4. Product-specific allegations

(a) CCFRS

7.1802 Japan, Brazil and the European Communities submit that the USITC did not conduct any specific evaluation of non-NAFTA imports as required by parallelism. Rather, it evaluated NAFTA imports, concluding that the exclusion of NAFTA imports would not change its findings of injury and causation as to total imports.[4225] In doing do, it repeated the very same mistakes previously highlighted by the Appellate Body. It is remarkable that the USITC even resorted to its unsupported conclusion that it "would have reached the same result" in justifying the exclusion NAFTA countries from the recommended measure. This was the very same language the Appellate Body found to fail the parallelism requirement in *US – Line Pipe*.[4226] The statement does not meet the obligation to explain how the facts support a finding that non-NAFTA imports alone caused serious injury or threat of serious injury.[4227] Providing a handful of numbers with no meaningful analysis accomplishes little more. The USITC's analysis of non-NAFTA imports, therefore, did not meet the Appellate Body's parallelism standard as set forth in *US – Line Pipe*, which requires a "reasoned and adequate explanation that establishes explicitly" that such imports alone caused serious injury to the domestic industry. To be explicit, the USITC "must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous".[4228] It accomplished none of this. It failed to establish that non-NAFTA imports alone caused serious injury; its conclusions about the causal link between non-NAFTA imports and serious injury were vague; and it merely implied or suggested why non-NAFTA imports alone caused serious injury. The USITC's analysis therefore did not satisfy the parallelism requirement.[4229]

7.1803 China submits that the USITC Supplementary Report does not evaluate the share of the domestic market taken by non-NAFTA imports, does not evaluate other factors relevant to the situation of the industry concerned, does not make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and does not indicate explicitly whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements. China considers that the USITC Supplementary Report for this product "does not establish explicitly that imports from sources covered by the measure 'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards' [and] does not amount to a 'reasoned and adequate explanation of how the facts support [the] determination'", in accordance with the Appellate Body's interpretation.[4230]

7.1804 Korea also argues that a review of the additional investigation demonstrates that the USITC failed to provide a "reasoned and adequate" explanation as required by the Agreement on Safeguards.

[4225] Japan's first written submission, para. 312; Brazil's first written submission, para.231, European Communities first written submission, para. 621. Remarkably, the USITC actually found in several cases that imports from NAFTA countries contributed importantly to the serious injuries of the domestic industry! For example, in the USITC's flat-rolled steel analysis, the USITC found that imports from NAFTA accounted for a substantial share of total imports and Mexican imports contributed importantly to the serious injury caused by imports. USITC Report Vol. I at 66 (Exhibit CC-6). Similarly, in its hot-rolled bar and cold-finished bar analysis, the USITC found that Canadian imports represented a substantial share of total imports and contributed importantly to serious injury caused by imports. Ibid. at 100, 107.

[4226] Appellate Body Report, *US – Line Pipe*, para. 194.

[4227] Ibid., at para. 195.

[4228] Ibid., at para. 194.

[4229] Japan's first written submission, paras. 312-315; Brazil's first written submission, paras. 231-233.

[4230] China's first written submission, paras. 592–594.

With respect to the increase in imports, the USITC argues that there was an increase in non-NAFTA imports absolutely and relatively between 1996 and 2000. It does not demonstrate how such an increase meets the standard of "recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'".[4231] With respect to serious injury and causation, the USITC's supplemental discussion is narrowly focused upon the price gap between non-NAFTA imports and domestic products and simply asserts, without substantiation, that increased imports from non-NAFTA sources are the substantial cause of serious injury.[4232] The cursory investigation conducted by the USITC for non-NAFTA imports is far from the strict standards established by the Appellate Body in numerous cases involving this issue. More importantly, the USITC fails to explain how it was able to segregate the impact of non-NAFTA imports from NAFTA imports since it also had determined that: Mexico was one of the top five sources of flat-rolled steel; Mexico's import volume increased 26.9% during the 1996-2000 period; Mexico's rate of increase was higher than the rate of increase of non-NAFTA imports; and Mexico's AUV for flat-rolled was consistently below the AUVs of other imports. Korea argues that in spite of these specific findings with respect to the serious injury arising from Mexican imports, the USITC failed to separate that injury arising from NAFTA imports from the injury it attributed to non-NAFTA imports.[4233]

7.1805 Similarly, the European Communities, Japan and Brazil submit with regard to the USITC's analysis of total imports and non-NAFTA imports of flat-rolled steel[4234] that the USITC's initial analysis on import trends found that total imports and Canadian imports increased absolutely as a share of domestic consumption, and that Canadian imports declined but remained a substantial share of total imports.[4235] The analysis of non-Canada flat-rolled steel imports was limited to whether the volume increase and the decline in AUVs were significant.[4236] The USITC did not specifically establish causation between non-NAFTA imports and the domestic industry's serious injury. The general discussion of causation, and the role of alternative causes, never once mentioned the role of non-NAFTA imports as distinguished from all imports.[4237] This was followed by the response to USTR, in which the USITC merely stated that non-NAFTA imports increased absolutely and as a share of domestic production. As for prices, the USITC merely informed USTR that "exclu[sion] of imports from Canada and Mexico from the database does not appreciably change import pricing trends".[4238] The USITC's treatment of injury and causation was even more perfunctory and inadequate. The USITC only noted that "we would have reached the same result had we excluded imports from Canada from our injury analysis".[4239] Yet, the general discussion of causation, and the role of alternative causes, never once mentioned the role of non-NAFTA imports as distinguished from all imports.[4240] No attempt at factual analysis for non-NAFTA imports was ever made. The response to USTR was no better. Again, no factual analysis, only the simple statement that "the same considerations that led us to conclude that increased imports of CCFRS are a substantial cause of serious injury to the domestic industry are also applicable to increased imports of CCFRS from all

[4231] See *Argentina – Footwear (EC)*, para 131.
[4232] Korea's first written submission, paras. 185, 187, 188, 189, 190, 191
[4233] USITC Report, Vol. I, pp. 66-67 (Exhibit CC-6).
[4234] This product category consists of slabs, plate, hot-rolled steel, cold-rolled steel, and coated steel.
[4235] USITC Report, Vol. I, pp. 66-67 footnote 319 (Exhibit CC-6).
[4236] Ibid., pp. 66-67, footnote 319.
[4237] Ibid., pp. 55-65.
[4238] USITC's 4 February Letter at 5 (Exhibit CC-11).
[4239] USITC Report, Vol. I, at 67 footnote 319 (Exhibit CC-6). The USITC found that "imports from Canada did not contribute importantly to the serious injury suffered by the domestic industry." (Ibid., p. 66), and thus implicitly acknowledged some contribution to injury by Canadian imports. The USITC never analysed carefully the extent of Canada's contribution.
[4240] Ibid. at 55-65.

