems were genuinely and substantially the result of increased imports.[3244]

NAFTA imports

7.1396 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic stainless steel bar industry, which is found in the USITC Report was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports' only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[3245]

7.1397 China further argues that in the Supplementary Report, the USITC was required to assess the injury caused by imports from Mexico and Canada and to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. China argues that it did not do so. China further argues that the USITC provided no explanation whatsoever that injury caused by imports from Mexico and Canada was not attributed to increased imports and there is no reason to believe that injury caused by imports from Mexico and Canada were not in fact attributed to increased imports.[3246]

7.1398 In this regard, the European Communities notes that the USITC concluded that "imports from Canada contributed importantly to the serious injury suffered by the domestic industry". However, the European Communities submits that this finding was made after the USITC had already concluded that "increased imports are a substantial cause of serious injury" and the USITC did not even attempt to factor this element into its analysis of the alleged causal link between serious injury and increased imports. Indeed, according to the European Communities, it is quite obvious that the USITC's initial analysis included imports from Canada in assessing whether increased imports have caused serious injury. The European Communities argues that no effort is made to distinguish the effect of Canadian imports and to make sure that the such effects are not attributed to imports from other sources.[3247] In light of the foregoing, it is China's view that the USITC failed to comply with Article 4.2(b) of the Agreement on Safeguards.[3248]

7.1399 For the United States' response, see paragraph 7.1066 *et seq*.

[3243] USITC Report, p. 212.
[3244] United States' first written submission, paras. 685-86.
[3245] China's first written submission, para. 483.
[3246] China's first written submission, para. 486; China's second written submission, para. 263
[3247] European Communities' first written submission, para. 560.
[3248] China's first written submission, para. 486; China's second written submission, para. 263

Failure to provide reasoned and adequate explanation

7.1400 China argues that to be certain that the injury caused by these other factors, downturn in demand and increases in energy costs, whatever their magnitude, was not attributed to imports, the USITC had to assess the injurious effects of these other factors. However, according to China, the USITC failed to do so, as there is no information to that effect in the USITC Reports.[3249] China states that, in sum, China believes that the injurious effects of the other factors that have caused the injury at the same time as the increased imports had not been properly assessed by the USITC. Thus, it is impossible to determine whether the USITC properly separated the injurious effects of these factors from the injurious effects of the increased imports.[3250] China further argues that the USITC failed to adequately evaluate the complexity of the alleged injury factors. According to the European Communities and China, it also failed to provide a sound, clear and straightforward explanation of how it ensured that injury caused by other factors was not attributed to increased imports. Therefore, China believes that the USITC acted inconsistently with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3251]

7.1401 The United States argues that the USITC performed a thorough and objective analysis of the record. It thoroughly assessed the nature and scope of the effects of other factors and ensured that it did not attribute the effects of these factors to imports.[3252]

(ix) Stainless steel wire

Decision-making

7.1402 China notes that it is the determination of Chairman Koplan which becomes relevant to examine in relation to stainless steel wire for he is the only Commissioner to have made his determination on the product on which the President imposed a safeguard measure.[3253]

7.1403 In response, the United States submits as an initial matter, that China mistakenly asserts in its brief that the President relied solely on Commissioner Koplan's causation findings for stainless steel wire products when determining to impose a safeguard remedy on stainless steel wire. Three Commissioners found that stainless steel wire was causing serious injury or threatening to cause such injury to the domestic tin mill industry: Commissioners Koplan, Bragg and Devaney. Commissioner Koplan found stainless steel wire to be a separate like product and made an affirmative threat of injury finding for that product; Commissioners Bragg and Devaney found stainless wire to be part of the same like product as stainless steel wire rope and made an affirmative determination for that like product.[3254]

7.1404 The United States further submits that under the United States statute, the President cannot simply decide to treat an individual affirmative finding of one Commissioner as a basis for imposing a remedy, as the complainants allege. Instead, under the United States statute, the President may only impose a remedy if at least half of the Commissioners then in office make an affirmative finding of causation and injury. In this case, the President was able to impose a remedy on stainless steel wire only because three of the six Commissioners had found that stainless steel wire, whether or not treated

[3249] China's first written submission, para. 476.
[3250] China's first written submission, para. 477.
[3251] European Communities' first written submission, para. 569; China's first written submission, para. 482.
[3252] United States' first written submission, para. 689.
[3253] China's first written submission, para. 534.
[3254] United States' first written submission, para. 723.

as a separate like product, had caused or threatened to cause serious injury to the industry. Indeed, in his official announcement of the imposition of these remedies, the President specifically stated that he considered the "determinations of the groups of Commissioners voting in the affirmative with regard to" stainless steel wire to be the determination of the USITC. In other words, the President specifically and clearly stated that he relied on the affirmative determinations of Commissioners Koplan, Bragg, and Devaney as grounds for his stainless steel wire remedy. Accordingly, the President's remedy finding simply does not indicate that he adopted the like product decision or injury finding of Commissioner Koplan as his own.[3255]

7.1405 The United States argues that, therefore, it is legally and factually incorrect for China to assert that the President adopted the injury and causation findings of Commissioner Koplan as the sole basis for his remedy decision. Nonetheless, because China and the European Communities focus their arguments concerning stainless steel wire entirely on Commissioner Koplan's causation analysis for stainless steel wire, the United States also focuses its discussion on his analysis as well.[3256] However, the United States notes that neither China nor the European Communities make any arguments challenging the affirmative injury findings of Commissioners Bragg and Devaney on stainless steel wire and rope. Accordingly, they have failed to make a prima facie showing that Commissioners Bragg and Devaney's analysis violated the causation requirements of the Agreement on Safeguards. The United States argues that the panel should therefore find that the causation analyses of these Commissioners have not been placed at issue in these proceedings and should affirm them.[3257]

7.1406 In counter-response, China argues that in its view, only Commissioner Koplan correctly identified the like product – stainless steel wire – to be a separate like product, in contrast to Commissioners Bragg and Devaney who found stainless wire to be part of the "stainless steel wire and rope" product category. Therefore, according to China, only Commissioner's Koplan findings could have been taken as the correct basis for imposing a remedy.[3258]

Factors considered by the USITC

Decline in consumption

7.1407 China argues that although Chairman Koplan refers to the extent of the decline in consumption, there is no information on his view concerning the extent of the contribution of the decline in consumption and the increase in unit costs on the overall situation of the industry. Similarly, Chairman Koplan did not state what portion of the decline in the industry's performance was attributable to the decline in demand for stainless steel wire.[3259]

7.1408 In response, the United States submits that Commissioner Koplan thoroughly examined the record evidence relating to the demand decline in interim 2001 and discussed the nature and extent of that decline in detail. In this regard, he recognized that apparent consumption of stainless steel wire declined by 16.1% between interim 2000 and 2001 and noted that the decline was related to the overall decline in the United States economy in interim 2001. He specifically acknowledged that the demand decline in interim 2001 had together with imports caused prices to fall in the market interim 2001 and that therefore "some portion of the observed declines in the industry's performance between the interim periods is attributable to an apparent decline in demand". Nonetheless, he also found that

[3255] United States' first written submission, para. 724.
[3256] United States' first written submission, para. 725.
[3257] United States' first written submission, para. 726.
[3258] China's second written submission, paras. 289 and 290.
[3259] China's first written submission, para. 538.

the decline in demand did not "explain the rapid deterioration in the domestic industry's financial performance" in interim 2001, because the "decline in United States production and shipments exceeded the total decline in apparent domestic consumption". After noting that there had been a "significant increase in imports" and a "rapid increase in the proportion of the domestic market supplied by imports" during interim 2001, he correctly concluded that imports had had a greater impact on domestic price and profitability declines in interim 2001 than demand declines.[3260]

7.1409 The United States submits that, given the foregoing, it is clear that Commissioner Koplan thoroughly and adequately discussed the nature and extent of the effects of the demand declines in interim 2001 and distinguished the effects of this decline from that of imports during the period of investigation. In particular, he acknowledged that some of the price and profitability declines suffered by the industry were attributable to the demand decline in interim 2001, but he also found that the industry's production and shipment levels had declined at a substantially faster rate than demand in interim 2001, which was due to the substantial increase in import market share during interim 2001.[3261] The United States argues that given these trends, it was reasonable for Commissioner Koplan to conclude that imports had had a greater hand in price declines in interim 2001 than demand. Moreover, by focusing on the fact that there was a faster rate of change for industry production levels than demand in interim 2001, he was able to separate and distinguish the effects of the demand declines from those attributable to imports in interim 2001. In other words, by examining the differences in the rates of decline between industry production and shipment levels and demand declines in interim 2001, he was able to conclude that the differential between these declines had been caused by the substantial increases in import volumes and market share in interim 2001. As a result, he was able to, and did, attribute to imports the bulk of the declines in the industry's pricing and profitability levels that occurred in interim 2001. By performing this qualitative assessment of the extent of the effects attributable to imports, he was able to distinguish the effects of the two factors and ensure that he did not attribute to imports the effects of the demand decline.[3262]

COGS

7.1410 The European Communities argues that while Chairman Koplan weighed the effect of decrease in demand against increases in imports and found that domestic production had fallen further than the decrease in demand, he did not consider the effect of increased COGS on the deteriorating operating margin of domestic producers. The European Communities submits that had he examined this factor, he may have found that increased COGS had such an effect that increased imports did not cause the decline in operating margins registered in this period. In failing to do so, Chairman Koplan failed to separate out and distinguish the effects of other factors and failed to ensure that the effects of these factors were not attributed to increased imports, thus acting inconsistently with Article 4.2(b) of the Agreement on Safeguards..[3263]

7.1411 In response, the United States argues that Commissioner Koplan very clearly did "consider the effects of increased costs of goods sold on the deteriorating operating margin of the industry". In particular, he discussed in detail the nature and extent of the effects that cost increases had on the condition of the industry. Although the industry's unit costs had increased in interim 2001, Commissioner Koplan correctly acknowledged that the industry had not been able to maintain its profitability margins in interim 2001 as it had earlier in the period, by keeping its prices in line with changes in its unit costs. He also reasonably concluded that the price declines in interim 2001, which

[3260] United States' first written submission, para. 742
[3261] United States' first written submission, para. 743
[3262] United States' first written submission, para. 744
[3263] European Communities' first written submission, para. 579.

directly led to reduced industry profitability, had been caused by imports and demand changes, after noting that the two major changes in the market in interim 2001 had been a substantial increase in import market share and a decline in demand.[3264] The United States argues that by focusing on the changes in unit margins that occurred during interim 2001, he was able to separate and distinguish the effects of increasing costs from those of imports and demand changes in his analysis. In this regard, his examination of the unit profits of the industry, and the relationship between the industry's profits, costs and prices, enabled him to establish that the decline in industry profitability in interim 2001 was caused not by rising costs but by a decline in the prices related to price competition from imports during a period of demand decline. Accordingly, it is clear that he properly assessed the amount of effect that these cost increases had had on declines in domestic operating income levels during interim 2001 and reasonably concluded that these declines were more appropriately considered to be a result of falling prices, not increasing costs. By doing so, he ensured that he was able to distinguish the effects of the cost increases from those of imports on the declines in the industry's condition and ensured that he did not attribute to imports the effects of these cost increases.[3265]

7.1412 In counter-response, the European Communities argues that Commissioner Koplan's opinion rested on developments in interim 2001 which led him to consider that increased imports posed a threat of serious injury. He identified three factors "which contributed" to the domestic industry's decline.[3266] The first two were imports and declining demand. Thirdly, "unit costs of goods sold increased by ***%" (all financial data for Stainless Steel Wire is confidential).[3267] He noted that "the falling prices and rising costs led to a *** percentage point loss [sic] in the operating income to sales ratio between interim 2000 and interim 2001".[3268] That is all the discussion of rising costs in interim 2001 that the USITC Report contains. The European Communities submits that the discussion in the United States' submissions cannot make up for this total lack of reasoned and adequate explanation. As the financial data is confidential, there is no reasoned and adequate explanation of how the facts support the findings, especially in the absence of a non-confidential indexed version of the data. There is no examination of the relevance or cause of increased costs, no separation and distinction, and thus no non-attribution.[3269]

NAFTA imports

7.1413 China argues that Chairman Koplan's determination of the existence of a causal link between the increased imports and the threat of serious injury to the domestic stainless steel wire industry, was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, what had to be determined was in fact whether total increased imports, with the exception of imports from NAFTA-countries, threatened to cause serious injury to the domestic industry. As a result, since the determination of causality at hand required that "increased imports" only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "another factor". Thus, in respect of Article 4.2(b) of the Agreement on Safeguards, this new determination also required that threat of injury due to movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[3270] China argues that such a new determination was not done concerning this

[3264] United States' first written submission, para. 738.
[3265] United States' first written submission, para. 739.
[3266] USITC Report, Vol. I, p. 259.
[3267] USITC Report, Vol. I, p. 259.
[3268] USITC Report, Vol. I, p. 259.
[3269] European Communities' second written submission, para. 433.
[3270] China's first written submission, para. 541.

product. According to China, this is especially surprising, given that the Chairman Koplan acknowledged that imports from Canada and Mexico were threatening to cause injury by stating that "imports of stainless steel wire from Canada […] did not contribute importantly to the serious injury" and "imports of stainless steel wire from Mexico […] did not contribute importantly to the serious injury". In other words, imports from NAFTA countries contributed in threatening to cause the injury, although this contribution was not substantial.[3271] China asserts that since it did not proceed to a new determination of causality between increased imports from non-NAFTA countries and the threat of serious injury to the domestic industry, there was consequently a failure to assess the injurious effects caused by imports from Mexico and Canada and a failure to ensure that they would not be attributed to increased imports from non-NAFTA countries. Therefore, the investigating authority did not comply with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3272]

7.1414 The European Communities also argues that in failing to analyse imports from Canada and Mexico as alternative causes of injury, the USITC also acted inconsistently with Article 4.2(b).[3273] The European Communities argues that the USITC Report does not provide a reasoned and adequate explanation of whether NAFTA imports were causing injury and how any such injury caused was not attributed to non-excluded imports. Chairman Koplan simply concludes that imports from neither Mexico or Canada were in the top five suppliers during the period of investigation. He does not even attempt to analyse whether such imports caused any injury and does not, therefore, ensure that any such injury is not attributed to non-excluded imports.[3274]

7.1415 For the United States' response, see paragraph 7.1066 *et seq*.

Failure to provide reasoned and adequate explanation

7.1416 The European Communities and China note, that in his separate views on injury, Chairman Koplan expressly stated that three other factors contributed to the threat of injury, i.e. a rapid decline in consumption, an increase in the unit costs of goods sold and declining demand.[3275] The European Communities argues that Chairman Koplan's conclusions, upon which it asserts that the safeguard measure for stainless steel wire are based, are directly contradicted by the opinion of the majority.[3276] The European Communities argues that in order to provide a reasoned and adequate explanation of Chairman Koplan's findings there would have to be a clear rebuttal of this finding. There is none, and this brings into question, therefore, the basis for the finding of a causal link between increased imports and a threat of serious injury. For this reason, the European Communities argues that the safeguard measures imposed on this basis are unjustified and are thus inconsistent with Article 2.1 and 4.2(b) of the Agreement on Safeguards, and additionally Articles 3.1 and 4.2(c).[3277]

7.1417 In response, the United States submits that, as an initial matter, the Agreement on Safeguards does not require that all six individual decision-makers reach the same conclusion, or that the individual Commissioners must rebut the findings of others with different conclusions, but requires that the determination, as the Appellate Body said in *US – Line Pipe*, meets the obligations contained in the Agreement on Safeguards. The determination of Commissioner Koplan meets those requirements. Indeed, the fact that Commissioners Miller, Hillman and Okun disagreed with

[3271] China's first written submission, para. 542.
[3272] China's first written submission, para. 543; China's second written submission, para. 293
[3273] European Communities' first written submission, para. 579.
[3274] European Communities' first written submission, para. 435.
[3275] European Communities' first written submission, para. 578.
[3276] European Communities' first written submission, para. 580; China's first written submission, para. 535.
[3277] European Communities' first written submission, para. 581.

Commissioner Koplan no more makes his analysis unreasonable than his disagreement with them makes their analysis unreasonable.[3278]

7.1418 The United States submits further that Commissioner Koplan's pricing analysis is actually not inconsistent with the pricing findings of Commissioners Miller, Hillman and Okun. Like these three Commissioners, Commissioner Koplan specifically found that imports had consistently undersold domestic stainless steel wire during the period from 1996 to 2000, but that this consistent underselling had not impacted domestic pricing adversely because the "domestic industry had kept prices of the domestic [wire] product in line with its costs" during that five year period. However, unlike the other three Commissioners, Commissioner Koplan also focused his analysis on pricing data for imports and domestic product in interim 2001 and noticed that lowered import pricing had begun interfering with the ability of domestic industry to keep its prices in line with its costs. In particular, he found that, in combination with declining demand, the increase in import volumes and market share caused the price of domestic wire to fall during a period of rising costs and led directly to a decline in the industry's operating income levels in interim 2001. As a result, he reasonably found, the increase in imports and their concurrent underselling had caused the substantial declines in the industry's condition in the final months of the period of investigation, thus showing that imports threatened the industry with imminent serious injury. In other words, Commissioner Koplan's findings about price competition in the market during the first five years of the period were, in fact, consistent with the findings of the other three Commissioners. However, Commissioner Koplan simply placed more emphasis than the other Commissioners on the pricing effects of imports during the last six months of the period, which is a reasonable choice given his finding that imports threatened serious injury to the stainless steel wire industry.[3279]

7.1419 China argues that to be certain that the injury caused by these three other factors, that is a rapid decline in consumption, an increase in the unit costs of goods sold and declining demand whatever their magnitude, was not attributed to imports, the USITC had to assess the injurious effects of these other factors. China believes that it failed to do so.[3280] China states that, in sum, China believes that the injurious effects of the three other factors that were threatening to cause injury at the same time as the increased imports were not properly assessed by Chairman Koplan. Thus, it is impossible to determine whether he properly separated the injurious effects of these factors from the injurious effects of the increased imports.[3281] China argues that, as a result, the investigating authority also failed to establish explicitly, with a reasoned and adequate explanation, that threat of injury due to other factors was not attributed to increased imports. Therefore, China believes that the "substantial cause" determination was inconsistent with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3282]

(x) Stainless steel rod

Factors considered by the USITC

Downturn in demand

7.1420 The United States argues that the USITC explained, in a reasoned and thorough manner, the nature and extent of the injurious effect attributable to these demand declines, and distinguished that

[3278] United States' first written submission, para. 732
[3279] United States' first written submission, para. 733.
[3280] China's first written submission, para. 537.
[3281] China's first written submission, para. 539.
[3282] China's first written submission, para. 540.

effect from the effects of imports. More specifically, the USITC recognized that, after remaining stable through most of the period of investigation, demand for stainless steel rod did decline in late 2000 and interim 2001. However, the USITC correctly noted that the industry had been experiencing declines in its market share, production volumes, sales levels, employment levels, and profitability levels during the period from 1996 to 1999, when imports had exhibited increasing volumes as well. Moreover, it also specifically found that "it is clear imports had a greater impact on the declines in the industry's condition in 2000 and interim 2001 than demand declines" because there had been a "substantial increase in import quantities and market share during the last year-and-a-half of the period" of investigation.[3283]

7.1421 The United States argues that it is clear that the USITC closely examined the nature of the injury that was attributable to demand declines during the period. In particular, the USITC properly noted that demand declines had become evident only during the final three quarters of the period of investigation. However, it also correctly noted that these late-period demand declines could not possibly have contributed to the serious declines in the condition of the industry during the three years prior to this period, when demand remained stable. Indeed, given that demand not only remained stable but actually increased slightly in 2000 over 1999 and 1998, it is clear that demand declines had no impact at all on the condition of the industry during 2000 as well. By examining whether imports caused injury to the industry during a period of increasing demand, the USITC was able to distinguish the effects of the demand declines in the final quarters of the period of investigation from those attributable to imports during prior periods. Accordingly, the USITC properly separated and distinguished the effects of demand declines from those of imports in its analysis.[3284]

Increases in capacity

7.1422 The European Communities argues that the USITC Report indicates that substantial increases in capacity were made in 1998 to 2000 and 2001. However, according to the European Communities, there is no analysis of the extent to which such increased capacity might have caused injury to the domestic industry.[3285]

7.1423 In response, the United States submits that none of the parties argued before the USITC that the industry's increased capacity levels was a source of injury to the industry during the period of investigation. While Members are not barred from raising before panels issues that were not raised before the USITC during its investigation, it remains the case, however, that the European Communities's arguments on this score, if valid, should have been significant enough for the European rod producers to have raised this as an argument before the USITC. The fact that they did not strongly suggests, as a matter of fact, that the European participants in the stainless steel rod market did not view industry capacity as an especially significant factor in the industry's declines during the period of investigation.[3286]

7.1424 The United States argues, secondly, that the USITC clearly did recognize the fact that the industry had increased its aggregate capacity levels during the period and that the industry's capacity utilization rates declined during the period as well. However, even with this capacity increase, the record also showed as the USITC found that 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.

[3283] United States' first written submission, paras. 706-707.
[3284] United States' first written submission, paras. 708-709.
[3285] European Communities' first written submission, para. 573.
[3286] United States' first written submission, para. 717.

Accordingly, the USITC properly recognized that the industry's capacity increases had little effect in the market because the industry's production, shipment and market share levels would have declined by the same amounts even if the industry had not increased its capacity levels. Moreover, because the industry's production and shipment levels declined substantially from 1996 through 2000 as a result of import competition, it is also clear that the import increases had an effect on the industry's capacity utilization rates as well, as the USITC found.[3287]

7.1425 The United States argues, in sum, that the USITC was aware of the industry's capacity increases, discussed them in some detail, and correctly found that they had not had an impact on the declines in the industry's overall condition. The USITC properly considered their effects and discounted them as a source of serious injury.[3288]

7.1426 In counter-response, the European Communities notes that capacity increases occurred between 1998 and 2000, and it has been established, that while imports only increased slightly between 1998 and 1999, the industry's operating income "dropped dramatically to a loss of US$*** million in 1999 and a loss of US$*** million in 2000".[3289] The United States tried to explain this away by claiming that that the industry's production levels and shipments declined between 1996 and 2000.[3290] However, a decline in production levels and shipments does not necessarily mean that an industry makes losses – such events could also incur when an industry is profitable. Rather, an industry makes losses when the value at which it sells does not cover its costs. Increasing capacity, especially when demand is stable[3291], will only lead to increased costs, and must be an element explaining the "dramatic" losses in 1999. However, the USITC does not provide a reasoned and adequate explanation of the effects such capacity increases had on the industry's performance, and it is impossible to fully comprehend the underlying trends in the absence of data or on indexed summary of such data.[3292]

NAFTA imports

7.1427 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic stainless steel rod industry, which is found in the USITC Report was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports' only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[3293] The European Communities also argues that in failing to analyse imports from Canada and Mexico as alternative causes of injury, the USITC also acted inconsistently with Article 4.2(b).[3294] The European Communities notes in this regard that the USITC concluded, both for Canada and Mexico, that NAFTA imports did not "contribute importantly" to

[3287] United States' first written submission, para. 718.
[3288] United States' first written submission, para. 719.
[3289] USITC Report, Vol. I, pages 215 and 216.
[3290] United States' first written submission, para. 718.
[3291] USITC Report, Vol. I, p. 217.
[3292] European Communities' second written submission, para. 428.
[3293] China's first written submission, para. 500.
[3294] European Communities' first written submission, para. 572.

serious injury. According to the European Communities, this does not suggest that such imports had no effect – the USITC failed to separate and distinguish this effect, and ensure that it was not attributed to non-excluded imports.[3295]

7.1428 For the United States' response, see paragraph 7.1066 *et seq*.

Failure to Provide Reasoned and Adequate Explanation

7.1429 China argues that to be certain that the injury caused by these other factors, downturn in demand and increases in energy costs, whatever their magnitude, was not attributed to imports, the USITC had to assess the injurious effects of these other factors. However, the USITC failed to do so, as there is no information to that effect in the USITC Reports.[3296] China states that, in sum, China believes that the injurious effects of the other factors that have caused the injury at the same time as the increased imports had not been properly assessed by the USITC. Thus, it is impossible to determine whether the USITC properly separated the injurious effects of these factors from the injurious effects of the increased imports.[3297] China argues that, in sum, the USITC failed to adequately evaluate the complexity of the alleged injury factors. It also failed to provide a sound, clear and straightforward explanation of how it ensured that injury caused by other factors was not attributed to increased imports. Therefore, China believes that the USITC acted inconsistently with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3298]

7.1430 The European Communities further argues that it is practically impossible to ascertain whether the USITC's determination with respect to stainless steel rod is justified since all data other than absolute imports has been kept confidential.[3299]

7.1431 In response, the United States notes that the USITC has treated as confidential and therefore not disclosed the bulk of the trade, employment, and financial data for the stainless steel rod industry. The USITC redacted this data from its opinion because the stainless rod industry is dominated by the only large domestic producer of stainless steel rod, Carpenter/Talley and Carpenter/Talley's operating and trade data essentially are the same as the aggregate industry data. Disclosing the aggregate confidential competitive data of the industry would therefore actually reveal the specific details of Carpenter/Talley's operations. The USITC is barred by United States law – as well as Article 3.2 of the Agreement on Safeguards – from disclosing such confidential company-specific competitive information without the consent of the provider. However, when the USITC is prohibited from disclosing confidential competitive data for a company, the USITC treats only the specific numeric data of the company as confidential; it may and does discuss trends in industry data (or other confidential data) in general but descriptive terms.[3300]

7.1432 The United States argues that, bearing this in mind, the European Communities' contention that the USITC failed to provide an adequate statement of its rationale for stainless steel rod is misplaced. First, as the United States had previously discussed, the Agreement on Safeguards not only permits, but indeed requires, a competent authority not to disclose any information that is submitted to it on a confidential basis, unless the submitting party consents to the disclosure. In fact, two panels have stated that the Agreement on Safeguards authorizes the United States not to disclose

[3295] European Communities' second written submission, para. 431.
[3296] China's first written submission, para. 493.
[3297] China's first written submission, para. 494.
[3298] China's first written submission, para. 499.
[3299] European Communities' first written submission, para. 570.
[3300] United States' first written submission, para. 693.

confidential data in its determination, even if that data is aggregated data. Moreover, these panels have rejected the argument that the USITC's analysis does not constitute a "reasoned and adequate explanation" of its findings simply because it has not disclosed confidential data in its analysis.[3301] Second, even though a substantial amount of confidential industry data is redacted from the USITC's opinion, its analysis is still sufficiently detailed and clear that the Panel can read the analysis and assess whether it meets the causation requirements of the Agreement on Safeguards. The USITC's decision, while deleting specific numeric data reflecting the operations of a company Carpenter/Talley, nonetheless describes in detail the trends in import and industry data, the clear correlations between those trends, and the extent to which other factors impacted the industry. It is clear that redaction of the data should not hamper the Panel's review of the USITC's analysis, especially given that redaction of this data is fully consistent with the provisions of the Agreement on Safeguards .[3302]

4. Effect of violations of other provisions of the Agreement on Safeguards

7.1433 The European Communities and Switzerland argue that the USITC's causation analysis will automatically be flawed if the Panel finds that the United States' determination of increased imports is flawed.[3303] More particularly, the European Communities argues that the USITC's analysis of increased imports which is based on an end-to-end comparison over the investigation period is inconsistent with the United States' obligation only to find increased imports where it determines the existence of an increase of imports recent enough, sudden enough, sharp enough and significant enough qualify as increased imports in the sense of the Agreement on Safeguards. The European Communities argues that this analytical error taints the USITC's causation analysis more generally, because the USITC only attempts to determine whether imports which have increased over the period of investigation have caused serious injury. It does not determine whether imports which have increased recently enough, suddenly enough, sharply enough and significantly enough are causing serious injury. This has two operational consequences. First, injury which has manifested itself before such increased imports cannot be ascribed to these increased imports. Second, if the level of imports increases and then drops away, injury which appears as imports drop away cannot be ascribed to such lower level imports even if they are low priced, because they are not recent enough, sudden enough, sharp enough or significant enough. Injury which appears after the level of imports has dropped away must be shown to be caused by imports which were, as a matter of fact, recent enough, sudden enough, sharp enough and significant enough to meet the standards of the Agreement on Safeguards. The further the lapse in time between such increased imports and the serious injury to the domestic industry, the more compelling must be the analysis of causal link.[3304] [3305]

7.1434 Korea argues that Article 3.1 of the Agreement on Safeguards imposes an obligation on the competent authorities to publish "their findings and reasoned conclusions" regarding "all pertinent issues of fact and law". Article 4.2(c) of the Agreement on Safeguards requires the competent authorities to "publish promptly" a detailed analysis of the results of the investigation, including "the relevance of the factors examined". Finding causality between an increase in imports and the serious injury is a "pertinent issue of fact and law". The United States did not provide any explanation on

[3301] United States' first written submission, para. 694.
[3302] United States' first written submission, para. 695.
[3303] European Communities' first written submission, para. 432; Switzerland's first written submission, para. 277.
[3304] Appellate Body Report, *Argentina – Footwear (EC)* para. 144.
[3305] European Communities' second written submission, para. 369.

how the increase in import of tin mill caused the serious injury of the United States industry producing the like product.[3306]

7.1435 Korea also argues that there is only one reasoned explanation in the USITC Report regarding causation for tin mill products.[3307] That reasoned explanation demonstrates why, in the view of the USITC, the increase in imports of tin mill products is *not* a substantial cause of serious injury to the domestic tin mill industry. The published report of the United States does not contain *any* findings or explanation to dispute or contradict the cited reasoned explanation contained in the USITC Report. Since the United States reached a legal conclusion that imports were a substantial cause of serious injury to the domestic industry without providing *any* explanation to support the conclusion, the United States is in violation of Articles 2, 3 and 4 of the Agreement on Safeguards.[3308]

I. ARTICLE 5

1. Requirements of Article 5.1

(a) General

7.1436 The remedy recommendations made by the USITC are listed in paragraph **Error! Reference source not found.**. The safeguard measures finally imposed by the US President are listed in paragraph **Error! Reference source not found.**.

7.1437 The complainants claim that Article 5.1 of the Agreement on Safeguards imposes on Members an obligation to ensure that the measure applied is proportionate, i.e. that it does not go beyond what is necessary to prevent or remedy the serious injury. They refer to the Appellate Body in *Korea – Dairy* which stated that Members must ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment and that this obligation applies regardless of the particular form that a safeguard measure might take.[3309] Norway, on behalf of the complainants, argued that the United States has not fulfilled its obligations under the Agreement on Safeguards in determining whether safeguard measures could be imposed in the first place. Therefore an infringement of these requirements automatically raises *ipso facto* or, at least, prima facie a presumption of violation of Article 5.1 of the Agreement on Safeguards. Should the Panel, however, reach a different conclusion on the preceding claims made by the complainants, the complainants are of the view that the United States, in any case, also violated the requirement laid down in Articles 5.1 of the Agreement on Safeguards that the safeguard measures be applied only to the extent necessary.[3310] Finally, they claim that the remedy and the choice of measure needed to be explained and justified before, or at the time, it was applied and that this was not done in this case.[3311]

7.1438 The United States responds that its safeguard measures were imposed to a level and for a duration that complies with the requirements of Article 5 of the Agreement on Safeguards. It is evident, through both a qualitative and a quantitative assessment of the effects of imports on the relevant domestic industries and of the measure taken, that the relief provided was only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. It emphasizes that it is

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[3306] Korea's first written submission, para. 167.
[3307] USITC Report, Vol. I, pp. 74-77 (Exhibit CC-6).
[3308] Korea's first written submission, para. 168.
[3309] Norway's first oral statement on behalf of all complainants, para. 6, citing Appellate Body Report, *Korea – Dairy*, para. 96; Norway's first written submission, paras. 347-348; Japan's first written submission, paras. 317-318.
[3310] Norway's second oral statement on behalf of the complainants, paras. 1-7 and Chapter III.
[3311] Norway's second oral statement on behalf of the complainants, paras. 8 and 22-27.

"impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions … ".[3312] The United States adds that any numerical analysis is, at best, an approximation that might assist a Member or a panel in evaluating whether a measure is commensurate with the injury caused by increased imports and the need for adjustment. While numerical estimates are necessarily limited in their ability to precisely quantify and isolate the full effect of imports and the appropriateness of remedial measures, they may be useful to test whether a measure is set at an order of magnitude consistent with Article 5.1.[3313] It also claims that it has rebutted all allegations of inconsistency of its safeguard measure with Articles 2 and 4 and, thus, the burden of proof that its safeguard measures are inconsistent with Article 5.1 is on the complainants. Moreover, the United States asserts that it was under no obligation to explain, justify or publish anything relating to its choice of remedy until challenged in a WTO dispute settlement process.[3314]

7.1439 The United States also contends that Member may apply a safeguard measure in any form and at any level that falls within the parameters of Article 5.1, which states that a safeguard measure may be applied to "to prevent or remedy serious injury and to facilitate adjustment." It also states that a Member may apply a safeguard measure "only to the extent necessary" for these purposes. Article 5.1 does not restrict a Member's discretion to act within this limitation. The Member may choose any form for the measure – for example, a tariff, tariff_rate quota, or quantitative restriction. Within this limitation, the Member may also choose the level of the measure – an *ad valorem* duty rate, a specific duty amount, the volume subject to a quota, etc.[3315]

(b) Extent and level of the safeguard measures

(i) "… to the extent necessary …"

7.1440 New Zealand argues[3316] that the requirement to apply a safeguard measure only to the extent necessary to remedy serious injury caused by imports and to facilitate adjustment by the domestic industry also carries with it the consequence that the least trade restrictive measure must be chosen. Furthermore, as panels in *US – Gasoline* and *Canada – Periodicals* have pointed out, a measure must be capable of achieving its objectives before it can be determined to be "necessary".[3317]

7.1441 The United States disagrees with New Zealand's argument that the measure should be no more restrictive than necessary. The United States argues that the Appellate Body did not state that Article 5.1 requires that safeguard measures be "no more restrictive than necessary". Its actual statement was that safeguard measures "may be applied only to the extent necessary" – a direct quote from Article 5.1.[3318] [3319] In the United States' view, New Zealand's interpretation conflicts with the ordinary meaning of Article 5.1 and the object and purpose of the Agreement on Safeguards. It suggests that the term "necessary" in Article 5.1 is linked to the words "to prevent or remedy serious injury and to facilitate adjustment". Thus, "necessary" relates to the preventive, remedial, and facilitative effect of the measure, and not to its trade restrictive effect. In short, the need for relief and adjustment defines what is "necessary". The final sentence of Article 5.1 advises that "Members should choose measures most suitable for the achievement of these objectives". This admonition

[3312] *US – Fur Felt Hats*, para. 35.
[3313] United States' first written submission, paras. 1060-1062.
[3314] United States' second oral statement, paras. 114-121.
[3315] The United States' executive summary of its first written submission, para. 111.
[3316] New Zealand's first written submission, para. 4.196.
[3317] Panel Report, *US – Gasoline*, para. 6.31; Panel Report, *Canada – Periodicals*, para. 5.7.
[3318] Appellate Body Report, *US – Line Pipe*, para. 260.
[3319] United States' first written submission, para. 1031.

shows that many potential measures might satisfy the requirements of the first sentence of Article 5.1, and that Members have discretion in choosing which, among them, best meets the objectives of preventing or remedying serious injury and facilitating adjustment. The cited passages of *US – Gasoline* and *Canada – Periodicals* did not equate necessity with the capability to achieve objectives. Even if "necessary" had been given the meaning attributed to it by New Zealand, the safeguard measures applied by the United States are capable of preventing or remedying serious injury and facilitating the adjustment of the relevant domestic industries.[3320]

7.1442 New Zealand responds that, in an effort to blunt the remedy standard to the point where it is impossible to make an objective determination as to whether it has been met, the United States suggests that what the standard really means is a measure can be applied "*as long as it is necessary* to remedy (or prevent) the serious injury and to facilitate adjustment"[3321], thereby taking the emphasis away from the limitation inherent in "extent". According to New Zealand, in this way, the United States seeks to unjustifiably broaden the scope of Article 5.1 so that any measure a Member asserts as being for the purpose of remedying or preventing serious injury and facilitating adjustment would be permitted. For this reason, the United States disputes[3322] New Zealand's statement that, in accordance with *US – Gasoline* and *Canada – Periodicals*, a measure must be capable of achieving its objectives before it can be determined to be "necessary".[3323] In doing so, New Zealand asks, is the United States seriously asking the Panel to conclude that a measure can be necessary to achieve an objective, without actually being capable of achieving it? To do so would be to render meaningless the concept of "to the extent necessary" as it appears in Article 5.1. New Zealand submits that the United States seeks to argue that the remedy standard in Article 5.1 implies a broad discretion, noting that a Member has the discretion to apply a measure that is "less than necessary".[3324] Yet New Zealand queries why a Member genuinely concerned with the effect of increased imports on its domestic industry would consciously choose a remedy that would be less than effective in remedying the serious injury caused by those imports. According to New Zealand, the United States point goes nowhere. It is simply a device used by the United States to support the notion of a broad discretion in Article 5.1 that disregards the actual standard contained in Article 5.1. As the Appellate Body has made clear, Article 5.1 instructs WTO Members to focus on what is "necessary" to fulfil that limited objective.[3325] Therefore, the clear purpose of safeguard measures is to prevent or remedy serious injury and facilitate adjustment. This was recognized by the Appellate Body in *Korea – Dairy* when it stated that a Member must ensure that the measure applied "is commensurate with the *goals of* preventing or remedying serious injury and of facilitating adjustment".[3326]

7.1443 New Zealand submits that in a further attempt to negate the words of Article 5.1, the United States also challenges New Zealand's statement that the requirement to apply a safeguard measure only to the extent necessary to remedy a serious injury caused by imports and facilitate adjustment by the domestic industry also carries with it the consequence that the least trade restrictive measure must be chosen. The implication appears to be that the United States interprets Article 5.1 as allowing a Member to take a more trade restrictive measure to achieve the objective of remedying serious injury caused by imports and facilitate adjustment when a less trade restrictive measure could achieve the same objective. Such an interpretation ignores altogether the requirement that a measure be applied

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[3320] United States' first written submission, paras. 1029-1031.
[3321] United States' first written submission, para. 1021 (emphasis added).
[3322] United States' first written submission, para. 1031.
[3323] New Zealand's first written submission, para. 4.196, citing Panel Report, *US – Gasoline*, and Panel Report, *Canada – Periodicals*.
[3324] United States' written reply to Panel question No. 100 at the first substantive meeting.
[3325] Appellate Body Report, *US – Line Pipe*, para. 246.
[3326] Appellate Body Report, *Korea – Dairy*, para. 96, (emphasis added).

"only to the extent necessary" to achieve the specified objectives. It also ignores the requirement that Members choose measures "most suitable" for the achievement of those objectives.

7.1444 Japan adds that when Article 5.1 says "only to the extent necessary", the text imposes a strict standard. The use of "only" means that the measure can be less restrictive than necessary, but cannot be more restrictive than necessary. Thus, when there is doubt regarding the effect of a remedy, the authorities must err on the side of a less restrictive measure.[3327] Japan puts forth the following simple example. Suppose the authority concludes it needs to raise domestic prices by 10% to remedy the injury. The economic studies show that a 12% tariff will raise prices by some amount between 8 and 10%. The economic studies also show that a 14% tariff will raise prices by some amount between 10 and 12%. It is common for such studies to provide reliable indications of ranges, but not precise figures. In this situation, the authorities could impose a 12% tariff but not the 14% tariff. In each case, Japan suggests, the tariff might completely eliminate the injury. However the possibility that the 14% tariff might over compensate renders that tariff level WTO inconsistent.[3328]

7.1445 The United States notes that Japan argues that when an economic model produces a range of estimated effects of imports, Article 5.1 allows the safeguard measure to address only the lowest estimated effect because "the possibility that the 14% tariff might over compensate renders that tariff level WTO inconsistent".[3329] The United States argues that this argument rests on three fallacies. First, it incorrectly views "no more than the extent necessary" in Article 5.1 as requiring a Member to ensure from the outset that a measure will never exceed the extent necessary. The GATT Contracting Parties recognized in *US – Fur Felt Hats* that such certainty is impossible. Moreover, the chance that a safeguard measure consistent with Article 5.1 may need modification in the course of events is built into the requirement under Article 7.4 for a Member to "review the situation" at the mid-term of a safeguard measure and "if appropriate, withdraw it or increase the pace of liberalization". This provision would be unnecessary if Article 5.1 required a Member to apply a safeguard measure less than the lowest possible effect of increased imports. Second, Japan fails to account for progressive liberalization of safeguard measures under Article 7.4. Automatic reductions in the extent of application of the measure lessen any uncertainty over whether the overall effect of the measure over its lifetime is consistent with Article 5.1. In this regard, it is noteworthy that an aggressive rate of liberalization is built into the steel safeguard measures – 6% per year for the 30% tariffs. Third, Japan mistakenly views the range of outputs of an economic model as actual effects of a measure and actual effects of increased imports that can be compared with pinpoint accuracy. They are not. At most, they indicate the general magnitudes of injurious and remedial effects. The Appellate Body recognized the inherent uncertainty of such a comparison when it described Article 5.1 as requiring that a safeguard measure be "commensurate" with – not equivalent or equal to – "the goals of preventing or remedying serious injury and facilitating adjustment".[3330] The United States argues that that is what it has done, and is the reason the Panel should find the measures to be consistent with Article 5.1.[3331]

(ii) "… to prevent serious injury attributed to 'increased imports' "

7.1446 The complainants submit that only the effects of the increase in imports and not the totality of the imports are to be remedied by a safeguard measure. Indeed, competition against imports is a normal feature in an open free trade system and the objective of safeguard measures cannot be the

[3327] Japan's written reply to Panel question No. 115 at the first substantive meeting.
[3328] Japan's written reply to Panel question No. 112 at the first substantive meeting.
[3329] Japan's written reply to Panel question No. 155 at the first substantive meeting.
[3330] Appellate Body Report, *Korea – Dairy*, para. 96.
[3331] United States' second written submission, paras. 224-226.

eradication of all imports. Safeguard measures cannot target adjustment to competition against imports as a whole and remain below the maximum permitted level under Article 5.1. The Appellate Body has interpreted the whole phrase "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment" as requiring that safeguard measures apply only to the extent that they address serious injury attributed to increased imports. This conclusion clearly rules out any interpretation which would allow safeguard measures to address more than the injury caused by increased imports on the basis that it would be necessary "to facilitate adjustment". In other words, the objective of "facilitating adjustment" does not mean that safeguard measures can address competition against the totality of imports.[3332]

7.1447 Switzerland submits that more particularly in *US – Line Pipe*[3333], the Appellate Body stated that Article 5.1, first sentence does not permit a Member to apply a safeguard measure to prevent or remedy "the *entirety* of the serious injury experienced by the domestic industry". The Appellate Body goes on to say that the words "only to the extent necessary" instruct WTO Members to focus on what is "necessary" to fulfil that limited objective, which is to prevent or remedy serious injury and facilitate adjustment".[3334] [3335] The European Communities and Japan suggest that this interpretation is supported by the second sentence of Article 5.1, which sets a limit to safeguard measures implemented in the form of quantitative restrictions. Indeed, quantitative restrictions cannot reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Thus, the second sentence of Article 5.1 prohibits, in principle, remedies which would have an impact on the totality of the imports and strongly suggests that safeguard measures can only address the increase in imports. The maximum permitted level of the safeguard measures should, in practical terms, be lower if the remedy can address only the increase in imports than if it is permissible to tackle the totality of the imports. In particular, safeguard measures cannot aim at cutting back imports to below the non-injurious level preceding the increase.[3336]

7.1448 Japan argues that the Agreement on Safeguards is meant to address changes in the competitive dynamic between imports and the domestic industry, whether it manifests itself as an absolute increase in imports or an increase relative to domestic production. The issue is not the effects of imports *per se*, but the effects of the import increase. It is critical also that the measure not attempt to address the effects of other factors, and that it take into account the remedial effects already at work in the market, such as anti-dumping and countervailing duties measures imposed since the increase in imports occurred.[3337] Norway adds that competition against imports is a normal feature in an open rule based free trading system and the objective of safeguard measures cannot be the eradication of all imports. It is only the sudden, recent and sharp increase which causes the serious injury that the measure can address.[3338]

7.1449 Korea submits that the difference between focussing on all imports and only on imports that have increased can be important. First, the authorities could quantitatively determine the amount of injury caused by increased imports alone (e.g., imports caused a 20% decline in profitability).

[3332] Norway's second oral statement on behalf of all complainants, paras. 9, 13 and 14.
[3333] Appellate Body Report, *US – Line Pipe*, para. 243.
[3334] Appellate Body Report, *US – Line Pipe*, para. 246.
[3335] Switzerland's second written submission, paras. 109-110.
[3336] Complainants' written replies to Panel question No. 153 at the first substantive meeting.
[3337] Japan's written reply to Panel question No. 153 at the first substantive meeting.
[3338] Japan's written replies to Panel questions Nos. 112 and 115 at the fist substantive meeting; Norway's written reply to Panel question No. 153 at the first substantive meeting.

Therefore, the remedy would be to return the industry to that level of profitability (20%). In this example, only the increase in imports would be addressed. Second, if the authorities are unable to specifically identify the exact amount of injury from increased imports, the measure should address the volume of import increases by reducing the volume of the increase to the extent of increase and its injurious effects. This is an alternative approach. Under either approach, if the entire amount of the imports rather than the increase is used, the result would be very different. In fact, it was only when the imports reached a certain level that they became injurious.[3339]

7.1450 Brazil adds that the entire safeguard mechanism is dependent on there being increased imports. This is what triggers an investigation and is a threshold condition under Article 2.1 for the application of safeguard measures. It is clear that the central purpose of safeguard measures is to address serious injury or the threat thereof from increased imports. Article 5.1 cannot be interpreted in a manner contrary to this purpose. In Brazil's view, Article 5.1 itself supports the notion that the purpose of the Agreement on Safeguards is to restore the *status quo ante*, specifically the condition of the domestic industry before the effect of increased imports. The limitation of quantitative measures to the average of the last three representative years is indicative of restoring the *status quo ante*. In effect, it suggests a rollback to the pre-increase in imports level and puts the burden on the competent authorities to justify quantitative restrictions which roll back imports below a representative former period.[3340] The European Communities, Korea and Brazil add that they would distinguish between the application of safeguard measures to imports as a whole and the application of safeguard measures to remedy the serious injury from increased imports. Because safeguard measures are on the face of the Agreement on Safeguards about remedying serious injury from increased imports, this limitation is implicit in Article 5.1. However, in their opinion, Article 5.1 does not limit the application of safeguard measures only to the increased imports, but rather permits competent authorities to apply safeguard measures to all imports so long as the remedial effect is limited to remedying the serious injury from increased imports.[3341]

7.1451 The United States responds that, based on the reasoning leading up to paragraph 260 of the *US – Line Pipe* Appellate Body Report, which relied heavily on Article 4.2[3342], "increased imports" in that paragraph must be read as referring to "increased imports" within the meaning the meaning of Article 4.2. "Increased" is a past participle modifying imports, so the ordinary meaning of the expression is imports that have "become greater in size, amount, duration, or degree; enlarge[d], extend[ed], intensif[ied]".[3343] Since the imports that have increased are all imports, the expression is to be understood as referring to the totality of imports. The United States submits that this expression must have a different meaning from the expression the "increase in imports". In that case, "increase" is a noun, and means "[t]he result of increasing; the amount by which something is increased, an addition".[3344] Thus, "increase in imports" is equivalent to the expression "only the increase". The context of the expression "increased imports" and "increase in imports" in Article 4 confirms this interpretation. Under Article 4.2(a), the "rate and amount of the increase in imports" and "the share of the domestic market taken by increased imports" are both factors that the competent authorities must consider in their analysis of whether increased imports have caused serious injury. Since a rate is relevant only in evaluating a change, "increase in imports" would indicate the change in imports from their previous levels – that is, it would refer to "only the imports". In contrast, "increased imports" is

[3339] Korea's written reply to Panel question No. 154 at the first substantive meeting.
[3340] Brazil's written reply to Panel question No. 46 at the second substantive meeting.
[3341] The European Communities, Brazil's and Korea's written reply to Panel question No. 47 at the second substantive meeting.
[3342] Appellate Body Report, *US – Line Pipe*, paras. 249-252.
[3343] The New Shorter Oxford English Dictionary, p. 1342.
[3344] The New Shorter Oxford English Dictionary, p. 1342.

the one factor listed in Article 4.2(a) that is not characterized as a "rate of increase" or a "change in the level". Thus, it must refer to "the totality of imports, including the increase".[3345]

7.1452 The United States submits that Article 4.2(b) further confirms this understanding. It calls for a finding of a causal link between "increased imports" and serious injury, and provides for non-attribution when "factors other than increased imports are causing injury to the domestic industry at the same time". If "increased imports" meant only the increase in imports, then the causation analysis would apply only to the increase, and would have to ignore pre-existing import levels. If the Agreement on Safeguards required such an artificial analysis, the United States argues that it would expect it to say so in clearer terms. Practical considerations further support this conclusion. Unlike imports of a certain type of product, imports from a particular source, or products of a particular company, it is impossible to identify the "increase in imports" as a discrete presence in the market and determine its effect on the domestic industry. For example, if imports from all sources increase from 100 units to 150 units between 1999 and 2000 there is clearly a 50 unit increase. However the competent authorities cannot identify any particular 50 of the 150 units imported in 2000 as "the increase". It would, therefore, be impossible for them to perform an analysis of "the increase" by itself that would satisfy the requirements of the Agreement on Safeguards.[3346]

7.1453 The United States also reiterates that nothing in Article 5.1 indicates that safeguard measures are limited to the increase in imports, as opposed to all of the imports that have increased, arguing that Article 1 confirms this conclusion. Article 1 defines a safeguard measure as a "measure[] provided for in Article XIX of GATT 1994". That provision, in turn, provides that if:

> "[A] *product* is being imported into the territory of [a Member] in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers ... of like or directly competitive products, the [Member] shall be free, in respect of such *product* ... to suspend the obligation in whole or in part or to withdraw or modify the concession."