sources other than Canada and Mexico".[4241] The USITC focused on non-NAFTA import volumes and average unit volumes to the exclusion of causation.[4242] [4243]

7.1806 Japan adds that even if one were to accept the USITC statements as accurate, the comparison demonstrates that the USITC's analysis is inadequate, particularly with respect to Canada which the USITC itself identified as "one of the top five suppliers of CCFRS imports during the [period of investigation]".[4244] [4245] The European Communities considers that there is no correct increased imports finding for non-FTA imports and that the USITC failed to acknowledge cumulated imports from FTA sources as "other factor" causing injury and failed to ensure non-attribution.[4246]

7.1807 The United States contends that the USITC's analysis of non-NAFTA imports, read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports, demonstrates that the USITC specifically considered all issues relating to imports of CCFRS from non-NAFTA sources. In its analysis of non-NAFTA imports, the USITC found that non-NAFTA imports increased at a rate similar to all imports. Non-NAFTA imports of CCFRS increased by 46.8% between 1996 and 1998, and non-NAFTA imports in 2000 were still well above 1996 levels.[4247] The USITC also considered the change in non-NAFTA import volume relative to domestic production. Non-NAFTA imports were equivalent to a higher share of domestic production in 2000 than in 1996.[4248] [4249] Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The European Communities is also wrong to criticize the USITC for failing to find that the increase was "recent, sudden, sharp, and significant", and for failing to use full-year 2001 data[4250], because these are not the relevant criteria.[4251]

7.1808 The United States further argues that in its analysis of non-NAFTA imports, the USITC found that each of the causal link elements was applicable to non-NAFTA imports. The USITC found a moderate to high degree of substitutability between domestically-produced CCFRS and imported CCFRS, and there was little difference between purchaser appraisals of non-NAFTA imports and all imports.[4252] Non-NAFTA imports followed the same volume trends as did all imports. Non-NAFTA imports followed the same pricing trends as did imports from all sources, generally peaking in 1997 and then falling notably in 1998 and 1999.[4253] In fact, non-NAFTA imports actually undersold the domestic products in a greater share of direct quarterly comparisons and by greater margins than did imports from either NAFTA country.[4254] Consequently, the USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the

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[4241] USITC's 4 February Letter, p. 5 (Exhibit CC-11).
[4242] Ibid., pp. 5-11.
[4243] Japan's first written submission, paras. 310-311; Brazil's first written submission, para. 229-230.
[4244] USITC Report, p. 66, (Exhibit CC-6).
[4245] Japan's first written submission, para. 309.
[4246] European Communities' first written submission, paras. 622-626; European Communities' second written submission, paras. 478-483. The detailed arguments are set out in the product-specific section on non-attribution (H.3(b)).
[4247] USITC Second Supplementary Report, p. 5.
[4248] USITC Second Supplementary Report, p. 5.
[4249] United States' first written submission, paras. 789-791.
[4250] European Communities' first written submission, paras. 622-623.
[4251] United States' first written submission, para. 792.
[4252] USITC Report, p. 58; USITC Memorandum INV-Y-212, pp. 15-19 (US-39).
[4253] USITC Second Supplementary Report, p. 5.
[4254] USITC Report, Table FLAT-77.

serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. In addition, the USITC's analysis of the effects, if any, attributable to other factors that increased imports was also equally applicable to non-NAFTA imports. Thus, the USITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the USITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the USITC did not need to conduct a separate non-attribution analysis for NAFTA imports. [4255]

7.1809 China argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4256] Imports from Mexico increased significantly between 1996 and 2000 at a rate that was higher than the rate of increase for total imports (13.7%) as shown in the USITC Report at page 66. Indeed, when total imports increased by 18.4 million tons in 1996 to 20.9 million short tons in 2000 (i.e. an increase of 2.5 million tons or 13.7%), Mexican imports, for their part, increased during the same period by almost 27%. In the same section of the USITC Report, one can also read that average unit values for CCFRS imports from Mexico were consistently below the average unit value for other imports.[4257] However, at no time has the USITC analysed the extent to which those specific characteristics of the Mexican imports could have a specific impact on the injury caused to the United States industry, different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used by the United States prevented it from establishing that the USITC did not attribute to non-NAFTA imports any effects due to NAFTA imports (in this particular case, Mexican imports), as other factors.[4258]

7.1810 New Zealand submits that the United States' assertion that "reasoned and adequate explanation" is constituted by "the USITC's analysis of non-NAFTA imports, *read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports*"[4259] is nothing more than an acknowledgement by the United States that the USITC Second Supplementary Report fails to provide the necessary adequate and reasoned explanation. The attempt to somehow 'save' this situation with reference to the analysis contained in the USITC Report on all imports fails for the very reason that it simply cannot be assumed that an analysis applicable to "all imports" provides the necessary information required for one relating specifically to non-NAFTA imports. The United States seeks to convert the requirement of parallelism to a less onerous enquiry in which the competent authority merely has to assert that its conclusions would not have changed if the non-FTA imports had been excluded from the determination. However, this *ex post facto* justification of an earlier pre-judgment begs the very question that the Appellate Body sought to underline.[4260] The USITC's belated attempt to satisfy the parallelism requirement in its Second Supplementary Report fell well short of the requirement to "establish explicitly" that the imports covered by the measure satisfy the conditions for the imposition of a safeguard measure. Indeed, in relation to CCFRS, the initial determination of the USITC in relation to NAFTA imports, which concluded that imports from both Canada and Mexico represented a substantial share and imports from Mexico "contributed

[4255] United States' first written submission, paras. 793-804.
[4256] China's second written submission, para. 326.
[4257] Incidentally, this statement can hardly be reconciled with the statement of the USITC Supplementary Report (p. 5) according to which *"excluding imports from Canada and Mexico from the database does not appreciably change import pricing trends during the period examined"*.
[4258] China's second written submission, paras. 326-328.
[4259] United States' first written submission., paras. 789, 796, and 804 (emphasis added).
[4260] New Zealand's second written submission, paras. 3.148-3.149.

importantly" to the injury, casts even further doubt on any claim that imports, minus the increases attributable to NAFTA, could satisfy the requirements of the Agreement on Safeguards.[4261]

(b) Tin mill products

7.1811 The European Communities and China submit that neither the USITC Report nor the USITC Supplementary Report contain any particular findings establishing "explicitly" that increased imports from non-NAFTA sources satisfy the conditions set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. The European Communities adds that the finding that this product does not "contribute importantly to the serious injury or threat thereof" in the USITC Report of October 2001 is not sufficient. For these reasons, the European Communities and China consider that the United States, for this product, failed to respect its obligation under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4262]