7.1454 The United States argues that, therefore, by definition, a safeguard measure may be applied to a product as such, and not merely to the increase in imports of that product. Article 2.1 mirrors Article XIX in specifying that a Member "may apply a safeguard measure to a *product*" only if it determines that "such *product* is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury". Thus, the determination of serious injury also applies to the entirety of the imported product. Article 4 lays out the requirements for making such a determination, which Article 4.2(a) describes as the determination "whether increased imports have caused or are threatening to cause serious injury ..." Thus, the determination described in Article 4.2 is the same as the determination described in Article 2.1.[3347] Accordingly, "increased imports" in Article 4.2(a) – and elsewhere in that Article – refers to the "product being imported in such increased quantities and under such conditions" under Article 2.1.[3348] Thus, the determination under Article 4.2 has the same scope as the determination described in Article 2.1 – increased imports

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[3345] United States' written reply to Panel question No. 153 at the first substantive meeting.

[3346] United States' written reply to Panel question No. 153 at the first substantive meeting.

[3347] The Appellate Body has found that Article 2.1 "as elaborated in Article 4 of the *Agreement on Safeguards*, sets forth the *conditions* for imposing a safeguard measure". Appellate Body Report, *US – Wheat Gluten*, para. 95.

[3348] As the Appellate Body noted in *US – Wheat Gluten*, "[i]n the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2". Appellate Body Report, *US – Wheat Gluten*, para. 96.

as a whole. Article 4.2(a) uses the term "increase in imports" to refer to the change in imports, and the term "increased imports" to refer to all imports.[3349]

7.1455 For the United States, the above-mentioned provisions of the Agreement on Safeguards and Article XIX indicate that the investigation of serious injury, determination of the competent authorities, and resulting application of a safeguard measure are all with regard to increased imports as a whole, and not merely the increase in imports. The United States submits that it is clear that the inquiry under Article 5.1 is based on imports as a whole.[3350]

(c) "Facilitate adjustment"

7.1456 The United States submits that the ordinary meaning of the words in Article 5.1 indicates what effect a safeguard measure may have. "Prevent" means "to forestall or thwart by previous or precautionary measures;" "provide beforehand against the occurrence of (something); make impracticable or impossible by anticipatory action; stop from happening".[3351] "Remedy" means "put right, reform, (a state of things); rectify, make good".[3352] Thus, a safeguard measure is permissible if it rectifies existing injury attributed to increased imports or forestalls such injury in the future. "Facilitate adjustment" means to promote the adaptation to changed circumstances.[3353] Practice under GATT 1947 indicates that the comparison between the remedial effect of a measure and the injury caused by increased imports is not a matter of scientific precision and this was already recognized in the *US – Fur Felt Hats* Working Party which stated that it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market, and that it would be desirable that the position be reviewed by the United States from time to time in the light of experience of the actual effect of the higher import duties.[3354] [3355]

7.1457 The United States argues that "facilitate adjustment" means to promote the adaptation to changed circumstances.[3356] In light of the other provisions of the Agreement on Safeguards, the United States considers that the changed circumstances in question are the continuation of imports in such increased quantities and under such conditions as to cause or threaten serious injury, which the domestic industry will have to face after the termination of a safeguard measure. Serious injury is defined in terms of the factors listed in Article 4.2(a). A remedy to "facilitate adjustment" could address all of these factors. The United States submits that the reference to "facilitate adjustment" in Article 5.1 means adjustment to a "product ... being imported ... in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause serious injury ..." under Article 2.1. A safeguard measure may facilitate adjustment to both the injurious effects of the increased imports and also the "conditions" associated with those imports that cause serious injury, such as the prices of those imports. The United States further submits that Article 5.1 contains an additive authorization – the measure may both prevent or remedy serious injury and facilitate

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[3349] United States' written reply to Panel question No. 47 at the second substantive meeting.
[3350] Appellate Body Report, *US – Line Pipe*, para. 262.
[3351] New Shorter Oxford English Dictionary, p. 2348.
[3352] New Shorter Oxford English Dictionary, p. 2540.
[3353] New Shorter Oxford English Dictionary, pp. 27 and 903.
[3354] *US – Fur Felt Hats*, para. 35. The Appellate Body cited this report as part of the GATT 1947 *acquis*. Appellate Body Report, *US – Line Pipe*, para. 174.
[3355] United States' first written submission, para. 1025.
[3356] United States' first written submission, para. 1025, citing *The New Shorter Oxford English Dictionary*, pp. 27 and 903(defining facilitate as "[m]ake easy or easier; promote, help forward (an action, result, etc.)" and adjustment as "the process of adjusting", which is defined in turn as "[a]dapt oneself (*to*); get used to changed circumstances, etc.").

adjustment. Thus, if a measure that fully remedies serious injury does not fully facilitate adjustment to increased import competition, a Member may apply a measure to a greater extent. The United States clarifies that "facilitate adjustment" means to promote the domestic industry's adaptation to increased imports, not to other potential causes of injury. For example, if the competent authorities determine that factors other than increased imports – such as bad managerial decisions or decreased demand – also caused injurious effects to the domestic industry, Article 5.1 would not authorize application of a measure to facilitate adjustment with respect to those injurious effects. In the United States' view, this is not an issue that the Panel need address in this dispute, since the United States applied the safeguard measure to the relevant product no more than the extent necessary to remedy the injurious effects of imports. The level of the application of the measures was not increased to facilitate adjustment.[3357]

7.1458 The United States submits that any numerical approach focusing merely on remedying the lost profits suffered by a domestic industry during a period of investigation and returning it to a normal level of profitability cannot adequately capture the full breadth of the need to "facilitate adjustment" to import competition pursuant to Article 5.1. To facilitate adjustment, the relief in question must, among other things, allow firms to make necessary new capital investments, consider restructuring and consolidation measures, improve their ability to raise capital, and often take extraordinary steps to make up for lost ground during the period of injury caused by imports. To this extent, such numerical estimates are, of necessity, inadequate to fully account for both the injury suffered by a domestic industry and the remedial measures necessary to facilitate adjustment.[3358]

7.1459 For the complainants, the permitted maximum level of the remedy under Article 5.1, as regards the profitability of the domestic industry, should be an improvement of that profitability limited to the extent that it has been depressed by increased imports. For instance, if increased imports have been found the cause of an X% decline in the profitability of the domestic industry, then the remedy cannot aim at raising profitability by more than X%. This pre-supposes a determination of the extent of the injury suffered by the domestic industry in terms of profitability decline as a result of increased imports.[3359]

7.1460 In the opinion of the United States, the complainants ignore the ordinary meaning of the words. They argue that "the permitted maximum level of the remedy ... should be an improvement of that profitability limited to the extent that it has been depressed by increased imports".[3360] However, their view ignores the accumulation of injurious effects caused by increased imports, which may be as grave a problem as the ongoing injury. Their interpretation of "remedy" also ignores the immediate context of the Article 5.1 reference to "facilitat[ing] adjustment". A measure that only returned the *status quo* in prices or profitability might give the industry a three-year respite, but leave it in no better position to respond to increased imports than it was prior to the measure. The United States further submits that the complainants' view that the measure can only remedy injury attributed to increased imports[3361], disregards the Appellate Body's silence on the significance of "and to facilitate adjustment".[3362] In any event, Article 3.2 of the DSU clearly prohibits the European Communities'

[3357] United States' written reply to question No. 56 at the second substantive meeting.

[3358] United States' first written submission, para. 1063.

[3359] *See*, for example, European Communities' written reply to Panel question no. 113 at the first substantive meeting.

[3360] European Communities' written reply to Panel question No. 112 at the first substantive meeting; Korea and Brazil make similar points in their written replies to Panel question No. 112 at the first substantive meeting.

[3361] European Communities' written reply to Panel question No. 153 at the first substantive meeting; Korea adopts a similar position in its written reply to Panel question No. 115 at the first substantive meeting.

[3362] Appellate Body Report, *US – Line Pipe*, para. 243.

interpretation, as it would effectively excise the words "and to facilitate adjustment" from Article 5.1. Therefore, for the United States, the Agreement on Safeguards establishes "to prevent or remedy serious injury" and "to facilitate adjustment" as additive objectives. The Appellate Body has recognized that one of the objectives of Article 5.1 is to facilitate adjustment.[3363] In fact, "facilitating adjustment" and preventing or remedying serious injury are equally important objectives. Absent adjustment, a safeguard measure would serve no purpose other than to provide a temporary respite, after which the industry would be no better off than it was when the measure began. On the other hand, if the measure succeeded in promoting adjustment, the industry might emerge from the safeguard measure better able to face import competition without the need of trade remedies. Furthermore, the preamble of the Agreement on Safeguards "[r]ecogniz[es] the importance of structural adjustment and the need to enhance rather than limit competition in international markets". By allowing a domestic industry to adjust to import competition, a safeguard measure may enhance the competitiveness or efficiency of that industry, thereby bolstering the long-term degree of competition in international markets.

7.1461 The complainants contest the notion advanced by the United States that it is entitled to remedy or, rather, "compensate" its industry for the accumulated effects of past increased imports.[3364] They also argue that there is no authority in Article 5.1 to remedy injury other than serious injury, suggesting that even if compensation for past serious injury were permitted, the competent authorities would have to determine precisely when serious injury caused by increased imports occurred in order to determine the level of compensation permitted. The European Communities adds that it is strange that the United States applies an accumulation theory to increased imports but refuses to "accumulate" the effects of the various causes of injury other than increased imports in its non-attribution and causation analysis. This should be especially true for alternative causes of injury that are more sensitive to accumulated effects, such as legacy costs or over capacity, for which an analysis of the trends is obviously not enough. Indeed, legacy costs and over capacity do not only have injurious effect if they increase over the period of investigation, but also and mostly because they accumulate.[3365]

7.1462 The European Communities recalls the text of the Presidential Proclamation where it is said that the measures were designed to facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.[3366] The European Communities' submits that, according to the United States, a domestic industry is entitled to a further bonanza (going beyond the "bonanza" of protecting against all imports rather than just the increase in imports) when it secures a safeguard measure since the United States considers that "facilitate adjustment to import competition" includes enabling firms to make necessary new capital investments and improve their ability to raise capital. For the United States, returning to a "normal level of profitability" would not be enough and it would be necessary to allow investment, restructuring and capital raising. The European Communities disagrees and submits that the fact that the United States designed its safeguard measures "to facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs" demonstrates by itself that the safeguard measures go beyond the extent allowed by Article 5.1 of the Agreement on Safeguards.[3367]

[3363] Appellate Body Report, *Korea – Dairy*, para. 96 (obligation "*to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment*".).

[3364] Norway's second oral statement on behalf of the complainants, paras. 16-19.

[3365] Complainants' written replies to Panel question No. 46 at the second substantive meeting.

[3366] Presidential Proclamation No. 7529 of 5 March 2002, para. 14 (Exhibit CC-13).

[3367] European Communities' second written submission, paras. 508-512.

7.1463 The United States reiterates that Article 5.1 treats the two objectives of preventing or remedying serious injury and facilitating adjustment as additive. That is, if application of a measure necessary to prevent or remedy injury attributed to increased imports would not fully facilitate adjustment to increased imports, a Member could apply the measure to a greater extent.[3368] The United States submits that, however, even if the steel safeguard measures were judged solely on the basis of their necessity to prevent or remedy serious injury, they would meet the requirements of Article 5.1. The United States argues that the numerical analyses (explained below) demonstrate that the safeguard measures did precisely that.[3369]

7.1464 Japan and Korea challenge[3370] the United States' interpretation of Article 5.1 as being "additive". According to the United States, if a measure is sufficient to remedy serious injury but will not facilitate adjustment, a more restrictive measure is allowed under Article 5.1. According to Japan and Korea, the United States asserts that adjustment is not limited to that adjustment which is required in response to increased imports. In sum, the United States appears to claim that it can impose measures sufficient to remedy serious injury from all sources and, if necessary, increase that remedy to facilitate adjustment from all sources of that injury. For Japan[3371], this is inconsistent with the rationale in *US – Line Pipe*, which links the Article 4.2(b) non-attribution analysis to the extent of the measures under Article 5.1. It is also contrary to the limitations on quantitative measures under Article 5.1, which imply restoration of the *status quo ante* as a limitation on measures in general.[3372] Korea[3373] notes that the United States is basically justifying its additional level of relief by arguing that there are direct injurious effects from imports (which their base period corrects), but then somehow there are additional injurious effects that have "accumulated" which justify doubling the profit margin shortfall.[3374]

7.1465 The complainants argue that the United States tries to justify its view by stating that an industry that has suffered from import competition should not only be placed in the same position as before the increase in imports occur, but in an even better position through extra resources to perform a structural adjustment.[3375] In their opinion, the United States claims that the objective to "facilitate adjustment" is "additive" to remedying the serious injury.[3376] Article 5.1 of the Agreement on Safeguards imposes two cumulative limits on the extent of a safeguard measure. The first limit is "the extent necessary to prevent or remedy serious injury" and the second limit is "the extent necessary ... to facilitate adjustment". If the domestic industry already has some ability to adjust to the increase in imports then the relief provided cannot remove all the injury caused by the increased imports, but only

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[3368] The United States writes that this formulation does not suggest that a Member may apply a measure to facilitate adjustment to injury attributable to factors other than increased imports. Rather, this formulation recognizes that remedying injury attributable to increased imports and facilitating adjustment *to increased imports* are both equally valid objectives of a safeguard measure under Article 5.1. For example, if a Member considered that a measure that remedied injury attributable to increased imports would not facilitate adjustment to those imports, it might apply the measure to a greater extent. However, if it considered that the same measure did not facilitate adjustment to other factors – such as decreased demand – applying the measure to a greater extent would not be permitted.

[3369] United States' first written submission, para. 1079.

[3370] Japan's and Brazil's written replies to Panel question No. 112 at the first substantive meeting.

[3371] Japan's written reply to Panel question No. 112 at the first substantive meeting.

[3372] Japan's second written submission, para. 166, Brazil's second written submission, para 111.

[3373] Korea's written reply to Panel question No. 46 at the second substantive meeting.

[3374] United States' Step 2 in its "Safeguard Measure Worksheets" at US Exhibit 56.

[3375] United States' second written submission, paras. 184 and 187. United States' written reply to Panel question No. 112 at the first substantive meeting. Norway's second oral statement on behalf of all complainants, paras. 15-17.

[3376] United States' second written submission, para. 189.

that which the domestic industry cannot achieve itself.[3377] In this regard, Brazil[3378] argues that "facilitate" is defined by *The New Shorter Oxford English Dictionary* as: make easy or easier; promote, help forward (an action, result, etc.). Notably, Article 5.1 is not written in terms of "ensure adjustment", "make certain of adjustment", or "accomplish adjustment", all phrases which imply something more than simply facilitating or assisting adjustment. Brazil believes that the "facilitate adjustment" language of Article 5.1 is intended to impose a limitation on safeguard measures beyond "only to the extent necessary to prevent or remedy serious injury". The additional limitation is that the measures necessary to prevent or remedy serious injury must also facilitate adjustment. That is, measures which prevent or remedy serious injury may be excessive to the extent that those measures do not facilitate adjustment. Put differently, measures may not be imposed unless: (i) they are limited to the extent necessary to prevent or remedy serious injury; and (ii) within this limitation, they facilitate adjustment. This reading of Article 5.1 is consistent with the preamble of the Agreement on Safeguards which indicates the desire to balance "the importance of structural adjustment" with "the need to enhance rather than limit competition in international markets". Consistent with these objectives, a measure which prevents or remedies serious injury but does not facilitate adjustment is excessive. In terms of the injury that is remedied and the adjustment that is facilitated, these are limited to the effects of increased imports. The Appellate Body in *US – Line Pipe* makes this clear.[3379] The objective of the Agreement on Safeguards is to provide a temporary period during which a domestic industry can adjust to import competition which has manifest itself in the form of increased imports. The objective of the Agreement on Safeguards is not to prevent or remedy injury from non-import sources or to facilitate the ability of a domestic industry to cope with competitive factors other than increased imports. Thus, the fact that the affected industry may be financially stronger after a period of protection is irrelevant unless it has made adjustments which will make it more able to compete against imports, in view of the circumstances which led to the increased imports, after the relief expires.[3380]

7.1466 Korea notes that the model used by the United States in its 5.1 analysis doubled operating margins over that of the base period ostensibly to take account of the need to facilitate adjustment.[3381] If the United States did not intend to rely on this "injury plus adjustment" approach[3382] – and the United States cannot, as the Appellate Body has already stated in *US – Line Pipe* – then the entire United States justification is fatally flawed.[3383]

7.1467 In response, the United States argues that increased imports may have immediate injurious effects on the domestic industry. For example, the mere fact of an increase may cause the domestic industry to lose sales volume and market share, which would translate into a loss in revenue. This development might impel the domestic industry to reduce its prices to regain volume or market share. The circumstances of the increased imports – that is, the conditions under which they are being imported – may also have immediate injurious effects. In either case, the industry will immediately

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[3377] Norway's second oral statement on behalf of the complainants, paras. 15-17.

[3378] Brazil's written reply to Panel question No. 56 at the second substantive meeting.

[3379] Appellate Body Report, *US – Line Pipe*, para. 260.

[3380] Brazil's written reply to Panel question No. 56 at the second substantive meeting.

[3381] United States' first written submission, para. 1074 states "Any price increase would have to return domestic prices at least to a level that would provide operating income equal to a level that does not reflect the price effect of increased imports and then increase prices by a further amount to counteract the negative effects of imports from 1998 to 2000 *and to facilitate adjustment*". (emphasis added). United States' first written submission, para. 1097 and Exhibit US-56, "Safeguard Measures Worksheets", calculations in Step 2 for each product. Korea's Exhibit 14 criticizing the necessity of this additional adjustment in the targeted operating income.

[3382] United States' second written submission, para. 189.

[3383] Korea's written reply to Panel question No. 46 at the second substantive meeting.

suffer a reduction in revenue and profits, and probably a reduction in its profit margin. The decrease in revenue is also likely to reduce the industry's cash flow. These immediate effects may also lead to long-term effects. An industry suffering an import-related decrease in revenue, sales volume, prices, and/or profits will have fewer funds to spend on buying necessary new equipment or facilities, maintaining existing equipment and facilities, improving employee training, or implementing cost reduction programs. The industry may have to release trained workers or cut spending on research and development necessary for its products to remain competitive. Losses may force the industry to spend cash reserves. Lenders faced with this deteriorated financial condition may charge higher interest rates (to reflect the heightened risk of default) or refuse to lend at all. For publicly traded producers, share prices will be likely to fall, reducing their ability to fund new projects through equity financing. According to the United States, in addition to the effects of imports on the price, volume, and revenue of the domestic industry, there will be effects on the industry's underlying condition – its asset base, cash reserves, trained workforce, and ability to raise capital. If the immediate effects of imports go unremedied, the underlying condition of the industry will progressively worsen. The United States refers to this as the accumulation of injurious effects, and argues that the USITC data demonstrate how the injurious effects of imports can accumulate.[3384]

7.1468 By way of example, the United States notes that the state of the domestic CCFRS declined throughout the investigation period, in marked contrast to the steady and significant increase in demand that also characterized that period.[3385] In 1996 and 1997, the domestic industry earned reasonable operating profits and made substantial capital investments in a growing domestic market. In the latter part of the investigation period, however, the condition of the industry substantially deteriorated, to the point of significant losses at the very end of the period.[3386] These losses had significant adverse effects on the cash flow to the domestic industry. In 1996, the CCFRS industry saw US$2.1 billion in cash flow, rising in 1997 to US$2.7 billion, and dipping to US$2.1 billion in 1998. In 1999, cash flow had dropped to US$0.9 billion (just one-third of the 1997 level) and fell further in 2000 to US$0.7 billion. In the first six months of 2001, the domestic industry had a negative cash flow of US$0.8 billion, compared to the US$1.2 billion positive cash flow in the first six months of 2000.[3387] The change from operating income to operating losses and the loss of cash flow accompanied the decline in AUV for commercial shipments of CCFRS. In 1996, the AUV for CCFRS was US$470. By 2000, this amount had declined by 11% to US$418. In the first six months of 2001, the AUV of CCFRS had fallen to US$373, representing a 20% decline in price since 1996.[3388] The number of production workers remained steady from 1996 to 1998, but then, between 1998 and 1999, the number of production and related workers dropped by over 4,000 workers or over 4.2%.[3389] The number of hours worked followed the same pattern. Both the number of hours worked and the number of production and related workers was lower in the first half of 2001 than in the first half of 2000. As the financial performance of the industry declined, capital expenditures fell off as

[3384] United States' written reply to Panel question No. 46 at the second substantive meeting.
[3385] USITC Report, pp. 56 and 60.
[3386] The United States submits that in 1996 and 1997, the domestic industry had positive operating income margins of 4.3 and 6.1% of sales respectively. The percentage dropped to 4.0 in 1998, and into a 0.7% loss in 1999 and a 1.4% loss in 2000. In the first half of 2001, operating losses plummeted to 11.5 percent. USITC Report, p. 53. In dollar terms, the domestic industry posted an operating income of US$1.2 billion in 1996, which rose to US$1.8 billion in 1997, and then fell to US$1.1 billion in 1998. After this point, operating income turned to continually deepening losses – US$181 million loss in 1999 and a US$370 million loss in 2000. In the first six months of 2001, operating losses reached US$1.3 billion, compared to an operating income of US$538 million in the first six months of 2000. USITC Report, pp. FLAT-24 – FLAT-28, Tables FLAT-20 – FLAT-25.
[3387] Ibid.
[3388] USITC Report, p. 53.
[3389] USITC Report, p. 54.

well. From 1996 to 1998, the domestic industry devoted US$2.3 billion, US$2.5 billion, and US$2.3 billion to capital expenditures respectively. By 1999, this amount had fallen to US$1.8 billion, dropping further to US$1.5 billion in 2000. A comparison of interim period data for 2000 and 2001 demonstrates a further decline, as US$478 million was spent in the first six months of 2000, compared to US$361 million in the same period for 2001.[3390] [3391]

7.1469 Similarly, for rebar, the United States explains how imports peaked in 1999, and remained at high levels afterward. However even when imports moderated somewhat in interim 2001, they continued to have injurious effects that combined with the accumulated and continuing injurious effects of imports in prior years. Specifically, imports of rebar (both including and excluding NAFTA imports) peaked in 1999, the second to last year of the investigation period. Total rebar imports reached 1.83 million tons in that year, an increase of more than 300% from 1996 import levels. Total imports then declined slightly to 1.67 million tons in 2000, before increasing to 852,000 tons in interim 2001.[3392] Although the peak of rebar imports occurred in 1999, import levels remained substantially higher in 2000 and interim 2001 than they were in 1996 through 1998. According to the United States, the result was to drive prices even lower in 2000 and interim 2001 than they were in 1999. Unit values of domestic shipments fell from US$274/ton in 1999 to US$269/ton in 2000 and US$265/ton in interim 2001, as domestic producers cut prices in response to sustained higher levels of imports. (Net commercial sales values also bottomed out in 2000 and interim 2001, at US$266/ton. Steel, vol. 2, at LONG-35.) Rebar unit values fell another US$9 per ton from 1999 to June 2001, as import levels moderated slightly from their peak in 1999.[3393] United States rebar producers reported modest operating income of US$43.9 million in 1999, the year that imports peaked. However, the continued high levels of imports combined with lower selling prices resulted in an operating loss of US$59.9 million by 2000.[3394] As a percentage of net commercial sales, the industry's operating profit of 5.0% in 1999 became an operating loss of negative 1.6%. The decline in profitability resulted in cash flow, capital expenditures, and R&D expenses reaching their lowest levels in 2000. Capital expenditures fell from US$108 million in 1996 to US$62.1 million in 1999, and fell again to US$49.4 million in 2000.[3395] Because major capital expenditures in the steel industry require advance planning, the United States claims that it is to be expected that import surges from earlier in the investigation period would lead domestic producers to reduce their capital expenditures later in the period. (In fact, given the lead times for capital spending, an exact match in timing between an import surge and declining expenditures could be purely coincidental.) [3396]

7.1470 For Japan and Korea[3397], the remedy must be limited to the increased imports because that is what "proportionality" means. The adjustment must be to increases in imports and not to other market conditions, etc. After all, the industry must be in a position to compete with imports after the relief ends. This "temporary breathing room" provided by safeguards must be used to adjust to increased import competition. Korea adds[3398] that to suggest that the Agreement on Safeguards does not require that the relief be tailored to the industry's ability to adjust to increased imports flies in the face of the entire object and purpose of the Agreement on Safeguards. First, Article 5.1 is quite clear – there are two mutual conditions to the imposition of relief – it must be limited to the extent necessary to

[3390] USITC Report, pp. FLAT-24 – FLAT-28, Tables FLAT-20 – FLAT-25. The United States derives these figures by adding the reported capital expenditures.
[3391] United States' written reply to Panel question No. 46 at the second substantive meeting.
[3392] USITC Report, p. LONG-11.
[3393] USITC Report, p. LONG-23.
[3394] USITC Report, p. LONG-35.
[3395] USITC Report, p. LONG-35.
[3396] United States' written reply to Panel question No. 46 at the second substantive meeting.
[3397] Japan's and Korea's written replies to Panel question No. 56 at the second substantive meeting.
[3398] Korea's additional comments on Panel question No. 56 at the second substantive meeting.

prevent or remedy serious injury and to facilitate adjustment to increased imports. Moreover, the entire object and purpose of the Agreement on Safeguards would be defeated if the relief were not limited to the relief necessary to allow for adjustment to increased imports. Taking the most extreme case, if an industry were incapable of adjusting to increased imports, there would be no purpose to any relief; the need for "emergency action" would not be present. The Preamble to the Agreement on Safeguards reconfirms the "importance of structural adjustment and the need to enhance rather than limit competition". (If an industry cannot adjust to import competition, structural adjustment should occur.) Article 7.2 of the Agreement on Safeguards repeats the dual conditions for extending relief (*i.e.*, "evidence" that the industry is adjusting) and Article 7.4 makes clear that every effort should be made to facilitate adjustment by progressively liberalizing the measure. In other words, taken as a whole, the terms of the Agreement on Safeguards make clear that facilitating adjustment to increased imports must be a key factor in establishing the level of relief, liberalizing the level of relief, or extending the relief. Logically, the adjustment of the industry to import competition must be the goal of the measure, and any remedy which exceeds the relief necessary to accomplish that goal would not be limited to the permissible extent. Further evidence that such adjustment must be to import competition is found in Article 7.4, which states that the measure should be liberalized (*i.e.*, lessen the restrictions on imports) in order to "facilitate adjustment". Obviously, the relief is phased out so that the adjustment is made to import competition. To comply, there should be a finding that the industry is able to adjust to import competition and that it has a plan for doing this, so that such a finding is adequately substantiated by facts. In some circumstances, an industry may be injured by imports but be incapable of adjusting, so relief would not be justified. In other words, both requirements of Article 5.1 limit the permissible extent of relief so either requirement could result in limiting or reducing the permissible extent of the measure. Korea submits that, in any event, there is no record evidence or even evidence presented to the Panel by the United States which explains how the relief was necessary to allow for adjustment at all, let alone to adjust to increased imports alone. The United States has even denied that adjustment was a consideration in establishing the level of relief.[3399] [3400]

7.1471 China submits that the reference to "facilitate adjustments" in Article 5.1 may mean to relieve pressure of the increased imports on the domestic industry. As the measures may be applied only to the extent necessary to remedy injury caused by the surge in imports, the adjustment should not cover the imports below the trigger level for application of the safeguards measures.[3401]

7.1472 The United States challenges Korea's assertions that "[t]o comply, there should be a finding that the industry is able to adjust to import competition and that it has a plan for doing this". For the United States, nothing in the Agreement on Safeguards requires that an industry present an adjustment plan, or that the competent authorities (or the Member itself) determine that the industry is "able to adjust". Article 4.2(a) is specific about what the competent authorities must consider – "all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry". The Article establishes this obligation as part of the "investigation to determine whether increased imports have caused or are threatening to cause serious injury". It does not mention the facilitation of adjustment. Thus, the "relevant" factors are those relating to injury or causation. The industry's ability to adjust to import competition (or any industry adjustment plans) do not advance this inquiry and, therefore, are not "relevant" in the sense of Article 4.2(a). The United States submits that Article 5.1 addresses imposition of safeguard measures, and does not require the consideration of specific factors. Therefore, it does not obligate a Member to address the industry's ability to adjust, or to require an adjustment plan from the domestic industry. Indeed, reading the Agreement on

[3399] United States' second oral statement, para. 119.
[3400] Japan's and Korea's written reply to Panel question No. 56 at the second substantive meeting.
[3401] China's written reply to Panel question No. 56 at the second substantive meeting.

Safeguards to require the industry as a whole to agree on what adjustment efforts to undertake would suggest the existence of a requirement to create cartels or an endorsement of collusion among the domestic producers. Nothing in the Agreement on Safeguards supports such a conclusion.[3402]

7.1473 Also with regard to Korea's assertion, it is unclear exactly what provision Korea sees as requiring such compliance. Korea also notes that Article 7.2 requires evidence that the industry "is adjusting", and Article 7.4 requires progressive liberalization of the measure "in order to facilitate adjustment"[3403], the United States submits that Korea does not explain how either of these obligations is relevant to the initial decision whether and to what extent to apply a safeguard measure. Indeed, Article 7.2 envisages an analysis of the effectiveness of the measure after it has been in place, which a Member surely cannot perform before applying the measure. Article 7.4, which is not subject to a claim raised by any of the parties, addresses the reduction in the level of application of a measure after its initial application. It is difficult to imagine how this provision would be applicable to the decision on the initial level of application of a measure, as opposed to any subsequent reductions in application. In any event, an adjustment plan or pre-application findings regarding adjustment are not necessary for a Member to determine at a later date whether adjustment has occurred. Thus, a Member is not obliged to seek an industry adjustment plan or to make a finding that the industry is "able to adjust" in order "to comply" with Articles 7.2 and 7.4.[3404]

7.1474 The United States adds that Korea asserts that "to facilitate adjustment" in Article 5.1 means that "the industry must be in a position to compete with imports after the relief ends" and that "'the temporary breathing room' provided by safeguards must be used to adjust to increased import competition".[3405] These statements mistake the objective of a safeguard measure – to facilitate the domestic industry's adjustment to import competition – for an obligation. A Member cannot guarantee in advance that a safeguard measure will achieve a full adjustment to import competition. Other forces could frustrate the success of a measure. The United States submits that Korea's interpretation would also disregard the word "facilitate". As the European Communities and Brazil point out, "facilitate" means "make easy or easier; promote, help forward (an action, result, etc.)".[3406] Further, according to the European Communities, "it therefore implies a contribution to a result – not the assurance of a result".[3407] Thus, Article 5.1 cannot be interpreted to require a Member to ensure before taking a safeguard measure that the industry will be able to compete with imports after termination of a safeguard measure.[3408]

[3402] United States' additional comment on Panel question No. 56 at the second substantive meeting.
[3403] Korea's written reply to Panel question No. 56 at the second substantive meeting.
[3404] United States' additional comment on Panel question No. 56 at the second substantive meeting.
[3405] Korea's written reply to Panel question No. 56 at the second substantive meeting.
[3406] European Communities' written reply to Panel question No. 56 at the second substantive meeting, quoting the New Shorter Oxford English Dictionary (electronic version) (January 1997). Brazil raises a similar point in its written reply to Panel question No. 56 at the second substantive meeting.
[3407] European Communities' written reply to Panel question No. 56 at the second substantive meeting; Brazil makes a similar point in its written reply to Panel question No. 56 at the second substantive meeting. "The United States agrees with this interpretation of 'facilitate'. (Indeed, para. 1025 of the United States' first written submission cited the definition.) However, the United States disagrees with the conclusion by the European Communiteis and Brazil that this means that a Member's ability to facilitate the adjustment to import competition is delimited by the need to prevent or remedy serious injury. If "making easier" or "promoting" adjustment to the injurious effects of imports (as distinguished from the effects of other factors having injurious effects) requires application of a measure beyond the extent of remedying the injurious effects of imports, Article 5.1 would permit such a measure".
[3408] United States' additional comment on Panel question No. 56 at the second substantive meeting.

7.1475 The United States argues that, therefore, Article 5.1 does not support Korea's view that a Member should require the domestic industry to submit an adjustment plan, and make a finding that the industry is able to adjust. Articles 5.1, 7.2, and 7.4 are the only provisions of the WTO covered agreements that appear in Korea's response. Since they do not support Korea's argument, the Panel should reject it. Finally, although Article 5.1 does not require adjustment plans, or analysis of the industry's ability to adjust, the United States safeguard statute envisages the submission of adjustment plans by domestic producers.[3409] Many of the domestic producers of the ten products subject to steel safeguard measures submitted plans. In addition, the USITC asked producers to indicate what actions they would take to adjust to import competition. Producers provided this information primarily in the form of company-specific (and generally confidential) objectives.[3410] [3411]

7.1476 The United States also challenges Korea's assertion that "there is no record evidence or even evidence presented to the Panel by the United States which explains how relief was necessary to allow for adjustment at all, let alone to adjust to increased imports alone". The United States notes rather that, rather, the record does contain such evidence. For CCFRSS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, and stainless steel rod, the USITC majority found that imports undersold domestic products, and that this condition had a negative effect on domestic producers' prices.[3412] The USITC found further that declining prices contributed to declining profitability. Finally, the USITC found that the domestic industries' capital and research and development efforts were impaired. For each of the products, data on import volumes and values indicate that foreign producers were willing and able to increase greatly their sales of these low-priced products. For the United States, the mechanism for the suppression and depression of prices is obvious. When increased imports sell for prices lower than comparable domestic products, purchasers can switch to lower priced imports. The threat of losing sales can force domestic producers to lower their prices. As long as imports remain in the market at prices lower than comparable domestic products, it is difficult or impossible for domestic producers to improve their situation by raising prices. By demonstrating that imports can increase dramatically, a recent surge would give credibility to customers' threats to replace domestic sales with imports, and would increase their ability to obtain pricing concessions. The effect on the industry's ability to adjust is equally obvious. An industry with low or negative profitability cannot attract the funds necessary to pay for adjustment. Banks will not lend and investors will not contribute capital needed to restructure, to buy more efficient equipment, to retrain workers, or to take any other steps that would facilitate adjustment.[3413]

7.1477 The United States argues that it is beyond dispute that application of the safeguard measures would facilitate the industry's adjustment. An increase in the price for imports would lessen their negative effect on domestic producers' prices, which would likely boost profitability. The data in the USITC record demonstrate that, at least in the first half of 2001, market conditions were not such that import prices would rise sufficiently by themselves. A safeguard measure would bolster import prices

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[3409] Section 202(a)(4) of the Trade Act of 1974, 19 U.S.C. § 2252(a)(4) ("A Petitioner under paragraph (1) may submit to the Commission and the United States Trade Representative . . . either with the petition, or at any time within 120 days after the date of filing of the petition, a plan to facilitate positive adjustment to import competition"). Of course, the fact that the US statute – independent of the Agreement on Safeguards or Article XIX of the General Agreement on Tariffs and Trade 1994 envisages adjustment plans does not elevate them to the status of an international obligation.

[3410] A summary of these plans appears on pp. 361-362, 374, 382, 389, 396, 403, and 412 of the USITC Report. Tabulations of proposed adjustment efforts appear on pp. FLAT-78, LONG-102 – LONG-103, TUBULAR-66, and STAINLESS-91of the USITC Report.

[3411] United States' additional comment on Panel question No. 56 at the second substantive meeting.

[3412] USITC Report, pp. 61-62, 97, 106, 113, 163, 176, 211, and 220-221.

[3413] United States' additional comment on Panel question No. 56 at the second substantive meeting.

and relieve pressure on domestic producers' prices. No party suggested an alternative means to increase domestic and import prices. Thus, the safeguard measures were necessary both to raising domestic prices and thereby providing the funds that would facilitate adjustment. There should be no concern that the tariff measures applied by the United States would also address the effects of other causes that putatively had a negative effect on the various industries. For example, they would not eliminate excess capacity, revive flagging demand, or address problems allegedly faced by particular producers, among other things. Thus, it is clear that the steel safeguard measures will facilitate the industry's adjustment to import competition.[3414]

7.1478 Finally, the United States[3415] challenges Korea's assertion that "[t]he United States has even denied that adjustment was a consideration in establishing the level of relief". For the United States, this assertion represents something of a reversal, in that complainants had previously argued that the United States was focusing on the need to facilitate adjustment, and disregarding the prevention or remedy of serious injury.[3416] The only support Korea cites for its exactly opposite characterization of the United States position is paragraph 119 of the US second oral statement.[3417] That paragraph states:

> "As we noted in our first written submission, our numerical exercises are based solely on remedying the injurious effects of increased imports as identified by the USITC, and do not assert that adjustment to import competition required application of a safeguard measure *beyond that extent*." (emphasis added).

However, Korea ignores the preceding paragraph, which states:

> "It is also clear that the concepts of remedying serious injury and facilitating adjustment overlap to a degree. 'Rectifying' or 'making good' the injurious effects of increased imports will provide the industry with resources that will enable it to compete more successfully with imports upon termination of the safeguard measure. Indeed, that is the purpose of a safeguard measure – to provide temporary breathing space so the industry *can* adjust."[3418]

7.1479 These two paragraphs reflect that the United States did consider the need to facilitate adjustment to import competition in deciding to apply the steel safeguard measures. This has been clear from the outset. In Proclamation 7529, which established the measures, the President "determined that these safeguard measures will facilitate efforts by the domestic industry to make a positive adjustment to import competition".[3419] These two paragraphs also reflect the point that the United States did not consider in this proceeding the need to facilitate adjustment as a factor indicating that any of the steel safeguard measures should be applied beyond the extent necessary to prevent or remedy the injurious effects attributable to increased imports. The United States insists that it did show that under Article 5.1, preventing or remedying serious injury and facilitating adjustment are additive bases for a safeguard measure. Therefore, the discussion of Article 5.1 has

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[3414] United States' additional comment on Panel question No. 56 at the second substantive meeting.

[3415] United States' additional comment on Panel question No. 56 at the second substantive meeting.

[3416] European Communities' second written submission, para. 509 ("The only indication we had in the Presidential Proclamation of the purpose sought to be achieved by the US safeguard measures is that they were designed to facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs"). The European Communities expands on this allegation in paragraphs 510 through 512 of that submission.

[3417] Korea's written reply to Panel question No. 56 at the second substantive meeting, footnote 86.

[3418] United States' second oral statement, para. 118.

[3419] Proclamation 7529 of 5 March 2002, 67 Federal Register 10553, 10555, recital 14 (7 March 2002).

focused on confirming that the steel safeguard measures were applied no more than the extent necessary to prevent or remedy serious injury. This was also the focus of the Appellate Body's analysis in *US – Line Pipe*.[3420] It is the United States' view that remedies applied within this limitation, like each of the steel safeguard measures, will be equally necessary to facilitate adjustment. Thus, there was no need for a further inquiry in this dispute into whether facilitating adjustment would justify applying one of the measures at a higher level. This in no way suggests that the steel safeguard measures, which were applied at or below the level necessary to prevent or remedy serious injury, would not facilitate adjustment.[3421]

7.1480 The United States concludes that in many cases, a safeguard measure that prevented or remedied serious injury would also provide all or most of the resources that the industry needed to facilitate adjustment to increased imports under such conditions as to cause serious injury. In some situations, the industry may need to make particular investments or reach a particular level of investment to adjust to the injurious effects of increased imports. If a measure that fully prevents or remedies the injurious effects of increased imports does not cover those needs, the level of the safeguard measure could be increased to do so. According to the United States, it did not increase the levels of the steel safeguard measures in this fashion.[3422]

7.1481 The complainants[3423] argue that since "facilitate adjustment" is an additional requirement which is cumulative to the limitation of the remedy to the extent necessary to address the injury caused by increased imports, the safeguard measures may not exceed the lesser of what is necessary to prevent injury from increased imports and what is necessary to facilitate adjustment. A domestic industry will often be in a position to adjust to increased imports on its own without the need for safeguard measures. In such cases, Article 5.1 makes clear that no safeguard measures are permitted. Indeed, the word "facilitate" means: make easy or easier; promote, help forward (an action, result, etc.)[3424] It therefore implies a contribution to a result – not the assurance of a result. Also, the Preamble of the Agreement on Safeguards recalls the need to balance "the importance of structural adjustment" with "the need to enhance rather than limit competition in international markets". Consistent with these objectives, a measure which prevents or remedies serious injury but is not necessary to facilitate adjustment is excessive. Therefore, a justification of the level of a safeguard measure requires both a demonstration that it is necessary to remedy injury and that it is necessary to – and will – facilitate adjustment. The latter requirement presupposes an analysis of what adjustment is needed and possible.

7.1482 The European Communities argues that by assuming that any measure needed to remedy serious injury will also be equally necessary for facilitating adjustment, the United States reveals that it takes no account of the industry's own capacity to adjust but imposes on imports the whole extent of what it considers necessary to remove the effect of increased imports (that is, in its view, the effect of imports that happen to have increased to some extent). Moreover, by presuming that "an industry [benefiting from] a safeguard measure would use any improvement in its financial position to advance preparations for the imminent removal of temporary import relief" and, therefore, that the protection

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[3420] Appellate Body Report, *US – Line Pipe*, paras. 237-262. Indeed, Norway recognizes that the Appellate Body did not need to address the role of facilitating adjustment in the Article 5.1 analysis; Norway's written reply to Panel question No. 56 at the second substantive meeting; Norway's second oral statement on behalf of the complainants, paras. 15-17.

[3421] United States' additional comment on Panel question No. 56 at the second substantive meeting.

[3422] United States' additional comment on Panel question No. 56 at the second substantive meeting.

[3423] Complainants' written replies to Panel question No. 56 at the second substantive meeting; Norway's second oral statement on behalf of the complainants, paras. 16-17.

[3424] New Shorter Oxford English Dictionary, (electronic version) January 1997.

provided will in fact be used to facilitate adjustment, the United States disregards the issue of whether the extent of the protection may go beyond what is necessary to facilitate adjustment.[3425]

7.1483 The European Communities and Korea further note that the United States repeatedly claims that: "The level of the application of the measures was not increased to facilitate adjustment.[3426] However, justification for the level of the safeguard measures given by the President states that they were designed to "facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs".[3427] [3428]

7.1484 For New Zealand, Article 5.1 provides that measure can only be taken to the extent necessary to remedy or prevent serious injury and facilitate adjustment. Accordingly a measure is not permitted that may be necessary to remedy or prevent serious injury, but which would not facilitate adjustment to the increase in imports resulting from the granting of the relevant tariff concession. Such an interpretation is clear from the finding of the Appellate Body that Article 5.1 imposes an obligation on a Member to ensure that the measure applied is "commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment".[3429] As noted above, this was recognized by the USITC in relation to its recommendation of a tariff of 20% for certain flat steel products when it concluded that some of the proposals for higher tariffs did not "clearly anticipate the reduction in capacity and closures, that, as discussed above, are necessary for the industry's improvement".[3430] By implication therefore the application of a higher tariff by the President of 30% is in fact not necessary for facilitating adjustment, and would in fact have the opposite effect that the USITC warned of.