7.1812 Korea argues that the USITC did not conduct any investigation on non-NAFTA imports alone, either in the original investigation or in response to a request of the USTR. Commissioner Miller found that imports of tin mill products from Canada were significant, and had doubled over the period with a higher rate of growth than imports from non-NAFTA countries. She also found that Canada's AUVs declined to their lowest point in 1999, when imports surged.[4263] Commissioner Miller was the only Commissioner to vote affirmatively with respect to injury to the domestic industry from tin mill products. In the first place, there was no basis whatsoever for the imposition of safeguard measures on imports of tin mill products. However having determined that such measures were appropriate, the United States was obliged to provide a reasoned explanation concerning how the serious injury caused by non-NAFTA imports was segregated and identified. The United States was also obliged to establish explicitly that the serious injury suffered by the domestic industry was due to non-NAFTA imports alone. The United States did neither. Thus, the United States is in violation of the parallelism between the scope of investigation and the scope of the measure with respect to tin mill products.[4264]

7.1813 Similarly, Norway notes that, concerning tin mill products, neither the increased imports section nor the serious injury section of the (first) report itself mentions products from these countries specifically. There is also no mention of tin mill products in the Second Supplementary Report. The dissenting Commissioner Miller, who analysed tin mill products separately did, however, make explicit findings with respect to imports from Canada. She found that imports from Canada accounted for a substantial share of total imports and contribute importantly to the serious injury[4265] (and therefore also recommended a tariff on such imports[4266]). Her statement is somewhat ambiguous, as it is connected to a footnote 29 where she – in passing – states "I further note that I would have found imports of tin mill products to be a substantial cause of serious injury had I excluded imports from Canada".[4267] She also states in footnote 28 on the same page that "I note that in my analysis of whether increased imports as a whole are a substantial cause of serious injury, I would have reached the same result had I excluded imports from Mexico". Norway does not consider that these statements of Commissioner Miller, even considering her individually, complies with the

[4261] New Zealand's written reply to Panel question No. 59 at the second substantive meeting.
[4262] China's first written submission, paras. 614-615; European Communities' first written submission, paras. 614-615.
[4263] USITC Report, Vol. I, pp. 309-310 (Exhibit CC-6).
[4264] Korea's first written submission, para. 193-194.
[4265] USITC Report, Vol. I, p. 310 (Exhibit CC-6).
[4266] USITC Report, Vol. I, p. 527 (Exhibit CC-6).
[4267] USITC Report, Vol. I, p. 310 (Exhibit CC-6).

standards set out by the Appellate Body, as there is no finding that products from other sources alone, excluding imports from all the excluded countries, fulfil the requirements of Articles 2.1 and 4. As for the final determinations of the United States for tin mill products, where the President did not follow the recommendations of Commissioner Miller, there is nowhere any particular finding establishing "explicitly" that increased imports from non-NAFTA sources satisfy the conditions as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards and, thus, no findings the President can rely upon in support of his determination. For this reason, the United States, for this product, has failed to respect its obligation under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4268]

7.1814 The United States asserts that both Commissioner Miller and Commissioner Bragg provided separate analyses of non-NAFTA imports relating to tin mill products. These analyses, read in conjunction with each Commissioner's discussion of other pertinent issues contained in her analysis of all imports, demonstrate that the analyses specifically considered all issues relating to imports from non-NAFTA sources. Commissioner Miller's analysis is found in footnotes 28 and 29 of her separate opinion analysing all tin mill imports. In footnote 28, she observes that tin mill exports from Mexico were minuscule, never exceeding 286 tons in any calendar year.[4269] In footnote 29, she notes that she would have found increased imports of tin mill to be a substantial cause of serious injury if she had excluded imports from Canada.[4270] Given the minuscule volumes of imports from Mexico cited in footnote 28, the analysis Commissioner Miller provides in footnote 29 is clearly applicable when imports from both Canada and Mexico are excluded. Commissioner Miller's footnote was not an ambiguous statement made "in passing", as asserted by Norway.[4271] Instead, it demonstrates that she specifically considered all issues relating to imports of tin mill from imported sources, including increased imports and causal link. In her analysis, Commissioner Miller observed that imports from non-NAFTA sources increased by 22.4% from 1996 to 2000.[4272] The greatest annual percentage increase in non-NAFTA imports occurred between 1998 and 1999, the same year imports from all sources increased by the greatest percentage.[4273] Commissioner Miller's analysis also demonstrated that there were imports "in such increased quantities ... and under such conditions as to cause or threaten to cause serious injury" by demonstrating the genuine and substantial causal link between non-NAFTA imports and the serious injury experienced by the domestic tin mill industry. The nature of that serious injury was discussed in great detail in Commissioner Miller's analysis of all imports. Each of these elements was applicable for non-NAFTA imports as well. Commissioner Miller had observed in her analysis of all imports that purchasers generally considered imported and domestically produced tin mill products to be substitutable.[4274] Because the questionnaire data indicated that non-NAFTA imports were not different from all imports in this respect, there was no need for Commissioner Miller to discuss this factor further in her analysis of non-NAFTA imports.[4275] Commissioner Miller's analysis of non-NAFTA imports, when read in conjunction with her analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. Miller's analysis of non-NAFTA imports, when read in conjunction with her analysis of all imports, also establishes that the she did not attribute to non-NAFTA imports any effects due to factors other than

[4268] Norway's first written submission, paras. 381-386.
[4269] USITC Report, p. 310, footnote 28.
[4270] USITC Report, p. 310, footnote 29.
[4271] Norway's first written submission, para. 392.
[4272] USITC Report, p. 310, footnote 29.
[4273] USITC Report, Table FLAT-C-8.
[4274] USITC Report, p. 307.
[4275] USITC Memorandum INV-Y-209, p. 20 (US-33).

imports. In her consideration of non-NAFTA imports Commissioner Miller did not need to conduct a separate non-attribution analysis for NAFTA imports.[4276]

7.1815 The United States further argues that Commissioner Bragg performed her analysis of non-NAFTA tin mill imports in the context of her like product analysis encompassing CCFRS. Commissioner Bragg first examined the increase in import volume. She found that non-NAFTA imports of carbon and alloy flat products including tin mill increased by 16.2% between 1996 and 2000. The largest single year increase occurred between 1997 and 1998, but an additional increase occurred between 1999 and 2000.[4277] Commissioner Bragg also noted that non-NAFTA imports accounted for a substantial majority of all imports.[4278] Commissioner Bragg demonstrated a genuine and substantial causal link between non-NAFTA imports and the serious injury experienced by the domestic industry. The nature of that serious injury was discussed in her analysis of all imports.[4279] In her analysis of all imports, Commissioner Bragg specifically examined several other factors alleged to be the cause of serious injury. Commissioner Bragg rejected each of these factors as a cause of injury. Because Commissioner Bragg's analysis of all imports contained the requisite discussion of these other factors to satisfy Article 4.2(b) of the Agreement on Safeguards, and she rejected the other factors as causes of injury, she was not obliged to discuss these factors further in her analysis of non-NAFTA imports, as she had not attributed any of the serious injury suffered by the domestic industry to any of these other factors.[4280] [4281]

7.1816 China points out that for tin mill products, Commissioner Miller, at page 309, made clear that the quantity of imports from Canada doubled over the period (+ 50%), while the growth rate of imports from non-NAFTA countries increased only by 22.4% over the period. In the same report, Commissioner Miller indicated that the average unit values of imports from Canada declined overall from 1996 to 2000 and were lowest in 1999, when imports generally surged and the United States industry's condition worsened.[4282] However, at no moment, did the USITC analyse the extent to which those specific characteristics of the Canadian imports could have a specific impact on the injury caused to the United States industry, different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used by the United States prevented it from establishing that the USITC did not attribute to non-NAFTA imports any effects due to NAFTA imports (in this particular case, Canadian imports), as other factors.[4283]

(c) Hot-rolled bar

7.1817 China submits that the USITC Supplementary Report does not evaluate the share of the domestic market taken by non-NAFTA imports, does not evaluate other factors relevant to the situation of the industry concerned, does not make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and does not indicate explicitly whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements. China considers that the USITC Supplementary Report for this product "does not establish explicitly that imports from sources covered by the measure 'satisf[y] the conditions for the

[4276] United States' first written submission, paras. 807-818.
[4277] USITC Second Supplementary Report, p. 15.
[4278] USITC Second Supplementary Report, p. 17, footnote 87.
[4279] *See* USITC Report, pp. 282-283.
[4280] USITC Second Supplementary Report, p. 17, footnote 87.
[4281] United States' first written submission, paras. 819-823.
[4282] China's second written submission, paras. 324, 229.
[4283] China's second written submission, para. 330.

application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards' [and] does not amount to a 'reasoned and adequate explanation of how the facts support [the] determination'", in accordance with the Appellate Body's interpretation.[4284]

7.1818 The United States asserts that the USITC's analysis of non-NAFTA imports, read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports, demonstrates that the USITC specifically considered all issues relating to imports of hot-rolled bar from non-NAFTA sources, including increased imports and causal link. In its analysis of non-NAFTA imports, the USITC found that non-NAFTA imports of hot-rolled bar increased at a greater rate than imports from all sources. Non-NAFTA imports increased by 107.9% from 1996 to 2000, and had major increases from 1997 to 1998 (when they increased by 70.4%) and from 1999 to 2000 (when they increased by 31.2%). In its analysis, the USITC also provided information concerning the annual evolution of non-NAFTA import volumes.[4285] Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The European Communities is also wrong to criticize the USITC for failing to find that the increase was "recent, sudden, sharp, and significant", and for failing to use full-year 2001 data[4286], because, as already argued, these are not the relevant criteria.[4287]

7.1819 The United States further argues that the USITC's analysis of all imports also described the causal link between all imports and the serious injury in considerable detail. The USITC determined that through price-based competition increased imports caused domestic hot-rolled bar producers to lose market share at the same time prices were falling. Thus, there were three basic elements of the finding of causal link relating to all imports: (1) price-based competition between imports and the domestically produced product; (2) imports gaining market share at the expense of the domestically produced product; and (3) declining prices. These elements collectively led to the hot-rolled bar industry's declines in production, sales volumes and revenues, and employment, as well as its poor financial performance during the latter portion of the period of investigation. In its analysis of non-NAFTA imports, the USITC found that each of these three causal link elements was applicable for such imports. First, the non-NAFTA imports were even more competitive on price with the domestically-produced product than were all imports, inasmuch as their prices were lower than those for all imports. The USITC found that the non-NAFTA imports undersold the domestically produced product by substantial margins during the principal period it examined in its causal link analysis – 1998 through 2000.[4288] Second, the non-NAFTA imports gained market share at the expense of the domestic industry. In its analysis of causal link for all imports, the USITC emphasized the domestic industry's loss of market share to imports in 1998 and 2000 and explained why this period was germane to its analysis. In its analysis of non-NAFTA imports, the USITC found that those imports were responsible for most of this loss, as they gained 3.7 of the 4.1 percentage points of market share the domestic industry lost from 1997 to 1998, and gained even more market share than the domestic industry lost from 1999 to 2000.[4289] Third, the USITC found that the value of the non-NAFTA imports fell by an even greater proportion during the period of investigation than did imports from all sources.[4290] Consequently, the USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a

[4284] China's first written submission, paras. 595–597.
[4285] USITC Second Supplementary Report, p. 5.
[4286] European Communities' first written submission, paras. 622-623.
[4287] United States' first written submission, paras. 825-827.
[4288] USITC Second Supplementary Report, p. 6.
[4289] USITC Second Supplementary Report, p. 6; USITC Report, Table LONG-C-3.
[4290] USITC Second Supplementary Report, p. 6.

genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The USITC did not reach this conclusion by "jump[ing] into some generalizations", as alleged by the European Communities.[4291] Instead, the USITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.[4292]

7.1820 The United States finally argues that in its analysis of all imports the USITC examined four factors other than increased imports alleged to be causes of serious injury to the domestic hot-rolled bar industry. It found that three of the four other factors (intra-industry competition, "inefficient" domestic producers, and changes in demand) did not cause the injury it observed. The fourth factor, relating to the domestic industry's input costs, related exclusively to domestic industry data which also did not change depending on which imports were being examined. Consequently, there was also no need for the USITC to discuss this factor further in its analysis of non-NAFTA imports.[4293]