7.1485 The United States argues that the view that "a measure is not permitted that may be necessary to remedy or prevent serious injury, but which would not facilitate adjustment to the increase in imports resulting from the relevant tariff concession"[3431] would mean that a measure could be applied no more than the extent necessary to prevent or remedy serious or facilitate adjustment, whichever was lower. As a practical point, it is difficult to see how a measure necessary to remedy serious injury would not be equally necessary as an aspect of facilitating adjustment. If an industry continues to experience serious injury from imports, presumably it has not adjusted to import competition. Furthermore, the United States would expect that an industry subject to a safeguard measure would use any improvement in its financial position to advance preparations for the imminent removal of temporary import relief. However, according to the United States, New Zealand suggests that the objectives of remedying serious injury and facilitating adjustment were in conflict for flat-rolled steel. It alleges that the USITC "recognized" that "proposals for higher tariffs [than recommended by the USITC] did not 'clearly anticipate the reduction in capacity and closures, that, as discussed above, are necessary for the industry's improvement.'"[3432] For the United States, New Zealand misunderstands the USITC's statement. First, the USITC recommendation and explanation have no legal significance. Second, the agency raised this point with regard only to "some of the domestic industries' proposals" and placed it in a footnote to a section applicable to all of the products, rather than CCFRS.[3433] In any event, for each of the ten steel products, the President adopted a measure at a level lower than the

[3425] European Communities' additional comment on Panel question No. 56 at the second substantive meeting.
[3426] United States written reply to Panel question No. 56 at the second substantive meeting.
[3427] Para. 14 of the Presidential Proclamation No. 7529 of 5 March 2002 (Exhibit CC-13).
[3428] European Communities' and Korea's additional comments on Panel question No. 56 at the second substantive meeting.
[3429] Appellate Body Report, *Korea – Dairy*, para. 96.
[3430] USITC Report, Vol. 1, p 358 and footnote 22.
[3431] New Zealand's second written submission, para. 3.180.
[3432] New Zealand's second written submission, para. 3.180.
[3433] USITC Report, p. 358.

measure proposed by the domestic industry. Therefore, the USITC's observation about some of proposals by domestic industries does not apply to the safeguard measures established by the President, including the measure on CCFRS. The United States also argues that, as a matter of interpretation, New Zealand misreads the text of Article 5.1. Article 5.1 uses "and" to connect "facilitate adjustment" with "prevent or remedy serious injury", indicating that the two are additive. It does not suggest that they restrict each other. If that provision established two independent tests, and required a Member to choose the one that resulted in application of the measure at the lower level, it would state something like "a Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury, but no more than necessary to facilitate adjustment". As it does not, the United States contends that New Zealand's understanding of Article 5.1 is plainly contrary to the established principle of interpretation that "words must not be read into the Agreement that are not there".[3434] [3435]

(d) Time reference point for analysis

7.1486 The United States argues that Article 5.1 requires only that a measure be applied no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment, which has been read by the Appellate Body as referring only to injury caused by increased imports. Thus, the injury is caused by increased imports, and not by the imports themselves, and the need to adjust to imports is the proper reference point for analysis of a safeguard measure. It may be that the negative effects of imports began at the same time as the increased imports. In these cases, a Member might find it appropriate to refer to the period during which imports increased to identify the injury caused by imports and devise a measure to prevent or remedy that injury and facilitate adjustment.[3436] However, the United States adds, two other scenarios are possible. It may be that at the time imports began increasing, the conditions of competition were such that the imports did not initially have negative effects on the domestic industry, or that the negative effects began so slowly as to not yet constitute serious injury. In that case, the reference period for devising an appropriate measure to prevent or remedy serious injury and to facilitate adjustment may begin after imports began increasing.[3437] It is also possible that imports had negative effects on the domestic industry before they began increasing, and that the negative effects of imports and other factors matured into serious injury only after the increase. In that case, the reference period for devising an appropriate measure to prevent or remedy serious injury and to facilitate adjustment may begin before imports began increasing. While this was not the case for any of the ten steel safeguard measures, the Panel should recognize the theoretical possibility of this occurrence in its analysis of Article 5.1. In short, in requiring that the injury to the domestic industry and its need for adjustment are the benchmark for the safeguard measure, Article 5.1 requires a consideration of the facts of each case. It does not permit an automatic recourse to the period during which imports increased.[3438]

7.1487 The European Communities submits that Article 5.1 imposes an obligation to tailor the remedy so as to address exclusively the portion of the entire injury suffered by the domestic industry which can be attributed to increased imports. This injury has to be measured in the period during which imports have increased. Accordingly, the period during which imports have increased is relevant for the determination of the level of the remedy under Article 5.1. Brazil adds that the first sentence of Article 5.1 addressing non-excessive remedies, should be read in the context of the second sentence of Article 5.1 which, by limiting quantitative restrictions to historically representative levels,

[3434] Appellate Body Report, *US – Line Pipe*, para. 250.
[3435] United States' written reply to Panel question No. 56 at the second substantive meeting.
[3436] United States' written reply to Panel question No. 152 at the first substantive meeting.
[3437] United States' first written submission, para. 1121.
[3438] United States' written reply to Panel question No. 152 at the first substantive meeting.

implies that the remedy is intended to restore the *status quo ante*, not compensate for past injury. For Brazil, as a general matter, since the objective of safeguard measures is to restore the *status quo ante* by eliminating the injurious effects of increased imports, one would expect that a parallel between the period during which increased imports are identified and the period to which reference is made for the purposes of Article 5.1 could and should be drawn. The problem in the instant case is that the increase in imports is remote and unrelated to the situation in the market in any recent period. When the period of increased imports is remote, it is difficult to see how it becomes relevant to addressing a current import problem.[3439]

7.1488 Japan argues that a parallel between the period during which increased imports are identified and the period to which reference is to be made in assessing the level of the safeguard measure might be an appropriate benchmark depending on how recently imports increased relative to the time of the investigation. The question touches upon the practical reason why, under Article 2.1 as clarified by the Appellate Body in *Argentina – Footwear (EC)*, increased imports must be recent.[3440] Where imports have been decreasing over a period of years, the issue of necessity becomes moot; drawing a parallel between the level of a measure and the now dated effect of increased imports would be inappropriate. This is consistent with the correlation requirement under Article 4.2(b), first sentence, including the understanding that increased imports normally shall coincide with declining industry performance.[3441] Brazil argues that the wider the disconnect between the two, the more difficult it is to establish a causal link. At some point, when increased imports are no longer a manifestation of the recent past, the inquiry must become moot. For Korea, it is important to recall that the increase in imports must be recent. If it is not, then the threshold for a measure has not been met. If the authorities determine that all the conditions for a measure have been met and that a measure should be imposed, then the "benchmark" for the measure must be found in the analysis by the authorities of increased imports, serious injury, and causation so in that way they must be related. Furthermore, the measure could be designed to return the industry to its state prior to the increase in imports as long as any other factors that also contributed to injury are properly isolated and evaluated so that the measure is carefully tailored to address only those effects caused by increased imports.[3442]

(e) Justification of the measure

(i) Timing of justification

7.1489 The complainants argue that the Appellate Body has made clear the obligation of explaining and justifying the extent of the measure. They refer, *inter alia*, to the statements by the Appellate Body in *US – Line Pipe*[3443] it is stated that the parties are under an obligation to "clearly explain [] and justify the extent of the application of the measure". Thus a Member must ensure that: (i) the chosen measure is proportional to the "serious injury" caused by the increase in imports alone, and not remedy the fact that there are imports at all; a proper non-attribution of the injury caused by other factors must also be made; (ii) no additional relief over and above what is necessary to remedy the "serious injury" attributed to increased imports, to assist in further adjustments of the domestic

[3439] Complainants' written replies to Panel questions Nos. 153 and 156 at the first substantive meeting.
[3440] Appellate Body Report, *Argentina—Footwear (EC)*, para. 130.
[3441] Appellate Body Report, *Argentina—Footwear (EC)*, paras. 144-145.
[3442] European Communities', New Zealand's, Norway's, Korea's, Japan's and Brazil's written replies to Panel questions Nos. 152 and 153 at the first substantive meeting.
[3443] Appellate Body Report, *US – Line Pipe*, para. 236.

industry is imposed; and (iii) it clearly explains and justifies the measure prior to or at the time it imposes the measure.[3444]

7.1490 For the European Communities, Japan, China and Switzerland, the Appellate Body in *US – Line Pipe* has made it clear that whether the conditions required to impose a safeguard measure have been met and whether a safeguard measure has been applied only to the extent necessary are two separate issues.[3445] Therefore, if the conditions pertaining to increased imports, injury and causation required to establish the right to apply a safeguard measure have not been satisfied, it is not necessary to investigate whether the extent of such safeguard measure is consistent with Article 5.1. Also, since the conditions required to impose a safeguard measure have not been met, any safeguard measure, whatever its extent might be, would fall short of the obligation set forth in Article 5.1.[3446]

7.1491 Similarly, for Norway[3447], the violation of injury determination and the violation of causal link are particularly relevant in order to conclude *ipso facto* that the United States measures go beyond the extent necessary. According to Norway, the violations of the provisions of the Agreement on Safeguards or GATT 1994 are sufficient to conclude that the United States measures, for all or some products (depending on the Panel's finding on the previous violations), also violate Article 5.1 of the Agreement on Safeguards, whatever the justification given by the United States in the USITC Report.[3448]

7.1492 Norway and Switzerland add that the justification under Article 5.1 is not only intended to help the Panel in determining if the relevant conditions are fulfilled but should also help the Member making the right decision. Attempts at a *post facto* justification will not suffice in this respect. As the justification must be determined by the Member prior to imposing the safeguard in question, there seems to be no legitimate reason why it should be kept secret and not be given to the Members concerned.[3449] Korea submits that the United States provides an *ex post* explanation of its measures and even creates an *ex post* record from which to construct that explanation.[3450]

7.1493 The United States first recalls that the assessment of consistency with the Agreement on Safeguards involves two "separate and distinct" inquiries: "first, is there a right to apply a safeguard measure? And, second, if so, has that right been exercised, through the application of such a measure, within the limits set out in the treaty?" According to the United States, only the content of the first investigation is to be reported before the measure is actually imposed. Article 5.1 explicitly states that the role of applying a safeguard measure is "to prevent or remedy serious injury and to facilitate adjustment". It also states that a Member may apply a safeguard measure "only to the extent necessary" for these purposes. Thus, the serious injury experienced by the domestic industry and the need to facilitate adjustment define the limit for applying a safeguard measure. A Member may apply a safeguard measure in any form and at any level that falls within the parameters of Article 5.1 and Article 5.1 does not restrict a Member's discretion to act within this limitation. The Member may choose any form for the measure – for example, a tariff, tariff-rate quota, or quantitative restriction.

[3444] Norway's second oral statement on behalf of the complainants, paras. 8-9.
[3445] Appellate Body Report, *US – Line Pipe*, para. 242.
[3446] European Communities' written reply to Panel question No. 105 at the first substantive meeting; Japan's first written submission, paras. 319-321.
[3447] Norway's first written submission, para. 352.
[3448] Norway's first written submission, para. 351.
[3449] Switzerland's second written submission, para. 114; Norway's second written submission, para. 173.
[3450] Korea's second written submission, para. 241.

Within this limitation, the Member may also choose the level of the measure – an *ad valorem* duty rate, a specific duty amount, the volume subject to a quota, etc.[3451]

7.1494 Some complainants read the passage of the Appellate Body *in US – Line Pipe* referring to the incidental effects of a proper investigation on the chosen level of remedy as placing an affirmative procedural duty on Members to explain in a published report the "sufficient motivation" or "justification" for the measures selected.[3452] For the United States, this interpretation is devoid of merit. The reasoning in the *US – Line Pipe* report makes clear that the competent authority's "compliance with Articles 3.1, 4.2(b) and 4.2(c)" in its investigation (*i.e.*, by "separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports" in a detailed report) "*should* have the *incidental* effect of providing sufficient 'justification'" for the safeguard measure applied.[3453] This passage indicates the Appellate Body's understanding that the competent authorities will *not* explain how a safeguard measure complies with Article 5.1 – if they did, the justification would be intentional, and not an "incidental effect." In other words, although Members need not *explicitly* state the reasons for selecting safeguard measures, the need for the measures should be *implicit* from the findings of the competent authorities.[3454] The Appellate Body will use the competent authority's report as the "benchmark" to determine, on a substantive basis, whether the measures selected did, in fact, comply with Article 5.1. However, the report itself need not address this issue. Thus, a Member remains free to explain its compliance with Article 5.1 during the dispute settlement process.[3455]

7.1495 The United States notes that the Appellate Body found in *Korea – Dairy* and reaffirmed in *US – Line Pipe* that Article 5.1 does not oblige a Member to demonstrate, at the time of taking a safeguard measure, how the measure complies with Article 5.1. Nothing in Article 3.1 affects this conclusion. In *US – Line Pipe*, the Appellate Body reiterated that "[i]t is clear, therefore, that apart from one exception, Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied 'only to the extent necessary.'"[3456] The texts also make clear that Articles 3.1 and 4.2(c) are obligations of the "competent authorities". The only functions assigned to the competent authorities under the Agreement on Safeguards are to investigate and make determinations of serious injury. The competent authorities are mentioned only in Articles 3, 4, and 7.2, and always in those contexts. In contrast, Articles 5 and 7.1, which address the extent and duration of a safeguard measure, make no mention of the competent authorities or their investigation. These obligations are addressed to the Member itself, which is not required to provide a report under Article 3.1.[3457] The United States recalls that, with respect to the investigation, Article 3.1 states that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions". With respect to the determination of serious injury, Article 4.2(c) states that "[t]he competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined". As the competent authority, the USITC must comply with these requirements. However, there is no analogous provision applicable to step two, i.e., application of the safeguard measure, except with respect to certain types of quantitative restrictions that were not used in the steel case. According to the United States, neither Article 5 nor any other provision of the Agreement on Safeguards contains an

[3451] United States' first written submission, paras. 1018-1023.
[3452] Korea's first written submission, paras. 203-207; Norway's first written submission, paras. 348-350.
[3453] Appellate Body Report, *US – Line Pipe*, para. 236 (emphasis added).
[3454] United States' first written submission, para. 1051.
[3455] United States' first written submission, para. 1031.
[3456] Appellate Body Report, *US – Line Pipe*, para. 233.
[3457] United States' first written submission, paras. 1018-1023.

obligation to explain at the time of taking a safeguard measure how the measure remedies or prevents serious injury and facilitates adjustment. Thus, the President, who administers this second step, was under no obligation to provide such an explanation. The absence of an explanation of how a measure is applied no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment signifies only that the explanation has not been published. It does not indicate anything about whether the explanation would establish consistency with Article 5.1.[3458]

7.1496 The United States submits that the complainants are now essentially contending that Articles 3.1 and 4.2(c) create just the obligation to explain, that the Appellate Body has twice found does not arise from Article 5.1.[3459] According to the United States, the complainants argue that a safeguard measure's consistency with Article 5.1 is clearly a "pertinent issue of fact or law" and, therefore, the report of the competent authorities under Article 3.1 must contain findings or reasoned conclusions on that issue.[3460] For the United States, the text of Article 3.1 is completely at odds with this interpretation. Rather, it is clear that Article 3.1, third sentence, and Article 4.2(c) are related to the investigation of the competent authorities. Article 4.2(c) references the investigation explicitly, while the title of Article 3 is "Investigation". Article 4.2(a) specifies the purpose of this investigation – "to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry". In other words, an investigation is conducted to determine whether conditions (as set forth at Article 2.1) are such that safeguard measures may legally be applied. By the terms of Article 3.1, Members may not apply safeguard measures until the "investigation" is complete.[3461] Once the competent authorities determine that safeguard measures may be applied, the Agreement makes clear that it is the "Member", not the "competent authorities" of that Member, who decides what, if any, safeguard measures shall be applied.[3462] Although Article 3.1 provides that the "competent authorities shall publish a report setting forth their findings and reasoned conclusions", there is no similar requirement that Members publish their findings regarding how the measures should be applied. In particular, other than the requirement to justify certain quantitative restrictions, which is not applicable to this dispute, there is no provision requiring Members to publish findings regarding why the particular safeguard measures selected conform with Article 5.1. The "pertinent issues of fact and law" that must appear in the report are, therefore, those issues that relate to the "investigation" by the "competent authorities" regarding whether the conditions for applying safeguard measures have been satisfied.[3463] They do not include issues related to the Members' selection and application of a measure consistent with Article 5.1.[3464] For the United States, it is noteworthy that the Appellate Body only described Article 3 as applicable to the inquiry regarding the

[3458] United States' written reply to Panel question No. 128 at the first substantive meeting.

[3459] European Communities' first written submission, para. 632; Japan's first written submission, paras. 325-328; Korea's first written submission, paras. 203-213; Norway's first written submission, para. 357; New Zealand's first written submission, paras. 4.203-4.204; Brazil's first written submission, para. 246.

[3460] Korea's first written submission, para. 167.

[3461] Article 3.1 states that "[a] Member may apply a safeguard measure *only following an investigation* by the competent authorities of that Member". (Emphasiz added.)

[3462] Article 3.1 states that "[a] *Member* may apply a safeguard measure only following an investigation by the competent authorities of that Member;" (emphasis added) and Article 5.1 states that "[a] *Member* shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment".

[3463] Appellate Body Report, *US – Wheat Gluten*, para. 52 ("The scope of the obligation to evaluate 'all relevant factors' is, therefore, related to the scope of the obligation of competent authorities to conduct an investigation").

[3464] United States' first submission, paras. 1042-1046.

determination of serious injury under Articles 2 and 4, and not in conjunction with the consideration whether the measure is consistent with Article 5.1, first sentence .[3465]

7.1497 The complainants challenge the United States view that the United States was under no obligation to justify the safeguard measures at the time of application and that a Member remains free to explain its compliance with Article 5.1 first during the dispute settlement process.[3466] In the view of the complainants, the arguments put forward by the United States have no merit. They are of the firm view that Article 3.1 of the Agreement on Safeguards includes an obligation to provide sufficient justification for a safeguard measure.[3467]

7.1498 China argues that the United States is trying to make an artificial distinction between the investigation and the application of the measure. In particular, the United States wrongly asserts that Articles 3.1 and 4.2(c) are obligations of the "competent authorities" and that the only functions assigned to the competent authorities are to investigate and make determinations of serious injury. The distinction made by the United States is not relevant, since WTO obligations are always imposed on a WTO Member. From there on, any authority of a WTO Member is necessarily subject to the WTO obligations undertaken by this Member. On the other hand, it is always a WTO Member that is considered to be responsible for a violation of its WTO obligations committed by any of its authorities. All WTO obligations are, by nature, supported solely and finally by the WTO Members. It is, therefore, not relevant to try to make a distinction between obligations addressed to the Member itself and obligations addressed to one of its authorities. The fact that the United States decided to split its decision process in the context of safeguards investigations is not without any impact on the current proceeding. Following the reasoning of the United States, separating and distinguishing the injurious effect of factors other than increased imports from those caused by increased imports should be related to the investigation and therefore be the task of the "competent authority". However, China notes that the Appellate Body in *US – Line Pipe*[3468], refers to this task as being undertaken by "a Member proposing to apply a safeguard measure". This should bring enough evidence that there is no such division of obligations as suggested by the United States under the Agreement on Safeguards and that the related distinction between a "Member" and a "competent authority" is of no relevance.[3469]

7.1499 Korea argues[3470] that the United States must demonstrate that the reasoning of its authorities regarding increased imports, serious injury and causation, justifies the measure imposed. However, in fact, the detailed analysis and reasoned conclusions of the USITC demonstrate that the United States measure actually imposed exceeded what was "necessary". Thus, Korea argues the United States proposes instead to justify its measure through *ex post* reasoning by creating a new record with a new analysis and conclusions, which is actually is in conflict with the USITC's reasoning on serious injury in numerous respects.[3471] However, in the case of welded pipe, the USITC specifically found that only future, additional injury needed to be prevented.[3472] Moreover, Korea argues that the United States is wrong that the USITC remedy recommendation is not relevant. In fact, it provides further clarification or justification of how the remedy should be adapted to the serious injury/threat of

[3465] United States' first submission, paras. 1047-1048.
[3466] United States' first written submission, paras. 1051-1052.
[3467] Switzerland's second written submission, para. 112; Japan's first written submission, paras. 325-328; Norway's second oral statement on behalf of the complainants, para. 23.
[3468] Appellate Body Report, *US – Line Pipe*, para. 236.
[3469] China's executive summary of the second written submission, pp. 9-10.
[3470] Korea's second written submission, para. 244.
[3471] Korea's second written submission, paras. 244-245.
[3472] USITC Report, Vol. I, pp. 164 and 383 (Exhibit CC-6).

serious injury benchmark by the authors of those underlying factual and legal conclusions.[3473] While such findings are not binding or determinative for the US President under United States law, those findings and recommendations are grounded in the serious injury/threat finding which the Appellate Body has said are relevant and, therefore, those recommendations complement the serious injury findings and offer additional compelling evidence of the benchmark against which to assess the permissible extent of the measure. The United States cannot just "wish away" parts of its own published report.[3474]

7.1500 The European Communities and China state that, in principle, the Appellate Body has indicated that there is no obligation to justify, prior to the application of a safeguard measure, that it does not go beyond the extent necessary to prevent or remedy the injury and to facilitate adjustment.[3475] Therefore, an omission of a discussion as to how the safeguard measure is limited to the extent necessary to prevent or remedy the injury and to facilitate adjustment does not in itself mean that the measure at issue surpasses that extent.[3476] However, the non-attribution exercise required under Articles 3.1, 4.2(b) and 4.2(c) must result in findings and reasoned conclusions in the report of the competent authority which have to provide evidence that the safeguard measure applied on the basis of these findings and reasoned conclusions clearly does not go beyond the extent necessary to prevent or remedy the injury caused by increased imports.[3477] Therefore, in the view of the European Communities, the question is not so much whether "Article 3.1 applies to Article 5.1" as whether the safeguard measures actually imposed pursuant to Article 5.1 can be considered to be based on a determination under Article 3.1. The European Communities considers that this is not the case in respect of many of the safeguard measures imposed by the United States in this case, especially those applied on products in the CCFRS product bundle and on tin mill.[3478]

7.1501 The United States submits that the complainants rest their arguments almost entirely on their claim that the USITC determinations of serious injury were inconsistent with the Agreement on Safeguards, and that this alleged shortcoming invalidates the safeguard measures. The USITC determinations were fully consistent with the Agreement on Safeguards and GATT 1994. Therefore, the primary argument against the steel safeguard measures themselves is unfounded. However, should the Panel find some flaw with the USITC determinations, the United States submits that two simple numerical tests exist to demonstrate that the United States complied with Article 5.1. These are explained in further detail by the United States below. These tests cannot be interpreted as a quantification of injury or of the effect of a safeguard measure, which the United States shows is neither consistent with the framework established under the Agreement on Safeguards nor possible. At best, they can provide an approximation that can indicate that a measure is set at an appropriate order of magnitude. The United States written submission contains two such numerical tests, which

[3473] Presumably, Korea argues, this was the United States' rationale for requiring such a recommendation by the USITC in the first place.

[3474] Korea's second written submission, paras. 244-245.

[3475] Appellate Body Report, *Korea – Dairy*, paras. 99-100; Appellate Body Report, *US – Line Pipe*, para. 233.

[3476] The European Communities' and China's written replies to Panel question No. 111 at the first substantive meeting.

[3477] The European Communities' written reply to Panel question No. 113 at the first substantive meeting.

[3478] The European Communities' and China's written replies to Panel questions No. 110 at the first substantive meeting.

show that the magnitude of the steel safeguard measures is consistent with the injury attributable to increased non-FTA imports.[3479]

7.1502 The complainants respond that they have, however, demonstrated that the measures were unjustified based on the facts before the USITC and President. Since the complainants demonstrate that the United States failed, in many respects, to comply with the requirements of Articles 4.2(b) and 4.2(c) of the Agreement on Safeguards, they have established a prima facie case that the United States measures are applied beyond the "extent necessary" and, therefore, violates Article 5.1 of the Agreement on Safeguards.[3480]

(ii) Presidential measure differs from measure recommended by the competent authority

7.1503 The complainants note, in this regard, that the Presidential Proclamation imposed an increased tariff of: Year 1: 30%; Year 2: 24%; Year 3: 18%[3481] but there is no particular explanation for this choice. Because the President's measure diverged from the USITC's recommendation, he was required to abide by the "investigation" requirements of Article 3.1, including the requirement to provide a report setting forth "findings and reasoned conclusions reached on all pertinent issues of fact and law".[3482] In particular, the President made no attempt to demonstrate that his safeguard measures were no more restrictive than necessary under Article 5.1. The President, therefore, did not "clearly explain[] and 'justify[]' the extent of the application of the measure".[3483] Norway adds that the absence of any report containing such findings and reasoned conclusion is especially surprising given that the USTR conducted its own independent investigation on behalf of the President.[3484]

7.1504 New Zealand[3485] recalls that notwithstanding the USITC's recommendation for 20% tariff on CCFRS with the exception of slab, the President imposed a 30% tariff on these products.[3486] No analysis accompanied these contrary decisions, and no attempt was made to explain how the 30% tariff, applied to a narrower group of countries than that recommended by the USITC, was no more restrictive than necessary. In addition, it is clear that the 30% tariff applied by the President directly conflicts with the express statements made in the USITC Report regarding the measures that would need to be taken by the United States domestic industry to adjust to import competition. For example, in the context of making its recommendation of a 20% tariff remedy the USITC observed that "some

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[3479] United States' first written submission, para. 1056; United States' executive summary of the first written submission, paras. 115-116.

[3480] European Communities' written reply to Panel question No. 110 at the first substantive meeting; China's second written submission, paras. 303-304; Japan's second written submission, paras. 162-165; Norway's second oral statement on behalf of the complainants, para. 20.

[3481] Annex to the Presidential Proclamation at headings 9903.73.37 through 99.03.73.39 (Exhibit CC-13); Notification by the United States pursuant to Article 12.1(c) and Article 9, footnote 2, of the Agreement on Safeguards on taking a decision to apply a safeguard measure, G/SG/N/10/USA/6 & G/SG/N11/USA/5, in point 4(i). (Exhibit CC-14)

[3482] The complainants argues that US law construct that the President rather than the competent authority, *i.e.*, the USITC, makes the final decision in safeguards cases does not absolve the USG of the obligation to abide by Article 3.1. If the President deviates from the USITC recommendations (which should be supported by its report, even if such was not in the case here), the President is required to provide an explanation for his decision. (Political expediency – the apparent reason for the decision – is not sufficient.)