7.1821 In response to the Panel's question about how the USITC conducted a causation analysis that isolated the effects of non-NAFTA imports from those of NAFTA imports, the United States responds, taking hot-rolled bar as an example, that the USITC's methodology for isolating the effects of non-NAFTA imports encompassed several steps. First, in its analysis of non-NAFTA imports, the USITC distinguished import volumes from non-NAFTA sources from import volumes from Canada and Mexico. Thus, for hot-rolled bar, the USITC specifically discussed the volume of imports from non-NAFTA sources, the rate of increase of that volume, and the ratio of that volume to United States production.[4294] Second, in its analysis of all imports, the USITC made findings concerning the conditions of competition in the pertinent domestic industry. These findings were not related to either the characteristics or the data relating to imports from specific countries, so no further isolation of imports from particular sources was necessary. Third, the USITC made findings, in its analysis of all imports, concerning the condition of the pertinent domestic industry. This analysis did not concern *why* the industry was seriously injured, but *whether* it was seriously injured. Consequently, no further isolation or discussion was necessary for the non-NAFTA imports. Fourth, the USITC conducted a particularized causation analysis for the non-NAFTA imports. The USITC's causation analysis for all imports for each of the pertinent products reflected findings concerning five factors. These were: (1) import volume patterns; (2) the conditions of competition; (3) the domestic industry's condition; (4) import volume and pricing patterns; and (5) other alleged causes of serious injury. For each product, the USITC analysed the particularized data for non-NAFTA import volume and non-NAFTA import pricing. Thus, for hot-rolled bar, the USITC found that average unit values of non-NAFTA imports declined from 1996 to 2000 and that this decline was greater than that for imports from all sources. It engaged in a particularized examination of pricing data for 1998 and the first half of 2000. These periods were of particular significance to its causation analysis because they were periods when both non-NAFTA imports and all imports surged and the domestic industry lost market share. The USITC found that during these periods the non-NAFTA imports undersold domestically produced hot-rolled bar by substantial margins. Consequently, based on its analysis of the particularized non-NAFTA import data, the USITC concluded that the same considerations that supported a finding of causal link for all imports – namely, that through price-based competition increased imports caused the domestic industry to lose market share while prices were falling – supported a finding of causal link for non-

[4291] European Communities' first written submission, para. 625; China raises a similar objection. China's first written submission, para. 595.
[4292] United States' first written submission, paras. 828-833.
[4293] United States' first written submission, para. 834.
[4294] USITC Second Supplementary Report, pp. 5-6.

NAFTA imports.[4295] Again, by considering only non-NAFTA imports, the USITC isolated the volume and pricing effects of non-NAFTA imports from those for the NAFTA imports. An isolation analysis was not necessary with respect to conditions of competition or the condition of the domestic industry. An isolation analysis also was not necessary for the other alleged causes of serious injury. For example, with respect to hot-rolled bar, three of the four alleged other causes were not in fact causes of serious injury and the fourth (relating to changes in the domestic industry's input costs) pertained exclusively to domestic industry data.[4296] Consequently, the USITC conducted a causation analysis that isolated for non-NAFTA imports those factors it needed to isolate, and incorporated from the all imports analysis those factors that were unchanged regardless of which imports were analysed. Based on these factors, it explained why its conclusions on causation for all imports were also applicable to non-NAFTA imports viewed in isolation.[4297]

7.1822 The European Communities notes that the United States justifies its "increased imports" finding by reference to the USITC Second Supplementary Report. However, the "increased imports" finding of 22 October 2001 is clearly based on import data from all countries.[4298] So is the relevant Commission determination.[4299] The USITC approach underlying the determinations of 22 October 2001 reflects that followed in the United States measures at issue in *US – Line Pipe*, and analysed by the Appellate Body who held that the USITC made "no reference to product origin. The USITC considered 'imports from *all sources* in determining whether imports have increased' and relied on data corresponding to total imports".[4300] In the present case, and in respect of hot-rolled bar the USITC expressly concluded that "our affirmative determination [that is "increased imports" and "serious injury" and "causation"] for hot-rolled bar encompasses imports from Canada".[4301] The European Communities submits that three irrelevant determinations in the USITC Report do not however make one relevant one. In other words, the fact that, in addition to the increased imports and serious injury findings based on imports from all sources, the USITC made separate determinations on imports from Canada[4302] and Mexico[4303] respectively, does not change the content of the first one and does not turn it into an "all imports minus Canada and/or Mexico" one. Nor does the fact that the Commission *determination* on hot-rolled bar on p. 18 of the USITC Report's Vol. I is followed by two determinations on Canada and Mexico respectively[4304] means that the first is turned into a determination on "all imports minus Canada and/or Mexico". The Appellate Body has already rejected this type of "shortcut" in *US – Line Pipe*.[4305]

7.1823 The European Communities submits that the USITC failed to separate and distinguish the impact of excluded imports and not attribute them to the imports covered by the measures. With regard to hot-rolled bar, Canada and Mexico respectively represented the first and the third or fourth

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[4295] USITC Second Supplementary Report, p. 6.
[4296] United States' first written submission, para. 834.
[4297] United States' written reply to Panel question No. 95 at the first substantive meeting.
[4298] USITC Report, Vol. I, p. 92, referring to Volume II, p. LONG 9, TABLE LONG-5. The import data referred to on p. 92 are taken from the "all imports" rows. Specifically, imports from Canada were found by the USITC to "account for a substantial share of total imports" (USITC Report, Vol. I, p. 100). Indeed, according to USITC data Canada supplied 46.0% of the quantity of all imports in 1998, 50.6% in 1999 and 45.6% in 2000 (USITC Report, Vol. I, p. 100, referring to USITC Report, Vol. II, Table LONG 5).
[4299] USITC Report, Vol. I, p. 18.
[4300] Appellate Body Report, *US – Line Pipe*, para. 186.
[4301] USITC Report, Vol. I, p. 100
[4302] USITC Report, Vol. I, p. 100.
[4303] USITC Report, Vol. I, pp. 100-101.
[4304] USITC Report, Vol. I, p. 18, column 2 from the left of the "Carbon & Alloy Long Products" column, rows 8 to 10 of the column respectively.
[4305] European Communities' second written submission, paras. 445-448.

supplying country in the most recent three years considered.[4306] They also contributed one third of the increase in imports over the period 1996-2000. Thus, it simply cannot be that the their exclusion made no difference to the causation finding. Assuming that imports caused injury, it is far from clear that a finding of a genuine and substantial causal link could be made once the injurious effects of Canadian and Mexican imports have been subjected to a non-attribution analysis. At the very least the United States authorities should have explained why the exclusion of certain imports from the increased imports base did not change at all the result.[4307]

7.1824 China argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4308] As it appears from the USITC Report at page 92 *et seq.*, the situation of the United States industry worsened in 1999 in terms of domestic production and increased capacity. At page 97 of the same Report, it is said that in 1999 domestic producers restricted their loss of market share to three-tenths of a percentage point. On page 92, the USITC Report indicates that imports from all sources increased slightly from 1998 to 1999, by 1%, while, at the same time, imports from Canada alone increased by almost 5%. However, at no time has the USITC analysed the extent to which those specific characteristics of the Canadian imports could have a specific impact on the injury caused to the United States industry, different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used by the United States prevented it from establishing that the USITC did not attribute to non-NAFTA imports any effects due to NAFTA imports (in this particular case, Canadian imports), as other factors.[4309]

(d) Cold-finished bar

7.1825 China submits that the USITC Supplementary Report merely contains an indication of loss of revenues for the United States domestic industry. It does not evaluate the share of the domestic market taken by non-NAFTA imports, it does not contain specific elements regarding the injury to the US industry caused by non-NAFTA imports, it does not evaluate other factors relevant to the situation of the industry concerned, it does not make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors and it does not indicate explicitly whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements. The European Communities considers that there is no correct increased imports finding for non-FTA imports and that the USITC failed to acknowledge cumulated imports from FTA sources as "other factor" causing injury and failed to ensure non-attribution.[4310] On the basis of the foregoing, the European Communities and China considers that the USITC Supplementary Report for this product "does not establish explicitly that imports from sources covered by the measure 'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards' [and] does not amount to a 'reasoned and adequate explanation of how the facts support [the] determination'", in accordance with the Appellate Body's interpretation.[4311]

[4306] USITC Report, Vol. I, p. 100.
[4307] European Communities' second written submission, paras. 483-484.
[4308] China's second written submission, para. 326.
[4309] China's second written submission, paras. 331-332.
[4310] European Communities' first written submission, paras. 622-626; European Communities' second written submission, paras. 478-483. The detailed arguments are set out in the product-specific section on non-attribution (H.3(b)).
[4311] China's first written submission, paras. 598–600.

7.1826 The United States asserts that the USITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries caused serious injury to the domestic cold-finished bar industry. This analysis, according to the United States, satisfies all requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[4312] In its analysis of non-NAFTA imports, the USITC found that non-NAFTA imports of cold-finished bar increased at a greater rate than did imports from all sources both from 1999 to 2000 and over the entire period examined. Non-NAFTA imports increased by 51.0% from 1999 to 2000, the year that imports from all sources increased most sharply. In its analysis, the USITC also provided information concerning the annual evolution of non-NAFTA import volumes.[4313] Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The European Communities is also wrong to criticize the USITC for failing to find that the increase was "recent, sudden, sharp, and significant", and for failing to use full-year 2001 data[4314], because these are not the relevant criteria. The USITC's analysis of all imports also described the causal link between all imports and the serious injury in considerable detail. The USITC determined that aggressive pricing by the imports during the latter portion of the period of investigation caused the domestic industry to lose market share and revenues. This resulted in serious injury, most particularly the industry's poor performance in 2000. The USITC found that each of two causal link elements that were applicable for all imports – aggressive pricing and increased market share – were also applicable for non-NAFTA imports. Consequently, the USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The USITC did not reach this conclusion by "jump[ing] into some generalizations", as alleged by the European Communities.[4315] Instead, the USITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports. In its analysis of all imports the USITC examined two factors other than increased imports alleged to be causes of serious injury to the domestic cold-finished bar industry. It found that one of these factors (the performance of domestic producer RTI) did not cause the injury it observed. The USITC satisfied its obligation to perform a non-attribution analysis of the other factor, demand patterns, by focusing on domestic industry data for 2000, a year in which demand for cold-finished bar increased. Thus the USITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the USITC did not attribute to non-NAFTA imports any effects due to factors other than imports. In its consideration of non-NAFTA imports the USITC did not need to conduct a separate non-attribution analysis for NAFTA imports.[4316]

7.1827 China argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4317] At page 107 of the USITC Report, it is said that the quantity of imports from Canada from 1998 to 2000 was 63.7% greater than the quantity of all imports from the second largest source, and Canada accounted for at least 25.5% of the quantity of all imports during each year in this period. The USITC Report also says at page 107 that Canada was the top supplier of cold-finished bar to the United States for each of the last three years in the period

[4312] United States' first written submission, para. 847.
[4313] USITC Second Supplementary Report, pp. 6-7.
[4314] European Communities' first written submission, paras. 622-623.
[4315] European Communities' first written submission, para. 625. China raises a similar objection, *see* China's first written submission, para. 598.
[4316] United States' first written submission, paras. 838-846.
[4317] China's second written submission, para. 326.

examined. At the same time, the USITC Report at page 105 indicates that the record indicates that price is an important factor in purchasing decisions for cold-finished bar. Purchasers listed price second most-frequently, after quality, as the top factor in purchasing decisions, and listed price most frequently as the number two factor. Most purchasers evaluated the imports and domestically-produced cold-finished bar as comparable with respect to product consistency and product quality. However, at no time has the USITC analysed the extent to which those specific characteristics of the Canadian imports could have a specific impact on the injury caused to the United States industry, different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used by the United States prevented it from establishing that the USITC did not attribute to non-NAFTA imports any effects due to NAFTA imports (in this particular case, Canadian imports), as other factors.[4318]

(e) Rebar

7.1828 The European Communities and China submit that neither the USITC Report nor the USITC Supplementary Report contain any particular findings establishing "explicitly" that increased imports from non-NAFTA sources satisfy the conditions set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. The European Communities adds that the finding that this product does not "contribute importantly to the serious injury or threat thereof" in the USITC Report of October 2001 is not sufficient. For these reasons, the European Communities and China consider that the United States for this product failed to respect its obligation under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4319]

7.1829 The United States asserts that the USITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries caused serious injury to the domestic rebar industry. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[4320] The European Communities and China overlook footnote 704 of the USITC's analysis of all imports, which provides a detailed analysis of non-NAFTA rebar imports. In that footnote, the USITC expressly found that "the conclusions we have made concerning the effects of increased imports are equally applicable whether or not imports from Canada and Mexico are included among the imports evaluated".[4321] The meaning of this sentence is unambiguous: it is an USITC finding that increased imports from non-NAFTA sources caused serious injury to the United States rebar industry. Moreover, the USITC expressly incorporated into its analysis of non-NAFTA imports the pertinent portions of its analysis for all imports. Because the USITC expressly made this finding in its analysis of imports from all sources, there was no need for the Trade Representative to request the USITC to make supplemental findings on this issue. In its analysis of non-NAFTA imports, the USITC emphasized that non-NAFTA imports of rebar increased by 434.8% from 1996 to 2000, by 183.5% from 1997 to 1998, and by 50.2% from 1998 to 1999. Each of these increases was greater than that for all imports for the applicable time period. In its analysis, the USITC also provided information concerning the annual evolution of non-NAFTA import volumes.[4322] The USITC's analysis also demonstrated that there were imports "in such increased quantities … and under such conditions as to cause or threaten to cause serious injury" by demonstrating the genuine and substantial causal link between non-NAFTA imports and the serious injury experienced by the domestic rebar industry. The nature of that serious