[3483] Appellate Body Report, *US – Line Pipe*, para. 236.

[3484] *See* for instance Norway's second oral statement on behalf of all complainants, para. 26.

[3485] New Zealand's first written submission, paras. 4.200-4.204.

[3486] Proclamation 7529 of 5 March 2002; To Facilitate Positive Adjustment to Competition From Imports of Certain Steel Products, 67 Fed. Reg. 10553, 10587 (7 March 2002) (reducing the measure to 24% in the second year and 18% in the third year) (Exhibit CC-13).

of the domestic industries' proposals do not clearly anticipate the reduction in capacity and closures, that, as discussed above, are necessary for the industry's improvement".[3487] In the view of New Zealand, the USITC was saying that protection from imports above the 20% rate it was recommending would have an adverse impact on the ability of the industry to reduce its capacity and consolidate and thereby adjust to import competition. The USITC expressly stated that "they did not agree with the domestic industry" that "an additional 35, 40 or 50% *ad valorem* tariff is necessary to achieve the desired result, or is otherwise appropriate".[3488] In light of these statements from the USITC, the President's decision to apply a higher tariff than that recommended demanded explanation and justification. New Zealand argues that since the President's measure diverged from the USITC's recommendation, there was an obligation under Article 3.1 to set forth findings and conclusions as to why his alternative measure was justified. However, the President made no attempt to explain how his safeguard measures are no more restrictive than necessary under Article 5.1. The President, therefore, did not "clearly explain[] and 'justify[]' the extent of the application of the measure".[3489] In the opinion of New Zealand, the United States had an obligation under Article 5.1 to ensure that the safeguard measure it adopted was limited to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. The Agreement does not assume that an authority has crafted the measure as narrowly as possible. Basic procedural fairness, as articulated in Article 5.1, demands an explanation setting forth the authority's "findings and reasoned conclusions".[3490]

7.1505 In the view of the European Communities and China, if a competent authority presents a recommendation, further finds that its recommendation would be adequate to address the injury found to be caused by increased import and furthermore explicitly states that any more restrictive remedy would be inappropriate, then it would be difficult to consider that a deviation from such recommendation could be justified on the basis of the determination made by the competent authority that increased imports have caused injury to the domestic industry producing like products. In these circumstances, explanation for departure from the recommendation is necessary. Moreover, if such a competent authority presents a recommendation and reaches findings and reasoned conclusions that its recommendation would be adequate to address the injury caused by increased import and, furthermore, explicitly states that any more restrictive remedy would be inappropriate, then deviation from the recommendation resulting in a more trade restrictive remedy than that has been recommended would suggest that the remedy effectively implemented goes beyond the extent necessary in violation of Article 5.1.[3491]

7.1506 The European Communities and China argue that the reason why a political authority (the US President) does not need to give reasons for the remedy he imposes, is because the justification should be apparent from the determination of the competent authority. To the extent that the political authority does not rely on a determination by the competent authority, but implicitly changes it, or picks and chooses amongst various elements of the findings of the competent authority to create his own determination, he is acting as a competent authority and is bound by the requirements of Article 3.1 of the Agreement on Safeguards. The European Communities explains[3492] that the determinations of the USITC are based on imports of a different range of products than are covered by the measures.[3493] In addition, the Proclamation excluded from the measures 35 pages of detailed

[3487] USITC Report, Vol. 1, p. 358 and footnote 22.
[3488] Ibid., p 363.
[3489] Appellate Body Report, *US – Line Pipe*, para. 236.
[3490] New Zealand's first written submission, para. 4.202.
[3491] European Communities' and China's written replies to Panel question No. 110 at the first substantive meeting.
[3492] European Communities' second written submission, paras. 8 to 26.
[3493] As shown in Exhibit CC-107.

product descriptions and the determinations are based on imports from all sources but the measures do not apply at all to Canada, Mexico, Israel and Jordan. Thus, either the safeguard measures imposed are not justified by the determination or the US President made certain determinations for which he did not provide any explanation.[3494]

7.1507 New Zealand argues that [3495] because what the President did in this case goes substantially beyond the "benchmark" set by the USITC's determinations and its own recommendations as to remedy, there is a prima facie breach of Article 5.1. This is especially so where, as in this case also, the USITC reasoning in justifying less restrictive measures explained why a more restrictive tariff was not necessary within the meaning of Article 5.1, and where (as here) no explanation is provided for the more restrictive remedy in fact imposed.[3496] In Japan's view, the requirement that the President abide by Article 3.1 in order to ensure compliance with Article 5.1 does not apply in all cases, but certainly does when the President's measure is not supported by the USITC's analysis. Japan adds a further distinction whereby if the President's measure exceeds the USITC's recommended measure, then there is no way that it can be said that the measure does not go beyond the extent necessary.[3497] Norway argues that Article 3.1 applies in all cases, as the proposed remedies by the USITC will have to be evaluated and assessed for their effectiveness in relation to the criteria of Article 5.1. This assessment of proportionality of the proposed measures is a "pertinent issue of fact and law" under Article 3.1. When the President decides to apply measures that have not been evaluated and assessed by the USITC, he will have to ensure the fulfilment of the requirements of Article 3.1.[3498]

7.1508 In New Zealand's view, the imposition of a safeguard measure more restrictive than that recommended by a competent authority – as occurred in this case – is likely to be very strong and compelling evidence of a violation of Article 5.1. The determination with respect to increased imports, serious injury and causation provide a "benchmark against which the permissible extent of the measure should be determined".[3499] Because what the President did in this case goes substantially beyond the "benchmark" set by the USITC's determinations and its own recommendations as to remedy, New Zealand submits there is a prima facie breach of Article 5.1.[3500]

7.1509 Japan, Korea, China, Norway and Brazil refer to the Appellate Body in *US – Line Pipe*, which said that "Compliance with Articles 3.1, 4.2(b) and 4.2(c) of the Agreement on Safeguards should have the incidental effect of providing sufficient 'justification' for a measure and, should also provide a benchmark against which the permissible extent of the measure should be determined".[3501] [3502] In the instant case, the United States has neither complied with these Articles by the USITC to justify its recommendations nor any explanation by the President why he deviated from these recommendations. This alone renders the measures invalid. Brazil and Korea add that the panel has before it two issues arising out of the relationship of Article 3.1 to Article 5.1. First, is there a reasoned explanation of the USITC's recommendation? Second, to the extent that the President did not follow the USITC recommendation, is there a reasoned explanation of the remedies ultimately imposed? If the President had followed the USITC's recommendation, then the second issue would not arise. In neither case was it demonstrated that the remedy (the USITC recommendation or the actual remedy

[3494] European Communities' written reply to Panel question No. 45 at the second substantive meeting.
[3495] New Zealand's written reply to Panel question No. 45 at the second substantive meeting.
[3496] New Zealand's written reply to Panel question No. 108 at the first substantive meeting.
[3497] Japan's written reply to Panel question No. 45 at the second substantive meeting.
[3498] Norway's written reply to Panel question No. 45 at the second substantive meeting.
[3499] Appellate Body Report, *US – Line Pipe*, para. 236.
[3500] New Zealand's written reply to Panel question No. 45 at the second substantive meeting.
[3501] Appellate Body Report, *US – Line Pipe*, para. 236.
[3502] Japan's, Korea's, and Brazil's written replies to Panel question No. 45 at the second substantive meeting; China's second written submission, para. 303; Norway's first written submission, para. 348.

imposed by the President) remedy was consistent with the underlying USITC injury and causation determinations.[3503] Brazil adds that it is not arguing that the USITC needed to undertake and publish an independent analysis of the extent of the measure. The USITC's failing under Article 5.1 is not that it did not perform an assessment of the measure distinct from the non-attribution analysis required by 4.2(b). Rather, the failing is reflected in the fact that the USITC failed to perform an analysis of any kind. Specifically, by failing to "separate" and "distinguish" the serious injury caused by increased imports in violation of Article 4.2(b), and without any other independent analysis, it failed to meet the requirement of Articles 5.1 and 3.1.[3504]

7.1510 The United States argues that since there is no legal requirement for any authority to present a remedy recommendation, there would be no requirement either to explain the departure from a recommendation made by a competent authority in addition to a determination performed under Articles 2 and 4. The Appellate Body in the *US – Line Pipe* case has clarified that "by separating and distinguishing the injurious effects of factors other than increased imports from those caused by imports, as required by Article 4.2(b), and by including this detailed analysis in the report setting forth the findings and reasoned conclusions, as required by Article 3.1 and 4.2(c), a Member proposing to apply a safeguard measure should provide sufficient motivation for that measure".[3505] The fact that the safeguard measures adopted by the President differ from the USITC's recommendations does not establish a prima facie case of inconsistency with Article 5.1. The panel in *US – Line Pipe* found that the President's safeguard measure may differ from the USITC's recommendation without running afoul of Article 5.1.[3506]

7.1511 The United States notes that the European Communities appears to agree that if a Member adopted a remedy recommendation of the competent authorities, the Member could rely upon any explanation made by the competent authorities to establish the remedy's consistency with Article 5.1. The United States agrees that in the case of a recommended measure adopted by a Member, any explanation by the competent authorities, if relied upon by the Member, would be relevant in a subsequent WTO dispute and properly subject to consideration by a panel. In addition, if the Member applied a measure to a lesser extent than recommended by the competent authorities, their explanation would establish consistency with Article 5.1. This was unquestionably the case with regard to tin mill steel, FFTJ, stainless steel rod, and stainless steel wire. For each of those products, the President established a measure at the same level or lower than the recommendation of the USITC, with a shorter duration. If the Member applied a measure to a greater extent than recommended by the competent authorities, the burden would remain upon complainants to establish that such a measure was inconsistent with Article 5.1. Consistent with the Appellate Body's reasoning in *US – Line Pipe*, the Member would have the opportunity to rebut such arguments in any WTO dispute. The United States points out that the Appellate Body has found that the Agreement on Safeguards only requires a contemporaneous explanation of compliance with Article 5.1 in certain limited circumstances that are not applicable to the steel safeguard measures.[3507] Thus, any analysis adopted by a Member to rebut a claimed inconsistency with Article 5.1 would be relevant in a dispute. It would not matter whether

[3503] Korea's and Brazil's written replies to Panel question No. 45 at the second substantive meeting.
[3504] Brazil's second written submission, para. 111.
[3505] Appellate Body Report, *US – Line Pipe*, para. 236.
[3506] United States' written replies to Panel questions Nos. 110 and 128 at the first substantive meeting, citing *US – Line Pipe*, Panel Report, para. 7.94 (footnotes omitted). According to the United States, when the Panel refers to the term "necessary", in this quote, it is referring to the maximum extent "necessary to remedy the serious injury".
[3507] Appellate Body Report, *US – Line Pipe*, para. 233.

the competent authorities or another instrumentality of the Member prepared the analysis, or whether the analysis was prepared before or after application of the measure, or during dispute settlement.[3508]

7.1512 Norway recalls also that on 26 October 2001, the USTR issued a notice to the public, requesting input on the measure to be imposed.[3509] Specifically, the USTR asked for comments on: (a) what form the measure should take (*i.e.*, tariff, quota, tariff-rate quota, etc.); (b) the duration of any action; and (c) any other actions that would facilitate the domestic industry's adjustment to import competition.[3510] Numerous interested parties submitted comments, but the President never issued a report. Nor did he explain how the 30% tariff – applied to a different group of countries – was tailored to mitigate the harm sustained as a result of imports from those countries.[3511]

7.1513 According to the United States, Korea, Japan and Norway err in characterizing this process as an investigation. The USTR merely recognized that in the event of an affirmative determination by the USITC, the United States executive would need to decide whether and to what extent to apply a safeguard measure, and that interested persons would want to present the executive departments with information regarding that decision. It formally requested public commentary to provide a framework for interested persons to provide such information, both in writing an in person.[3512]

7.1514 The United States responds[3513] that it, like any WTO Member, is clearly permitted under the Agreement on Safeguards to bifurcate the administration of its safeguards law between the USITC and the President. As the excerpt from the Appellate Body's decision in *US – Line Pipe* indicates, a WTO Member has the discretion to assign responsibility for making determinations under its safeguards law to as many or as few decision-makers as it sees fit, provided that the "singular act", i.e., the injury determination by the competent authorities, complies with the requirements of the Agreement on Safeguards. Thus, the United States was free to create a process in which the executive decides the nature and extent of the safeguard measure, but does not participate in the injury determination. Furthermore, in the opinion of the United States, all parties agree that the Agreement on Safeguards obligates competent authorities, in this case the USITC, to provide certain findings and explanations related to the investigation and injury determination. The parties disagree, however, on whether the Agreement on Safeguards requires the President to explain how a safeguard measure prevents or remedies injury and facilitates adjustment. According to the United States, it has never asserted that the "bifurcation" of the process allows the President to escape responsibility under the Agreement on Safeguards. The key point is that the Agreement on Safeguards itself divides the process into two stages: (1) the investigation (Article 3) and the determination of serious injury or threat thereof (Article 4); and (2) application of the safeguard measure (Article 5). This is recognized by the Appellate Body which stated that "These two inquiries are separate and distinct. They must not be confused by the treaty interpreter".[3514] Thus, the United States contends that it is fully consistent with the Agreement on Safeguards to treat the determination of the competent authorities as separate from the selection of a safeguard measure consistent with Article 5.1, and to employ different procedures at each stage.

[3508] United States' written replies to Panel questions Nos. 110 and 128 at the first substantive meeting.

[3509] Trade Policy Staff Committee; Public Comments on Potential Action Under Section 203 of the Trade Act of 1974 With Regard to Imports of Certain Steel, 66 Fed. Reg. 54321 (26 Oct. 2001) (Exhibit CC-59).

[3510] Trade Policy Staff Committee; Public Comments on Potential Action Under Section 203 of the Trade Act of 1974 With Regard to Imports of Certain Steel, 66 Fed. Reg. 54321, 54323 (26 October 2001) (Exhibit CC-59).

[3511] Norway's first written submission, para. 356.

[3512] United States' first written submission at footnote 1368.

[3513] United States' written reply to Panel question No. 128 at the first substantive meeting.

[3514] Appellate Body Report, *US – Line Pipe*, para. 84.

7.1515 For the United States, the bifurcation of the proceedings between the USITC and the President is not pertinent. Even if the USITC administered both stages of the process, the Agreement on Safeguards still would not require an explanation, at the time a safeguard measure was imposed, of how that measure was only to the extent necessary to remedy or prevent injury and to facilitate adjustment. As stated by the Appellate Body in *US – Line Pipe*, "[i]t is clear, therefore, that apart from one exception [certain types of quantitative restrictions that were not used in this case] Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied 'only to the extent necessary.'"[3515] [3516]

(iii) Relationship with the non-attribution requirement and determinations under Article 4.2(b)

7.1516 The complainants argue that the level of the injury which can be remedied or prevented under Article 5.1 should not correspond to the entirety of the injury suffered by the domestic industry as assessed under Article 4.2(a). Instead, the injurious effect of factors other than increased imports determined in the context of the non-attribution requirement under Article 4.2(b) should be deducted. Therefore, if a remedy is tailored to a finding of serious injury which has not undergone a proper "non-attribution" process, it will be excessive. Hence, in practical terms the non-attribution requirement under Article 4.2(b) serves to determine the portion of the entire injury suffered by the domestic industry which can be remedied in line with Article 5.1. According to the complainants, Article 4.2(b) serves the purposes of Article 5.1 for two reasons. First, it prevents authorities from inferring a causal link between increased imports and serious injury when several factors cause injury at the same time. Second, and more importantly, it is a "benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports" and, therefore, it "informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1".[3517] Failing to meet the requirements of Article 4.2(b) necessarily creates a presumption that the measure is more restrictive than needed and is therefore in violation of Article 5.1. Without an appropriate "benchmark", the USITC could not possibly determine how any measure could be tailored to the harm caused by imports alone. In such a case, without a compelling explanation of why the measure was still no more restrictive than necessary, it must be considered to violate Article 5.1.[3518] Moreover, they add, compliance with the causation or non-attribution requirements of Article 4.2(b) does not conclusively establish that the remedy is not excessive.[3519]

7.1517 Brazil, Japan and Switzerland argue that a violation of Article 4.2(b) necessarily means a violation of Article 5.1. The European Communities, Korea, China, New Zealand and Norway argue that the Appellate Body in *US – Line Pipe* ruled that a prima facie case is made under Article 5.1 as soon as a violation of the non-attribution requirement under Article 4.2(b) has been established[3520], as is the case in the present dispute where errors in the serious injury and causation analysis have been identified. As indicated by the Appellate Body, the burden of proof then turns to the Member applying the safeguard measure to rebut this prima facie case.[3521] More specifically, the Member applying the safeguard measure then bears the burden of proving that its measure does address a portion of the injury suffered by its domestic industry equal or less than that caused by increased

[3515] Appellate Body Report, *US – Line Pipe*, para. 233.
[3516] United States' written reply to Panel question No. 128 at the first substantive meeting.
[3517] Appellate Body Report, *US – Line Pipe*, para. 252.
[3518] Norway's first and second oral statements.
[3519] Brazil's and Japan's written replies to Panel question No. 99 at the first substantive meeting.
[3520] Appellate Body Report, *US – Line Pipe*, para. 261.
[3521] Appellate Body Report, *US – Line Pipe*, para. 262.

imports. In this context, the Member applying the safeguard measure has the burden of assessing the injury attributed to increased imports.[3522]

7.1518 Korea agrees and states that Article 4.2(b) is designed to ensure that the injury caused by other factors not be improperly attributed to imports (Article 4.2(b)), while Article 5.1, first sentence, is aimed at ensuring that the measure be limited to remedying the impact on the domestic industry from imports alone. Article 5.1 does not permit the application of a safeguard measure beyond what is necessary to prevent or remedy the serious injury caused by imports alone.[3523] Article 5.1 does not permit the application of safeguard measures to remedy injury caused by other factors.[3524] For New Zealand, Article 4.2(b) is absolutely integral to compliance with Article 5.1 and, in particular, to meeting the requirement "that the part of the total serious damage attributed to an exporting Member must be proportionate to the damage caused by the imports from that Member".[3525] The Appellate Body emphasized that "safeguard measures should be applied so as to address only the consequences of *imports*".[3526] [3527]

7.1519 The complainants point to the Appellate Body report in *US – Line Pipe* which emphasized that "[B]y separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports, as required by Article 4.2(b), and by including this detailed analysis in the report that sets forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c), a Member proposing to apply a safeguard measure should provide sufficient motivation for that measure. Compliance with Articles 3.1, 4.2(b) and 4.2(c) of the Agreement on Safeguards should have the incidental effect of providing sufficient "justification" for a measure and should also provide a benchmark against which the permissible extent of the measure should be determined".[3528] For the complainants, the Appellate Body, therefore, has clarified that an authority not only must avoid attributing causation to factors other than increased imports (Article 4.2(b)), but must also ensure that the measure that is applied is limited to the extent necessary to address that particular injury caused by such separated and distinguished imports (Article 5.1), and must justify the measure clearly (Article 3.1).[3529]

7.1520 In the United States' view, the Appellate Body has found that the injury attributed to increased imports forms the benchmark for application of a safeguard measure. This injury is identified through the causal link and non-attribution analyses under Article 4.2(b), and informs the selection of a safeguard measure. While one analysis leads to the other, the Appellate Body has emphasized that the injury assessment under Articles 3 and 4 is "separate and distinct" from the evaluation of the permissible extent for applying a safeguard measure, and that these two inquiries "must not be confused by the treaty interpreter".[3530] Thus, there is no requirement to consider the Article 4.2(a) factors a second time in the application of Article 5.1.[3531] The United States argues that

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[3522] European Communities', Switzerland's, Japan's, Norway's, New Zealand's written replies to Panel question No. 114 at the first substantive meeting.

[3523] Appellate Body Report, *US – Line Pipe*, para. 258.

[3524] Korea's written reply to Panel question No. 99 at the first substantive meeting.

[3525] Appellate Body Report, *US – Line Pipe*, para. 253, citing with approval the Appellate Body Report, *US – Cotton Yarn*.

[3526] Appellate Body Report, *US – Line Pipe*, para. 258 (emphasis in original); New Zealand's written reply to Panel question No. 99 at the first substantive meeting.

[3527] New Zealand's written reply to Panel question No. 114 at the first substantive meeting.

[3528] Norway's first written submission, para. 348.

[3529] Complainants' written replies to Panel question Nos. 113-114 at the first substantive meeting; Norway's first written submission, para. 350.

[3530] Appellate Body Report, *US – Line Pipe*, para. 84.

[3531] United States' written reply to Panel question No. 102 at the first substantive meeting.

non-attribution relates to the identification of the causal link between imports and serious injury to the domestic industry by distinguishing the injurious effects of imports from the injurious effects of other factors. It is not a requirement of Article 5.1 and, therefore, is not a requirement for deciding the proper safeguard measure to apply. The United States submits that the Appellate Body's analysis of Article 5.1 in *US – Line Pipe* compels the conclusion that Article 4.2(b) is to provide "a benchmark" for ensuring that only an appropriate share of the overall injury is attributed to increased imports. Thus, the competent authorities must complete the non-attribution analysis under Article 4.2(b) before the Member's decision as to the permissible extent of a safeguard measure. Non-attribution is part of the process of identifying the injury attributable to increased imports, which in turn sets the "benchmark" for application of the measure. Therefore, under the Appellate Body's reasoning, there is a relationship between the non-attribution analysis under Article 4.2(b) and the selection of the level of a safeguard measure under Article 5.1. The former informs the latter. Since the injury attributed to imports, which incorporates the non-attribution analysis, is the benchmark for the extent of application of a safeguard measure, a second non-attribution analysis is redundant. If the measure falls below that benchmark, there need be no concern that it is being applied to remedy injury caused by factors other than increased imports. For the United States, this is confirmed by the fact that under the Agreement on Safeguards there should be two analyses. A first analysis is used to determine whether increased imposed were causing serious injury to the domestic producers and a second one to determine the appropriate remedy. Non-attribution is part of the first basic inquiry, which the Appellate Body described as being the determination by the competent authorities pursuant to Articles 3 and 4 as to whether increased imports are causing or threaten to cause serious injury.[3532]

7.1521 The United States concludes that the complainants misstate the standard for evaluating the United States' counter-arguments. The Appellate Body recognized that a Member may "rebut" the presumption created by an inconsistency with Article 4.2(b). In so doing, it did not suggest that the Member bore a burden any greater than a defending party normally bears under the DSU – to counter or rebut a prima facie case established by the complaining party.[3533] When a complaining party relies on an inconsistency with Article 4.2(b) to create a prima facie case on inconsistency with Article 5.1, it will have done nothing more than demonstrate uncertainty as to the appropriate level of the safeguard measure. Thus, the rebuttal would need to show only that the measure was commensurate with the injurious effects attributable to increased imports. The United States submits that it has fully rebutted any allegation of inconsistency with Article 4.2(b).[3534]

(f) Quantification

7.1522 The European Communities, Switzerland and Norway argue that Article 5.1 indisputably requires that safeguard measures not exceed the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Assessing the "extent necessary" inevitably requires some form of quantification.[3535] They note that no one is asking the United States for absolute precision – just to make an honest estimate.[3536] Norway is of the opinion that even if the text of the Agreement does not explicitly use the word "quantify", the Appellate Body has in *Korea – Dairy* explicitly stated that it is an obligation under the Agreement to ensure that the safeguard measure applied is "commensurate" with the goals of preventing or remedying serious injury. It is hard, if not impossible, to understand how one could craft a measure that is tailored only to such injury caused by imports without in any

[3532] United States' written reply to Panel question No. 99 at the first substantive meeting.
[3533] Appellate Body Report, *EC – Hormones*, para. 98.
[3534] United States' executive summary of the second written submission, para. 71.
[3535] European Communities' second written submission, para. 506.
[3536] European Communities' second written submission, para. 508.

way making attempts to quantify the relevant injury.[3537] Furthermore, quantification allows other Members to control that the chosen level is in compliance with the requirements of the Agreement on Safeguards. Where there are no indications of what injury the measure is intended to redress, it is impossible to assess if the measure goes beyond the proportionality requirement or not. This is also eminently clear from the requirement of non-attribution, as set forth by the Appellate Body in *US – Line Pipe*.[3538] If one cannot quantify the effects of the different factors that have been attributed to the alleged injury, one cannot ensure that non-attribution actually takes place. The allegations by the United States claiming that there is no requirement to quantify anything is not only wrong, but is simply an excuse to include extraneous factors in their remedy and, thus, overcompensate for whatever injury imports may have caused.[3539]

7.1523 The United States takes issue with the complainants' allegation that injury, non-attribution and other determinations under the Agreement on Safeguards including that of the appropriate level and extent of the remedy, should be "quantified". The United States submits that the Agreement on Safeguards does not require either the Member applying a safeguard measure or its competent authorities to "quantify" the injury attributable to increased imports. In fact, Article 4.2(a) frames the analysis in a way that makes quantification impossible. That provision requires the competent authorities to evaluate a number of specific factors that are measured in different units. No other provision of the Agreement on Safeguards suggests that quantification of "injury" is necessary, or even possible. Indeed, under GATT 1947, it was recognized that "it is impossible to determine in advance with any degree of precision the level of import duty necessary" for a safeguard measure to achieve the goals of Article XIX.[3540] For the United States, Articles 5 and 7, which address the extent and duration of a safeguard measure, do not require the valuation of either serious injury or the extent of application of a safeguard measure. Nor do they eliminate the practical impossibility of such an exercise.[3541]

7.1524 The United States adds that the text provides no support for the notion that "injury", as such, must be quantified. Article 4.1 defines serious injury as "a significant overall impairment in the position of a domestic industry". Article 4.2(a) specifies that, in determining whether injury exists, the competent authorities must evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry". Thus, the text itself treats the two concepts differently. The factors considered by the competent authorities are characterized as "quantifiable", but "serious injury" itself is not. This omission is significant because, where the covered agreements require quantification or valuation of something, they generally state so clearly, and often provide detailed guidelines.[3542] The United States argues that the analytical framework contained in Article 4.2(a) provides further support for this conclusion: it is not possible to "quantify" injury for many reasons. The most obvious is that the different factors in Article 4.2(a) are measured in different units – market share and capacity utilization in percentages, level of sales and production in

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[3537] Norway does not exclude there may be a possibility to combine quantification with qualitative assessments, but this requires that the qualitative assessments are precise enough to allow a meaningfull comparison and to establish explicitly that the requirement of proportionality is met; Norway's second written submission, para. 159.