[4318] China's second written submission, paras. 333-334.
[4319] China's first written submission, paras. 601-602; European Communities' first written submission, paras. 614-615.
[4320] United States' first written submission, para. 859.
[4321] USITC Report, p. 116, footnote 704.
[4322] USITC Report, p. 116, footnote 704.

injury was discussed in great detail in the USITC's analysis of all imports. The USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, therefore, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The USITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports. The USITC's report also establishes that the USITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the USITC did not need to conduct a separate non-attribution analysis for NAFTA imports.[4323]

(f) Welded pipe

7.1830 Switzerland considers that the United States has failed to fulfil its obligation of parallelism provided by Articles 2.1 and 4.2 of the Agreement on Safeguards. More particularly, China submits that the USITC Supplementary Report does not evaluate the share of the domestic market taken by non-NAFTA imports, does not evaluate other factors relevant to the situation of the industry concerned, does not make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and does not indicate explicitly whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements. China and Switzerland consider that the USITC Supplementary Report for this product "does not establish explicitly that imports from sources covered by the measure 'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards' [and] does not amount to a 'reasoned and adequate explanation of how the facts support [the] determination'", in accordance with the Appellate Body's interpretation.[4324]

7.1831 The European Communities submits that the USITC failed to carry out a proper increased imports and causation analysis for non-FTA imports. In particular, the USITC failed to separate and distinguish the impact of excluded imports and to ensure that these are not attributed to the imports covered by the safeguard measure. The import data in the USITC Report reveals that the shares of NAFTA imports in total imports were significant, reaching up to 50% in the case of certain tubular products.[4325] [4326]

7.1832 Korea submits that the USITC's supplementary discussion of threat of serious injury from non-NAFTA imports with respect to other welded pipe was perfunctory and far from complying with the standard set by the Appellate Body in previous safeguard cases. The additional information of the USITC narrowly focuses on the price gap between non-NAFTA imports and domestic products. Then, the USITC states conclusively that "excluding Canada and Mexico from the data base does not appreciably alter projections for foreign production, capacity, and exports to the United States. Indeed, capacity, production, and exports to the United States from non-NAFTA countries are all projected to reach new peaks during the period 2001-2002".[4327] This conclusive statement was made

[4323] United States' first written submission, paras. 848-858.

[4324] China's first written submission, paras. 603–605; Switzerland's first written submission, paras. 356-357.

[4325] USITC Report, Vol. II, Table TUBULAR-6.

[4326] European Communities' first written submission, paras. 622-627. The detailed arguments are set out in the product-specific section on non-attribution (H.3(b)).

[4327] USITC Response to USTR Request For Additional Information, (Questions 1 and 3) (4 February 2002), p.10 (Exhibit CC-11).

without any substantiation other than a footnote to a few tables in the USITC Report. Moreover, the tables do not support conclusions for which they are cited by the USITC. For example, the USITC asserted that the non-NAFTA capacity is projected to reach a new peak during the period 2001-2002. The analysis of the tables cited by the USITC shows that the non-NAFTA capacity stood at 17,383,373 tons in 1998 and 17,064,937 tons in 1999, while, according to the USITC table, it was projected to drop to 16,988,276 tons in 2001 and 17,074,446 tons in 2002, respectively.[4328] The perfunctory discussion of the impact of non-NAFTA imports is far from the Appellate Body's stated requirements of a "reasoned and adequate explanation" of how the facts support their injury determination by conducting a substantive evaluation of the "bearing", or the "influence" or "effect" or "impact" that the relevant factors have on the situation of the domestic industry.[4329] More importantly, the USITC failed to even acknowledge, much less explain, how it segregated the threat of injury it had determined to be caused by the largest single supplier to the United States market–*i.e.*, Canada–from all other imports. According to the USITC: Canada was the largest single supplier for the three most recent years; the quantity of imports from Canada between 1999-2000 was 141% greater than the quantity from the second largest supplier; between 1998-2000, Canada accounted for at least 35% of the imports; and imports from Canada increased their market share from 10.8% in 1999 to 14.2% in 2000.[4330] Korea concludes that the USITC clearly did not segregate the threat caused by imports from Canada from the threat caused by non-NAFTA imports. Therefore, the USITC failed to provide "reasoned and adequate explanation" that establishes explicitly that non-NAFTA imports, by themselves, satisfy the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2. of the Agreement on Safeguards.[4331] [4332]

7.1833 The United States asserts that the USITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries threatened to cause serious injury to the domestic industry producing welded pipe. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[4333] In its analysis of non-NAFTA imports, the USITC found that non-NAFTA imports increased by 80.7% from 1996 to 2000, and had major increases of 20-30% in every year of the period examined except 1999.[4334] Non-NAFTA imports of welded pipe increased at a greater rate than imports from all sources.[4335] Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The European Communities is also wrong to criticize the USITC for failing to find that the increase was "recent, sudden, sharp, and significant", and for failing to use full-year 2001 data[4336], because, as already argued, these are not the relevant criteria. USITC's analysis of all imports also described the causal link between all imports and the threat of serious injury in considerable detail. The USITC determined that, through price-based competition, increased imports caused domestic producers of welded pipe to lose market share at the same time prices were falling. The USITC also determined that increases in exports to the United States market resulting from increases in foreign capacity would continue unabated in the imminent future. These elements collectively led to the domestic industry's continuing declines in production, sales volumes and revenues, and

[4328] USITC Response to USTR Request For Additional Information, (Questions 1 and 3) (4 February 2002), p.10 (Exhibit CC-11).
[4329] Appellate Body Report, *US – Lamb*, paras. 103 and 104 (emphasis in original).
[4330] USITC Report, Vol. I, pp. 166-167 (Exhibit CC-6).
[4331] Appellate body Report, *US – Lamb*, para. 103; Appellate Body Report, *US – Wheat Gluten*, para. 98.
[4332] Korea's first written submission, paras. 195-199.
[4333] United States' first written submission, para. 871.
[4334] USITC Second Supplementary Report, p. 10.
[4335] USITC Report, Table TUBULAR-C-4.
[4336] European Communities' first written submission, paras. 622-623.