[3538] Appellate Body Report, *US – Line Pipe*, paras. 252-260.

[3539] Norway's second written submission, paras. 159-163; Switzerland's second written submission, paras. 109-118.

[3540] *US – Fur Felt Hats*, para. 35; the Appellate Body cited this report as part of the GATT 1947 *acquis*. Appellate Body Report, *US – Line Pipe*, para. 174.

[3541] United States' first written submission, para. 1032.

[3542] For example, AD Agreement, Article 2; SCM Agreement, Article 14. These detailed requirements for calculation of the dumping margin and amount of the subsidy, respectively, contrast with the treatment of injury in both agreements, which do not require calculation of the amount of the injury.

units, profits and losses in currency (or percentages), and employment in number of workers or hours worked.[3543] The Appellate Body has emphasized that "it is only when the *overall position* of the domestic industry is evaluated, in light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is 'a significant overall impairment' in the position of that industry".[3544] [3545]

7.1525 The United States submits that another problem with quantification of "serious injury" is that the factors most illustrative of the condition of an industry may differ depending on the industry. For example, in an industry that requires highly trained workers to produce a product, reductions in employment may be particularly indicative of injury. Once such workers are dismissed, the industry could have difficulty training replacement workers to permit it to restore production to previous levels. By contrast, in an industry that produces a product incorporating technology that changes frequently, reductions in research and development expenditures may be particularly indicative of injury. Without such expenditures, the industry will be unable to make further developments in its product needed to remain competitive in the marketplace. Any formulaic mathematical "quantification" would not allow for these informed judgments about the relative importance of the factors required to be considered.[3546]

7.1526 Norway notes[3547*] that although the United States tries to argue that the quantification proposed by the complainants is impossible[3548], the United States does provide for some *ex post facto* quantification in the economic modelling referred to by the United States in "Modelling Worksheet I"[3549] and "Remedy Worksheet I"[3550], proving that it is indeed possible to quantify, even for the United States. This modelling, however, was not included in the USITC Report. The United States, therefore, cannot rely on them to justify the measures. Furthermore, the United States does not dispute that a rebuttal against a prima facie case of violation of Article 5.1 arising from deficient non-attribution analysis would encompass some sort of "quantification" of the effect of the remedy in connection with the injury caused by increased imports.[3551]

7.1527 According to Brazil, national authorities have the obligation of demonstrating that the elements necessary to impose safeguard measures, whether qualitative or quantitative, are present. For example, Article 4.2(b) states: "The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports…and serious injury". Similarly, Article 4.2(c) talks about a "demonstration of the relevance of the factors examined". Article 3.1, of course, requires competent authorities to set forth "their findings and reasoned conclusions". Thus, there is no question that the burden is on national authorities. Whether or not a quantitative analysis is provided or necessary will vary depending on the circumstances and the availability of data to conduct such an analysis. There are two factors present in the instant case which would seem to require a quantitative analysis to justify the findings and conclusions of the USITC. First, with regard to CCFRS, there were numerous factors other than subject imports that intuitively would seem to have had a more substantial effect individually and cumulatively than subject imports. For example, intuitively one would think that an

[3543] United States' first written submission, para. 1036.
[3544] Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.
[3545] United States' first written submission, para. 1035.
[3546] United States' first written submission, para. 1038.
[3547] Norway's second written submission, para. 163.

[3548] United States' first written submission, para. 1036.
[3549] Exhibit US-57.
[3550] Not exhibited.
[3551] United States' first written submission, para. 1062.

increase in domestic excess capacity of 16 million tons in excess of demand between 1996 and 2000[3552] would have a substantially greater effect in terms of injuring the domestic industry than a 2.5 million ton increase in imports. One would also assume that an increase of 3 million tons in low-cost minimill shipments between 1998 and 2001[3553] would also have a substantially greater effect on the health of the domestic industry than a smaller increase in imports. Thus, Brazil argues that it appears that there must be some demonstration that there is a genuine and substantial link between increased imports, as distinguished and separated from these other factors, and serious injury. Where, intuitively, the facts seem to indicate one conclusion and the authorities reach another conclusion, there must be some demonstration that the conclusion reached was correct. In this case, Brazil is of the opinion that a quantification of the effects of imports and other causes would seem to have been required; otherwise, there is not support for the USITC's conclusion. Second, there is an abundance of data on which to base a quantification of the causes of injury to the domestic industry. In particular, the main problem according to both the industry and the USITC was the low price levels in the latter part of the period of investigation. There was an abundance of information to model the effect of various factors on prices. Indeed, such a model had already been accepted and endorsed by the USITC economic staff in the cold rolled anti-dumping investigation. Such a model could have been constructed by the USITC. In the alternative, models were provided by various interested parties which could have been adapted to the USITC's requirements. In the face of a counterintuitive result, the USITC made no effort to demonstrate a basis for its findings and conclusions.[3554]

7.1528 Brazil asserts that the failure to undertake a proper non-attribution analysis as required by Article 4.2(b) in and of itself establishes a prima facie case. In addition, Brazil believes that a counterintuitive result without a concrete demonstration of how that result was reached also establishes a prima facie case. Finally, as regards whether the remedy is in excess of what is necessary to remedy the injury from increased imports, the imposition of a remedy in excess of that recommended (and supposedly supported by findings and reasoned conclusions) without any explanation of the reason or need for the change in the remedy, would also seem to establish a prima facie case. Whether or not a prima facie case has been established will vary according to the facts and circumstances of each case.[3555]

7.1529 Similarly, in the opinion of Japan, Korea and New Zealand, since the authorities are the ones deciding to impose safeguard measures, they bear the burden of collecting and assessing sufficient factual information to meet all of the requirements for imposing safeguard measures. In situations where extensive data is available, and particularly in those cases where the data is both available and presented to the authorities, the authorities have an obligation to consider that data. In this case, the complainants submit that there existed extensive publicly available data and the parties presented various economic studies utilizing that data. The USITC, therefore, had information and studies at its disposal to quantify the injurious effects, but chose not to do so.[3556]

7.1530 The United States notes that Japan and Brazil posit only one way to "quantify" injury – through the use of economic modelling.[3557] In effect, they would replace the complex and nuanced analysis anticipated by Article 5.1 with a rigid and formulaic mathematical test. Modelling is widely used in theoretical economics, and may play a role in the evaluation of a safeguard measure.

[3552] Brazil's first written submission, Figure 3.
[3553] Brazil's first written submission, Figure 24.
[3554] Brazil's written reply to Panel question No. 114 at the first substantive meeting.
[3555] Brazil's written to Panel question No. 114 at the first substantive meeting.
[3556] Japan's, Korea's and New Zealand's written replies to Panel question No. 114 at the first substantive meeting.
[3557] Japan's first written submission, para. 324, Brazil's first written submission, paras. 212-214.

However, modelling has important limitations that prevent it from quantifying "injury" within the meaning of the Agreement on Safeguards, or from measuring with any precision the effect of increased imports or of a safeguard measure on the individual factors demonstrating injury.[3558]

7.1531 The United States suggests that the most important difference between the Japanese/Brazilian and United States' approaches lies in how models are used. Japan and Brazil argued to the USITC, and now argue to the Panel, that particular models can calculate the effect of imports and other factors on the domestic industry and that the calculated results should inform the competent authorities analysis of causal link and non-attribution. As a general matter, this view ignores the limitations in computer models. A model designed to estimate the impact of one market participant's sales on the prices and quantities of other market participants will probably reflect the effect of other factors with less accuracy. Although one could theoretically design models for all potential causes of injury, they would require different underlying assumptions and qualitative and quantitative inputs, which would make any comparison of the outputs highly suspect. In short, the best computer models available provide a type of "quantification" that would not satisfy the obligation under the Agreement on Safeguards to demonstrate a causal link or to ensure non-attribution. Specifically with regard to the models referenced by Japan and Brazil – which were developed for purposes of the *Steel* proceedings – the USITC staff concluded that they did not provide "statistical evidence that the effect from import competition on domestic price was significantly greater than the effect of the other factors included in their analysis".[3559] Moreover, the models did not assess the magnitude of the effects of imports as opposed to the effects of other factors "in a statistical manner". The models measured the effect of domestic competition either "weakly" or "not ... at all".[3560] Nor did the models purport to consider and weigh all of the factors required to be considered in assessing injury and causation. Accordingly, the USITC gave the models little weight because of their "serious limitations".[3561] [3562]

7.1532 In contrast, the United States argues that it did not use a new computer model to compare different factors as part of the causation analysis. Instead, it used an established computer model for a discrete inquiry related to one factor – imports – in analysing the permissible extent of application of the safeguard measure in terms of the volume, price, and revenue for the product sold by the domestic industry. Specifically, the United States took two scenarios – (1) imports in 2000 remaining at pre-surge levels and (2) application in 2000 of the safeguard measures established by the President – and modelled how prices and volumes of products sold in the United States might have been different. By looking at the volume and price effects of imports in both scenarios and holding all other putative causes of injury constant, the United States claims it had avoided the danger that the model would not accurately compare the volume and price effects of two different causes of injury. Moreover, since it is "impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions"[3563], the United States argues that the uncertainty inherent in computer modelling is no different from any other available analysis. In contrast, when it comes to analysing causation, there is an alternative – the type of qualitative analysis employed by the USITC.[3564]

7.1533 The United States argues that it cannot discern exactly what the proponents of quantification would have the USITC do differently. Only a few of the complainants have raised this issue and, to

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[3558] United States' first written submission, para. 1039.
[3559] USITC Memorandum EC-Y-042, p. 42.
[3560] USITC Memorandum EC-Y-042, p. 1.
[3561] USITC Report, p. 59, footnote 260.
[3562] United States' written reply to Panel question No. 116 at the first substantive meeting.
[3563] *US – Fur Felt Hats*, para. 35.
[3564] United States' written reply to Panel question No. 116 at the first substantive meeting.

date, they have not indicated exactly how the USITC should have quantified injury. According to the United States, Norway states repeatedly that quantification is required, but does not indicate how quantification is possible. Brazil also faulted the economic model that the USITC used in its remedy recommendation, but suggests that the USITC should actually have relied upon economic modelling, particularly upon a computer model submitted on behalf of foreign producers, which the USITC rejected.[3565] Japan also faults the USITC for not relying on the foreign producers' computer model.[3566] According to the United States, proponents of quantification have not explained what they mean by this term, or how a competent authority would quantify injury or the effects of imports on all of the indicators of injury that the Agreement on Safeguards requires to be considered. Therefore, the United States claims that it cannot tell how its numeric exercise differed from any suggestions the complainants might have.[3567]

7.1534 The United States notes that the complainants take varying positions on whether quantification is necessary. Most avoid the question by stating that the competent authorities must quantify injury "if necessary", and bear the burden of doing so.[3568] The United States contends that on the contrary, it is a well-established principle in disputes under the DSU that the party asserting the affirmative of a proposition bears the burden of proving it.[3569] The United States claims to have presented extensive evidence that it is not possible to quantify precisely the injury caused by increased imports or the injurious effects of increased imports for use in an analysis separating the injurious effects of imports and other factors. Therefore, it argues that the proponents of quantification bear the burden of establishing both that (i) the Agreement on Safeguards requires quantification and (ii) an accurate quantification of injury or injurious effects caused by increased imports is possible. According to the United States, the complainants have not met either aspect of this burden. The only evidence that the complainants present to demonstrate that quantification is possible consists of computer models submitted to the USITC, which the USITC rejected. Although Japan and Brazil criticize the USITC for "dismissing" economic modelling results "in a single footnote"[3570], they never address the USITC's reasons for placing little weight on the models. The only legal basis the complainants cite for the proposition that quantification is mandatory is the Article 5.1 "no more than the extent necessary" standard. Some complainants believe that a Member can meet this standard only if it quantifies the effects of both increased imports and the safeguard measure.[3571] However, in the opinion of the United States, a qualitative analysis could also suffice to establish that a safeguard measure was commensurate with the injury attributable to increased imports.[3572]

7.1535 For the United States, to the extent that the complainants have suggested that some further analysis is required to precisely and scientifically quantify the exact measure of injury and effect of the measures taken, such a standard would clearly be unworkable and inconsistent with the

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[3565] Brazil's first oral statement, para. 35.

[3566] Japan's first written submission, paras. 276-281.

[3567] United States' written reply to Panel question No. 116 at the first substantive meeting.

[3568] European Communities' written reply to Panel question No. 114 at the first substantive meeting; Japan, Norway and Brazil take a similar position in their written replies to Panel question No. 114 at the first substantive meeting. Korea and New Zealand argue that the quantification is always necessary, while China and Switzerland take no position; Korea's, New Zealand's and Switzerland's written replies to Panel question No. 114 at the first substantive meeting.

[3569] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 17.

[3570] Brazil's first written submission, para. 213; Japan's first written submission, paras. 276-278; the European Communities makes a similar point, European Communities' first written submission, para. 278.

[3571] New Zealand's written reply to Panel question No. 114 at the first substantive meeting.

[3572] United States' second written submission, paras. 192-196.

Agreement. It would create a standard that no party could meet in taking a safeguard measure and would thus effectively nullify the Agreement.[3573]

7.1536 In the United States' view, no quantification analysis can meet the requirements of Articles 5.1 or 4.2(b). The limited numerical exercises provided in the United States' first written submission had the limited purpose of providing the Panel with additional evidence that the steel safeguard measures were consistent with Article 5.1. They certainly do not support the notion that either the type of quantification envisaged by some complainants or a numerical exercise like the one(s) used by the United States in this dispute is/are required.[3574]

(g) Exclusion of products

7.1537 The European Communities and Norway argue that to determine whether products investigated can be excluded from the application of a safeguard measure, Article 5 must be interpreted in the light of the principle of parallelism inherent in that provision and in Articles 2 and 4 of the Agreement on Safeguards. Seen in this context, the clause "extent necessary to prevent or remedy serious injury" in Article 5.1 means "extent necessary to prevent or remedy serious injury caused by the imports which have formed the basis of the 'increased imports' and the 'serious injury' and causation determinations", and which must correspond to the imports subject to the measure. If the serious injury and causation have been assessed with reference to a certain range of products, it is that range of products which has been recognized to cause serious injury. The level and type of remedy appropriate to counter that serious injury cannot be re-distributed among a narrower range of products. Otherwise, these claimants suggest, certain imports would be attributed the consequences of injury they have not been determined to cause. On the other hand, if all imports investigated and found to have caused serious injury are covered by a measure, then such measure could be uniformly reduced to some less than is necessary if the importing country so chose.[3575]

7.1538 In the view of Brazil, product exclusions alter the remedy by making it less restrictive. As such, they affect the level of protection afforded by the remedy and should be viewed as such.[3576] Japan considers that product exclusions are specifically aimed at ensuring that the measures are not in excess of what is necessary to provide relief. If a product is not produced in the United States, then it would be excessive to impose relief for that product.[3577] According to Korea, by excluding those products from the remedy, the United States is choosing not to impose relief. Such action is not only permitted but contemplated by the terms of Article 5.1, first sentence.[3578]

7.1539 According to the European Communities, the exclusion of a product (or sub-product) covered by a safeguard measure, because it is requested by the United States industry or for whatever other reason, removes the restriction on that sub-product but does nothing to render more proportionate the application of the safeguard measures to the remaining sub-products. Indeed, the fact that product exclusions have even been requested and obtained by the United States domestic steel industry itself (for example for slabs) would tend to indicate that the original level of the measures was disproportionate.[3579]

[3573] United States' first written submission, para. 1064.
[3574] United States' written reply to Panel question No. 116 at the first substantive meeting.
[3575] European Communities' and Norway's written replies to Panel question No. 100 at the first substantive meeting.
[3576] Brazil's written reply to Panel question No. 100 at the first substantive meeting.
[3577] Japan's written reply to Panel question No. 100 at the first substantive meeting.
[3578] Korea's written reply to Panel question No. 100 at the first substantive meeting.
[3579] European Communities' second written submission, para. 520.

7.1540 The United States responds that the exclusion of particular types of each product from the measures does not establish a prima facie case of inconsistency with Article 5.1. That Article clearly allows a Member to apply a safeguard measure less than the extent necessary to remedy or prevent serious injury and to facilitate adjustment, as long as it complies with the MFN obligation under Article 2.2. This discretion includes the lessened application – or even non-application – of a measure to particular types of a product. The use of "no more than the extent necessary" indicates that Article 5.1 establishes a maximum for the application of a safeguard measure. "No more than" means that the measure may be applied up to, but not beyond, that level. Since Article 5.1 places no constraint on a Member's ability to apply a measure less than necessary, a Member has discretion to do so. Accordingly, a Member remains free to exclude a type of the product or apply the measure at lower levels to that type of the product as long as it complies with the other requirements of the Agreement on Safeguards, including the Article 2.2 requirement to apply the measure regardless of source.[3580]

7.1541 The United States notes that Japan, Korea and Brazil agree that product exclusion is not necessarily inconsistent with Article 5.1. Only New Zealand argues that exclusions are forbidden, on the grounds that parallelism requires the application of any safeguard measure to each and every one of the items included in the product subject to a finding of serious injury.[3581] (The United States refers to this concept as "scope parallelism".) New Zealand recognizes that parallelism, as described in *US – Wheat Gluten* and *US – Line Pipe*, "was, on the facts, restricted to imports by source".[3582] (The United States refers to this as "source parallelism".) However, according to the United States, New Zealand argues that those reports also stand for the "broad principle" of scope parallelism. For the United States, no such principle exists.[3583] The United States argues that New Zealand has not rebutted their analysis and, therefore, has not established a prima facie case that the Agreement on Safeguards requires scope parallelism.[3584]

7.1542 For the United States, the exclusions (or reductions in application) are a factor that the Panel should consider in evaluating whether the steel safeguard measures are consistent with Article 5.1. These adjustments to the steel safeguard measures lessen their effect on the domestic industries, and thus lessen the extent to which they prevent or remedy serious injury.[3585]

(h) Different remedies for slabs and CCFRS

7.1543 The European Communities and China note that the two separate safeguard measures on slabs and CCFRS respectively, as explained by the USITC itself, have different goals and extents.[3586] In particular, the tariff rate quota on slabs aims at taking into account the specific end-use and marketing channel of slabs, namely the fact that "domestic producers typically internally consume nearly all the slabs they produce" and that "commercial sales of slabs have been extremely limited". Accordingly,

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[3580] United States' written reply to Panel question No. 100 at the first substantive meeting.
[3581] New Zealand's written reply to Panel question No. 92 at the first substantive meeting.
[3582] New Zealand's written reply to Panel question No. 92 at the first substantive meeting.
[3583] United States' first written submission, paras. 763-766.
[3584] The United States also notes that, as a systemic matter, New Zealand's understanding of the *US – Wheat Gluten* and *US – Line Pipe* reports is troubling. In New Zealand's view, general comments by the Appellate Body in those reports are dispositive as to an issue – scope parallelism – that the parties did not raise and that the Appellate Body did not address. Thus, the Appellate Body did not have the chance to fully consider the implications of scope parallelism and the consistency of that concept with the Agreement on Safeguards. Its statements regarding source parallelism should accordingly be understood as being inapplicable to scope parallelism.
[3585] United States' second written submission, para. 210.
[3586] USITC Report, Vol. I, pp. 362-366.

the tariff rate quota on slabs is "intended to avoid causing harm to domestic steel producers that have legitimate needs to continue to import slabs". In the light of their respective goals and extents, it appears difficult to argue that the safeguard measures for slabs and for the rest of certain carbon and alloy flat can be justified on the basis of the same determination that increased imports of all certain carbon and alloy flat have caused injury to the domestic industry producing all carbon and alloy flat.[3587]

7.1544 For the European Communities, if a competent authority does present a recommendation, further finds that its recommendation would be adequate to address the injury found to be caused by increased import and furthermore explicitly states that any more restrictive remedy would be inappropriate, then it would be difficult to consider that a deviation from such recommendation could be justified on the basis of the determination made by the competent authority that increased imports have caused injury to the domestic industry producing like products. In these circumstances, explanation for departure from the recommendation is necessary.[3588] Moreover, if such competent authority does present a recommendation and reaches findings and reasoned conclusions that its recommendation would be adequate to address the injury caused by increased import and furthermore explicitly states that any more restrictive remedy would be inappropriate, then deviation from the recommendation resulting in a more trade restrictive remedy than that has been recommended would suggest that the remedy effectively implemented goes beyond the extent necessary in violation of Article 5.1.[3589] For Korea, the critical question is whether the measure adopted can be reconciled and is consistent with the underlying determinations of serious injury and causation. In the case of welded pipe, for example, the critical issue is that the USITC recommendation actually provided a detailed explanation of how the threat of injury finding provided a "benchmark" for the remedy recommended.[3590]

7.1545 Japan adds that if these products are the same and compete with each other, why should they be subjected to different remedies with different effects? The burden is on the United States to explain why the remedy applied to slab, which is less restrictive than the tariffs applied to finished flat products, should not be expanded and applied to finished flat products so as to meet the obligations of Article 5.1. In other words, absent some explanation, Japan believes there is a presumption that different remedies within a "like product" violate Article 5.1. Japan submits that different remedies for products within a single like product category, as defined by the competent authority, proves that the products were inappropriately grouped together within that category.[3591]

7.1546 Similarly, Korea and New Zealand argue that by applying a remedy to slab that was less restrictive than that applied to other CCFRS products, the United States was acknowledging that the injury caused by CCFRS products (slab) could be addressed through less restrictive means than the remedy applied to most CCFRS products.[3592]

7.1547 Brazil argues that the fact that the United States granted a separate additional quota for ultra low carbon slab is recognition that there are sub-products within the slab grouping.[3593] Both the

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[3587] Complainants' written replies to Panel question No. 104 at the first substantive meeting.
[3588] European Communities' written reply to Panel question No. 110 at the first substantive meeting.
[3589] European Communities' written reply to Panel question No. 109 at the first substantive meeting.
[3590] Korea's written reply to Panel question No. 109 at the first substantive meeting.
[3591] Japan's written reply to Panel question No. 103 at the first substantive meeting.
[3592] Korea's and New Zealand's written replies to Panel question No. 103 at the first substantive meeting.
[3593] Exclusion of Particular Products from Actions under Section 203 of the Trade Act of 1974 With Regard to Certain Steel Products; Conforming Changes and Technical Corrections to the harmonized Tariff Schedule of the United States, 67 FR 56182 (30 August 2002).

exclusions and the additional slab quota are recognition that certain products within a broader like product category may not be produced in the importing market or might not be produced in sufficient quantities. It points out that the United States has traditionally carved out exclusions from like product definitions in anti-dumping and countervailing duty cases.[3594] The fact that there are different remedies for products within the same USITC product grouping, however, raises a very different question. Specifically, if all of the products within the like product category compete with each other, why is it necessary to have a different remedy for a sub-category of these products? Presumably, if slab is competing directly with plate, hot-rolled, cold-rolled and corrosion resistant flat products, the remedy necessary to eliminate the injury from imports of slab is no different than that necessary to eliminate the injury from imports of these downstream products. If slab is the same like product subject to the same competitive dynamics as the other flat-rolled carbon products, why is it necessary to impose a different remedy on slab? According to Brazil, the need for a different remedy for slab demonstrates that the products within the grouping are not like one another, do not directly compete with one another and should not be grouped together. If products are like one another, then the competitive dynamics between them should, by definition, be the same. Hence, there is no reason why the remedy should not be the same. The fact that the President felt compelled to impose a TRQ for slab and a high tariff for the other products within the flat-rolled grouping demonstrates that there are different competitive dynamics at play between slab and the finished flat products, meaning that they cannot be part of the same like product.[3595]

7.1548 The United States argues that the Agreement on Safeguards also allows a Member to reduce the extent of application of a measure to certain items within the imported product. For a tariff-based safeguard measure, such a reduction could take the form of a lower rate of duty for a particular item, or a zero-rate for a limited quantity of imports of that item. Just as with a complete exclusion, either of these measures would lessen the overall application of the measure. The exclusions endorsed by Japan, Korea, and Brazil contain several examples of quantitative exclusions for particular items.[3596]

7.1549 The complainants misunderstand the basis for the application of a TRQ to slab. The USITC found that slab was part of the certain carbon flat-rolled like product and affected the sale of that product in the United States. Specifically, the USITC noted that "slab prices are solely a function of downstream prices for hot-rolled steel and cold-rolled steel, which would suggest a strong cross-price effect between these types of steel".[3597] The President did not revise or modify these conclusions, or the overall finding that slab imports were injurious. Instead, he found that a TRQ for slab was appropriate based on the various statutory factors that he was required to consider, even if the remedy was less than the maximum remedy permitted under the Agreement on Safeguards.[3598]

7.1550 The treatment of slab does not call into question the USITC's like product definition for certain carbon flat-rolled steel. The President did not find that slab was not "like" other steel products. Rather, the President included slab in the safeguard measure precisely because slab imports are like domestic certain carbon flat-rolled steel, and have an effect on the domestic industry producing that product. He then applied the measure to slab in the form of a TRQ because the long-

[3594] For example, *Carbon and Certain Alloy Steel Wire Rod From Brazil et. al.*, Inv. Nos. 701-TA-417-421, and 731-TA-953-954, 956-959, 961-962, USITC Pub. 3546 (Oct. 2002) at fn. 2 (excluding, among other products, grade 1080 tire cord and tire bead quality wire rod).

[3595] Brazil's written replies to Panel questions Nos. 22 and 103 at the first substantive meeting.

[3596] United States' second written submission, para. 211.

[3597] USITC Report, p. 43.

[3598] United States' second written submission, para. 213.

term remedial effect of applying the safeguard tariff to all slab was outweighed by the short-term disruption such action would cause to the broader United States economy.[3599]

2. Demonstration/justification by the United States of the measures imposed in this case

(a) General

7.1551 The United States argues that an analysis of the ten safeguard measures applied by the United States demonstrates that they are consistent with the standard set out in Article 5.1, as interpreted by the Appellate Body. The USITC Report established that the United States has the right to apply a safeguard measure with regard to each of the ten steel products at issue. The United States claims that it has demonstrated that as a result of unforeseen developments, imports of each product increased in such quantities and under such conditions as to cause or threaten to cause serious injury. The report further demonstrated that, in reaching this determination, the USITC separated and distinguished the injury caused by increased imports from the injury caused by other factors. According to the United States, no complainant has established a prima facie case of inconsistency with these obligations. To the extent that any complainant could be considered to have made a prima facie case on any of these issues, the discussion in the preceding sections has fully rebutted that case.[3600] The United States submits it is evident, through both a qualitative and a quantitative assessment of the effects of imports on the relevant domestic industries and of the measure taken, that the relief provided was only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. The injury suffered by the domestic industries at issue in this case was extraordinary by any measure. The nature and extent of this injury was documented throughout the findings of the USITC. This injury involved significant financial losses, numerous bankruptcies, tens of thousands of job losses, as well as lost sales, decreased production, reduced capacity utilization, lost investment opportunities and many other indicators of serious injury. The USITC's findings also document the extraordinary steps required for domestic producers to facilitate adjustment to import competition. In the opinion of the United States, the enormity of the injury documented here plainly necessitated the type and extent of the measures taken by the United States if the industries at issue were to be given any chance to recover from serious injury and adjust going forward.[3601]

7.1552 According to the United States, one potential numerical approach begins with the ordinary meanings of the terms of Article 5.1. A safeguard measure to "remedy" injury caused by increased imports would, in the ordinary meaning of the term, need to "put right, reform, (a state of things); rectify, make good". To "prevent" serious injury would be "to forestall or thwart by previous or precautionary measures". To "facilitate" adjustment would be to promote the adaptation to changed circumstances, namely, competition from increased imports. Each aspect of Article 5.1 – the "injury" being prevented or remedied and the "adjustment" being facilitated – depends on the facts of the case, most particularly the condition of the industry and the injurious effects of imports. Most of the steel determinations noted that the low prices of increased imports were forcing domestic producers to lower their own prices, thus reducing profitability. In these cases, the United States considers that a remedy in the sense of Article 5.1 would both stop the ongoing negative effects of imports and allow the domestic industry to recoup the losses caused by increased imports during the investigation period. Such a remedy would also advance the goal of facilitating adjustment, since producers could

[3599] United States' second written submission, para. 214.
[3600] United States' first written submission, para. 1055.
[3601] United States' first written submission, paras. 1066-1067.

devote increased profits to projects that would make them more competitive with imports when the safeguard measures are removed.[3602]

7.1553 The United States explains that, in some of the steel determinations, the analysis of the USITC noted that the domestic industry's loss of market share played a prominent role. In these cases, the United States considers that a remedy in the sense of Article 5.1 would allow the domestic producers to recover market share. The associated improvements in revenue and profits would also, to some extent, allow them to undertake projects that would make them more competitive with imports when the safeguard measures are removed. In both sets of cases, simply counteracting the current negative effects of imports or promoting a temporary return to the industry's historical condition before imports began to increase would not be sufficient. First, the industries' condition before increased imports manifestly did not permit them to adjust to increased imports. That is why they reached a state of serious injury. Second, the very concept of "remedy" suggests an alleviation of the injury identified during the investigation period, as well as cessation of future injury. An industry cannot adjust successfully if past losses left it in a financially perilous position that a measure could remedy only in the future. Thus, the United States considers that the extent of application of a safeguard measure includes both counteracting current negative effects of imports and alleviating past negative effects to permit the industry's adjustment.[3603]

(b) Numerical analysis

7.1554 The United States explains that the simple numerical analysis described below focuses on conditions during a year in the investigation period to estimate the change in revenue or import volume necessary to remove the current negative effects of imports and to recoup past negative effects. As a surrogate for the "uninjured" condition of the industry, the United States uses a year either before the increase in imports or before the condition of the industry began to decline. This is a conservative approach because the USITC did not identify any time during the investigation period as one in which there was no injury. Indeed, in several cases, the USITC specifically found that imports had negative effects throughout the period. Thus, any part of the period would potentially reflect a level of operating income or revenue already reduced by the effects of increased imports.[3604]

7.1555 The United States recalls that the selection of a comparison year, estimated operating margin, or estimated import volume are not intended to suggest that imports did not have negative effects on the domestic industry and its operating income levels at that time. It does not imply either that there was serious injury in that year, or that there was not serious injury, as the USITC did not make a determination in that regard. The comparison year merely provides a starting point to evaluate the negative effects that imports in subsequent years may have had on the industry's performance. This numerical analysis then estimates the extent to which non-NAFTA import prices would have to increase, or volumes decrease, to attain the desired condition. Accordingly, to perform this numerical analysis for the industries in which the price effects of imports played a prominent role, the United States performs a four-step analysis to estimate the extent to which domestic producers' prices and revenues would have to rise to eliminate the negative effects of increased imports on the industry's operating income. The United States then estimates the degree that import prices would have to

[3602] United States' first written submission, para. 1066.
[3603] United States' first written submission, para. 1068.
[3604] United States' first written submission para. 1069.

increase for the domestic industry to achieve this level of profitability, and the additional tariff that would achieve that price increase.[3605] [3606]

7.1556 The United States explains that the first step of this approach estimates the amount of revenue domestic producers would have needed in each year to raise operating income to its level at a point (the "base year") in the investigation period before the industry's performance began to decline. The approach estimates the degree to which the industry's operating income declined in each year after the base period. In cases in which the USITC found that factors other than imports were also injuring the industry, the approach uses a comparison year in which the USITC observed that one or more non-import factors were affecting the industry. For example, if the USITC found that increased capacity had injurious effects, the United States would attempt to choose a year in which capacity had already risen to its level during the period of serious injury. The approach then estimates the amount that revenue would have had to increase to produce that estimated operating margin in each year in which the USITC identified the industry's performance as deteriorating due to increased imports. In situations in which there is no comparison year that reflected the injurious effect of non-import factors, this analysis either omits the years in which other factors had an effect, or subtracts the amount of profit shortfall the United States estimates would be attributable to that factor.[3607]

7.1557 In the second step, the United States' analysis estimates the degree to which domestic producers' prices would have to increase during the pendency of a safeguard measure. Any price increase would have to return domestic prices at least to a level that would provide operating income equal to a level that does not reflect the price effect of increased imports and then increase prices by a further amount to counteract the negative effects of imports from 1998 to 2000 and to facilitate adjustment. This estimate calculates the further amount of increase by dividing the revenue shortfall estimate in the first step by total revenue during the period of the shortfall, and adding that percentage to the operating income margin for the comparison year.[3608]

7.1558 As a third step, this approach estimates the degree to which import producers' prices would have to increase for domestic producers to achieve the operating income margin described above. The average unit values or USITC pricing comparisons, as appropriate, involved domestic prices from years when the industry did not achieve this level of profitability. To estimate a price that would achieve the target operating income level calculated in the second step, this approach decreases domestic producers' annual unit value or price[3609] by the unit operating income[3610] and then increases the resulting figure to a point where it would produce an operating income margin equal to the target operating income margin. This approach compares this price in each year to the annual unit value or

[3605] For the most part, the United States bases the calculations on unit values, as these captured all of the products under investigation. For some products, the findings of the USITC or data in the USITC Report indicated that the difference in unit values between imports and domestic products reflected different product mixes, as well as the injurious effects of price underselling by non-FTA imports. In those cases, the United States based our calculations on the item-specific pricing comparisons conducted by the USITC.

[3606] United States' first written submission, para. 1070.

[3607] United States' first written submission, para. 1073.

[3608] United States' first written submission, para. 1074.

[3609] Since the USITC performed pricing comparisons on a quarterly basis, the United States weight averages pricing data to produce an annual figure that we could then compare to profitability, which was expressed on an annual basis.

[3610] The United States does this by multiplying the unit value annualized price by the one minus the reported profit margin.

price of imports to calculate how much import prices would have to increase for the domestic industry to achieve the target operating income.[3611]

7.1559 As a fourth step, this approach estimates the additional duty that would achieve the price increase calculated in the third step. As part of its investigation, the USITC performed economic modelling on the United States industries. These models indicated that there would not be full "pass-through" of any increases in tariff rates. That is, an increase of tariffs of X% would result in a less-than-X increase in the prices importers charged in the United States market. Based on these models, the United States estimates a range of tariff increases that would produce the target increase in import prices for the product in question. These estimates of pass-through were in line with those predicted by industry participants.[3612]

7.1560 The United States explains that this approach uses a somewhat different process for the finding of threat of serious injury with regard to welded pipe. For that industry, the concepts of "preventing" and "remedying" serious injury overlap to a significant degree. To "prevent" injury attributable to imports, which the USITC found would imminently result from the negative effects of increased imports during the investigation period, a safeguard measure would have to counteract those current negative effects. Since the determination reflected negative performance that developed late in the period, the revenue shortfall calculation in the first step reflected a shorter period than for the industries subject to determinations of serious injury. Finally for industries in which the market share effects of imports were prominent, this approach analyses compliance with Article 5.1 in terms of import volumes. This approach was used with tin mill and stainless steel wire.[3613]

7.1561 The United States reiterates that while this numerical analysis may be instructive, as recognized by the Working Group in *US – Fur Felt Hats*, it is not a science. These estimates are intended to show that the steel safeguard measures were applied no more than the extent necessary to prevent or remedy serious injury. For the United States, they are conservative estimates, in that the USITC identified a number of negative effects that imports had on the domestic industry – reduced volume, prices, revenue, production, capacity utilization, employment, capital formation and investment – but these estimates have not attempted to address the negative effects of imports on other indicators of injury, such as employment, production, and capacity utilization. These estimates also do not attempt to add to the estimated tariff levels to attain operating income levels that would fully facilitate the adjustment of the industry to increased imports.[3614]

7.1562 The United States indicates that the safeguard measures worksheets for each product show the results of these calculations, but it reiterates that the decision on the nature and level of a safeguard measure, or the defense against a claimed inconsistency with Article 5.1, is a not strictly numerical exercise. Just as "serious injury" as described in the Agreement on Safeguards is not quantifiable, the overall effect of a safeguard measure in preventing or remedying serious injury and facilitating adjustment is not quantifiable, either. The United States reiterates that there are important limitations in the analytical tools that are available to estimate the effect of a remedy. Thus, any numerical analysis is, at best, an approximation that might assist a panel in evaluating whether a measure is commensurate with the injury caused by increased imports and the need for adjustment. The numerical analysis will not delineate with any precision the extent of the injury, or the extent of application of the measure that would remedy only that injury. In short, these estimates are not in any

[3611] United States' first written submission, para. 1075.
[3612] United States' first written submission, para. 1076.
[3613] United States' first written submission, para. 1077.
[3614] United States' first written submission, para. 1079.

manner a quantification of injury, excluding as they do a consideration of most of the factors required to determine serious injury under Article 4.2(a).[3615]

(c) Economic model

7.1563 The United States explains that economic modelling of the price, volume, and revenue effects of increased imports and of the safeguard measures established by the US President on 5 March 2002 also suggests that these measures were in accord with Article 5.1. During its remedy phase, the USITC prepared an economic model, similar to ones it has used over a long period and in a variety of proceedings, to model the theoretical effect of various measures on the relevant U.S. industries. It is a comparative statics model, which estimates how price, quantity, and total revenue associated with sales by domestic producers and various imports sources during a particular period would have been different if there were a change in market conditions. It is important to recognize that the model does not predict future performance and, does not measure injury as such. What it does do is estimate how certain indicators of past performance might have changed if market parameters had changed.[3616]

7.1564 The United States stated that it used this model, inputting variables to model how the quantity, price, and revenue of sales by the domestic industry and various import sources would have changed in 2000 if the safeguard measure established by the US President on 5 March 2002, had been in effect during that period. The results appear in column 2 of the Modeling Results Worksheet for each product.[3617]

7.1565 The United States explained that it then modelled how the quantity, price, and revenue of sales by the domestic industry would have changed if imports in 2000 had been at the same quantity in a year prior to the increase in imports. The results appear in column 1 of each Modelling Results Worksheet. This exercise only models the effect of the change in imports on the price, quantity, and revenue associated with sales of the domestic like product. It does not capture the injury that imports may have been causing at lower levels, before any increase. Subject to all of the limitations inherent with modeling, this model provides a rough estimate of certain effects of the increase in imports, *i.e.*, on the quantity, price, and revenue of sales by the domestic industry. A comparison between the figures in columns 1 and 2 of each worksheet explains how the remedy applied was no more than the effect of the increase in imports on indicators of injury covered by the model – the price, volume, and revenue associated with sales by the domestic industry.[3618]

(d) USITC recommendations compared with justification by the United States in this case

7.1566 The United States notes that it is important to recognize the differences in the use of the model by the USITC in its remedy discussion and in the modelling exercise in the United States' first written submission.[3619] Although the volume, price, revenue, and elasticity inputs to reflect market conditions in 2000 were the same, the USITC modelled a series of remedy options different from remedies subsequently chosen by the President. In contrast, the modelling exercise in the United States' first written submission is based on the estimated price, volume, and revenue effects of the remedies actually applied by the President. It compares these with the estimated price, volume, and revenue effects of the increase in imports. The USITC did not model the price, volume, and revenue

[3615] United States' first written submission, para. 1080.
[3616] United States' first written submission, para. 1081.
[3617] United States' first written submission, para. 1082.
[3618] United States' first written submission, paras. 1083-1084.
[3619] The United States notes that the USITC used the modelling results as one element in its evaluation of the remedy options, and not in its analysis of injury and causation.

effect of the increase in imports. It is also important to recognize that the USITC reached its remedy recommendation by considering a number of factors, of which the results of the model were only one. The USITC also considered information and arguments submitted by the parties, testimony at its remedy hearings, data on the administrative record, and non-modelling economic analysis. Based on this information, the USITC evaluated the remedy in terms of all of the injurious effects of the increased imports – changes in the production, productivity, capacity utilization, profits and losses, and employment, as well as the price, volume, and revenue of each domestic industry, and any other relevant factor. The Memorandum accompanying Proclamation 7529 specifies that the President determined that the steel safeguard measures were appropriate, "after considering all relevant aspects of the investigation, including the factors set forth in section 203(a)(2) of the Trade Act and the supplemental report".[3620] These include the recommendation and report of the USITC, the extent to which workers and firms in the domestic industry are benefiting from adjustment assistance and engaged in worker retraining efforts, the domestic industries' efforts to make a positive adjustment to import competition, the short- and long-term economic and social costs and benefits of any safeguard measure, and national economic interests, among other considerations. The modelling exercise uses a comparison of the price, volume, and revenue effects of the actual measures as compared to the price, volume, and revenue effects of increased imports to confirm that the safeguard measures were not applied beyond the extent necessary. The United States provides this analysis in rebuttal to the complainants' arguments that the USITC findings were inconsistent with Article 4.2(b), and that a finding in their favour on this point would, by itself, create a presumption that the measures are inconsistent with Article 5.1.[3621] [3622]

(e) Justifications for each of the safeguard measures

7.1567 The United States explains how and why it considers that the level of remedy chosen by the President for each safeguard measure is no more restrictive than what was necessary to remedy serious injury and allow for adjustments

(i) Tariff on CCFRS and tariff-rate quota on slabs

7.1568 The United States[3623] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic CCFRS industry and this was the starting assumption of its justification.

7.1569 The USITC identified six factors other than increased imports that potentially caused injury: declining demand, increased capacity, legacy costs, intra-industry competition, management decisions, and purchaser consolidation. It found that legacy costs, management decisions, and purchaser consolidation did not cause injury to the domestic industry during the investigation period. The USITC did not identify declining demand prior to the first half of 2001 as a cause of injury. Demand increased from 1996 through the third quarter of 2000, and demand for all CCFRS products in full year 2000 was higher than in 1996 or 1999. However, the USITC found that declining demand contributed to serious injury at the end of the investigation period.[3624] The USITC noted that capacity increases outstripped growth in apparent domestic consumption, and that production increased at a lower rate, causing capacity utilization rates to fall, which would affect producers' pricing behavior.

[3620] Memorandum of 5 March 2002, 67 Fed. Reg. 10593, 10594 (Exhibit CC-13).
[3621] The Appellate Body has found that any presumption created by an inconsistency with Article 4.2(b) would be rebuttable. Appellate Body Report, *US – Line Pipe*, para. 262.
[3622] United States' written reply to Panel question No. 72 at the second substantive meeting.
[3623] United States' first written submission, paras. 1085-1101.
[3624] USITC Report, p. 63.

However, it did not attribute this effect to imports. It noted that imports consistently undersold the domestic industry – including those producers that added capacity – and continued to lead prices down in 1999 and 2000. From this, the USITC concluded that imports, not increased capacity, were the primary cause of decreasing prices.[3625] The USITC found that competition from minimills had some effect on domestic pricing. The Commissioners concluded that although minimills had lower costs than integrated producers, it was imports that were price leaders and led prices down, underselling the minimills throughout the investigation period. Accordingly, the USITC found that minimills were not primarily responsible for declines in domestic prices.[3626] In this regard, the United States notes that the volume of imports far exceeded the volume of minimill sales in the commercial market, by an order of two-to-one.[3627] The USITC found that the only factors other than increased imports that caused injury to the domestic industry were increased capacity, competition from minimills, and a decline in demand after 2000. This is not to suggest that imports in 1996 and 1997 had no negative effects. However, since the analysis of the USITC focused on changes in industry performance after 1997, and as a conservative estimate of the injury attributable to imports, the numerical analysis for CCFRS was based on the changes from 1998 through the first half of 2001 only, as compared with 1997. The injury attributable to imports from 1998 to 2000 continued into the first half of 2001. Non-FTA unit values fell in the first half of 2001, as compared with the same period in 2000. Beginning in the fourth quarter of 2000, domestic prices collapsed. Import prices fell to a lesser extent, resulting in a reduction, or elimination of the margins of underselling.

7.1570 The United States notes that the numerical analysis follows the general approach outlined previously to evaluate the safeguard measure on CCFRS products, with appropriate modifications to reflect the greater variation among the categories of steel covered by the like product. The estimate in the analysis is based on the unit values, which appear to be broadly reflective of the products available from domestic producers and the import sources. This is a conservative approach since, for most of the period, differences between domestic and non-FTA import unit values were greater [sic] than the margin of underselling. The analysis also considers the effect of anti-dumping and countervailing duty orders on the domestic industry. Most of the orders predate the USITC investigation period. The exceptions are the 1997 and 2000 orders on plate, and the 1999 and 2001 anti-dumping orders on hot-rolled steel. The USITC found that import surges in many of the products occurred after anti-dumping and countervailing duty orders were in place, an observation that applies equally to pre-investigation-period orders and the 1997 plate orders. In addition, the USITC data for the surge and post-surge periods reflect any effect on the industry that these orders may have had. Since the United States bases its estimate of the measure on that data, it considers that it does not need to perform any additional analysis to account for these orders. The 1999 and 2001 anti-dumping duty orders and suspension agreements on hot-rolled steel applied to several countries. However, in light of the fact that the 1999 orders did not prevent the continuation of imports at high and injurious levels, and would not have prevented injury by fairly traded imports, the analysis did not adjust the estimate to account for these orders. With regard to the 2000 anti-dumping orders on plate, it is significant that the offset of dumping under the 1997 dumping orders and suspension agreements affected the volume of imports, but did not prevent a reduction in unit values and continued underselling.[3628] Accordingly, the analysis does not adjust the estimate to reflect the offset of dumping and subsidization under the 2000 orders.

[3625] USITC Report, pp. 63-64.
[3626] USITC Report, p. 65.
[3627] From 1996 to 2000, imports ranged from 18.3 to 25.3 million tons annually, while minimill shipments never exceeded 8.49 million annually.
[3628] USITC Report, pp. FLAT-64 & FLAT-C-3