employment, as well as declines in its performance during the period of investigation, and would likely continue to cause serious injury to the domestic industry in the imminent future, if these trends continued unabated. In its analysis of non-NAFTA imports, the USITC found that each of these three causal link elements was applicable for such imports. First, the non-NAFTA imports undersold the domestically produced product in all but one quarter (32 of 33 quarters) for which data were available, and the prices for such imports declined over the period examined including during the most recent quarters.[4337] The value of the non-NAFTA imports fell by an even greater amount during the period of investigation than did imports from all sources.[4338] Second, the non-NAFTA imports gained market share at the expense of the domestic industry. In its analysis of causal link for all imports, the USITC emphasized the domestic industry's loss of market share to imports, particularly between 1999 and 2000. In its analysis of non-NAFTA imports, the USITC found that market share for non-NAFTA imports increased from 13.1% in 1996 to 19.8% in 2000.[4339] Non-NAFTA imports gained 6.7 of the 10.5 percentage points of market share the domestic industry lost from 1996 to 2000.[4340] Third, the USITC found that foreign capacity, production, and exports to the United States from non-NAFTA countries are all projected to reach new peaks during the period 2001-2002, and thus projections regarding these factors for all imports were not appreciably altered by considering only non-NAFTA imports.[4341] In its analysis of all imports the USITC examined three factors other than increased imports alleged to be causes of the threat of serious injury to the domestic welded pipe industry. It found that these other factors (changes in demand, increased domestic capacity, and non-import difficulties of a particular producer) did not cause the injury it observed. Because the USITC's analysis of all imports contained the requisite discussion of these other factors to satisfy Article 4.2(b) of the Agreement on Safeguards, and its conclusions were not based upon the particular set of imports it examined, the USITC was not obliged to discuss these factors further in its analysis of non-NAFTA imports.[4342]

7.1834 China argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4343] It is stated at page 167 of the USITC Report that Canada was the top supplier of welded non-OCTG products to the United States for each of the most recent three years in the period examined. The Report then goes on to state that the quantity of imports from Canada from 1998 to 2000 was 141% greater than the quantity of imports from the second largest source during this three-year period. From 1998 to 2000, Canada also accounted for at least 35% of the quantity of all imports during each year in this period. In addition, imports from Canada increased their market share by value from 10.8% in 1999 to 14.2% in 2000. At the same time, it is worth noting that certain United States producers are integrated with Canadian producers and that no domestic producer of welded pipe products took a position regarding NAFTA exclusions during the injury phase of the investigation. Furthermore, at page 167, it is evident that Mexico was among the top five suppliers of welded non-OCTG products to the United States in each of the most recent three years in the period examined. Mexico was also the fourth largest supplier each year during 1998-2000 and the quantity of imports from Mexico increased by 94.7% from 1996 to 2000. However, at no time has the USITC analysed the extent to which those specific characteristics of the Canadian and Mexican imports could have a specific impact on the injury caused to the United States industry, different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used

[4337] USITC Second Supplementary Report, p. 10.
[4338] USITC Report, Table TUBULAR-C-4.
[4339] USITC Second Supplementary Report, p. 10; USITC Report, Table TUBULAR-C-4.
[4340] USITC Report, Table TUBULAR-C-4.
[4341] USITC Second Supplementary Report, p. 10; USITC Report, Tables TUBULAR-30-32.
[4342] United States' first written submission, paras. 861-870.
[4343] China's second written submission, para. 326.

by the United States prevented it from establishing that the USITC did not attribute to non-NAFTA imports any effects due to NAFTA imports, as other factors.[4344]

(g) FFTJ

7.1835 China submits that the USITC supplemental finding on non-NAFTA import prices does not evaluate the share of the domestic market taken by non-NAFTA imports, it does not contain specific elements regarding the injury to the US industry caused by non-NAFTA imports, it does not evaluate other factors relevant to the situation of the industry concerned, it does not make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and it does not indicate explicitly whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements. The European Communities submits that the USITC failed to carry out a proper increased imports and causation analysis for non-FTA imports. In particular, the USITC failed to separate and distinguish the impact of excluded imports and to ensure that these are not attributed to the imports covered by the safeguard measure. The European Communities and China consider that the USITC Supplementary Report for this product "does not establish explicitly that imports from sources covered by the measure 'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards' [and] does not amount to a 'reasoned and adequate explanation of how the facts support [the] determination'", in accordance with the Appellate Body's interpretation.[4345]

7.1836 The United States asserts that the USITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries caused serious injury to the domestic FFTJ industry. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[4346] In its analysis of non-NAFTA imports, the USITC found that non-NAFTA imports of FFTJ increased during the period of investigation. Non-NAFTA imports increased from 76,079 short tons in 1996 to 100,592 short tons in 2000; there were annual increases during each year of the period of investigation except 1997. The ratio of non-NAFTA imports to United States production also increased during each year of the period of investigation except 1997, rising from 37.1% in 1996 to 51.8% in 2000.[4347] Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The European Communities is also wrong to criticize the USITC for failing to find that the increase was "recent, sudden, sharp, and significant", and for failing to use full-year 2001 data[4348], because these are not the relevant criteria. The USITC's analysis of all imports described the causal link between all imports and the serious injury in considerable detail. The USITC emphasized that the increasing presence of imports in the United States market from 1997 to 2000 coincided with declines in the domestic industry's sales, production, capacity utilization, employment, and profitability. The USITC also emphasized that, for the butt-weld pipe fitting product for which it collected pricing data, imports

[4344] China's second written submission, paras. 335-336.

[4345] China's first written submission, paras. 606–608; European Communities' first written submission, paras. 622-626; European Communities' second written submission, paras. 478-483. The detailed arguments are set out in the product-specific section on non-attribution (H.3(b)).

[4346] United States' first written submission, para. 883.

[4347] USITC Second Supplementary Report, p. 8. The USITC also found that non-NAFTA import volume, both on an absolute basis and relative to United States production, was higher in interim 2001 than in interim 2000. Ibid.

[4348] European Communities' first written submission, paras. 622-623.

consistently undersold the domestically produced product, with the highest margins of underselling occurring at the conclusion of the period of investigation. In its analysis of non-NAFTA imports, the USITC found that the first of the three causal link elements on which it relied in its analysis of all imports – increasing import presence in the United States market – was applicable for non-NAFTA imports. The USITC specifically noted the increases in market share for non-NAFTA imports during its period of investigation. Indeed, non-NAFTA imports were responsible for 7.7 of the 8.8 percentage points of market share the domestic industry lost between 1997 and 2000.[4349] The second element in the USITC's analysis of causal link for all imports focused on domestic industry performance data. Because these data did not change depending on which imports were being examined, there was no need for the USITC to discuss this factor further in its analysis of non-NAFTA imports. The third element of the causal link analysis – underselling – was also applicable to non-NAFTA imports, as the USITC found. Non-NAFTA imports undersold domestically-produced products by margins in excess of 20% for every quarter in the period of investigation after the third quarter of 1999.[4350] Consequently, the USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The USITC did not reach this conclusion by "jump[ing] into some generalizations", as alleged by the European Communities.[4351] Instead, the USITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports. In its analysis of all imports, the USITC examined five factors other than increased imports alleged to be causes of serious injury to the domestic FFTJ industry. It found that four of the five other factors (demand for oil and gas related products, increased capacity, industry inefficiency, and worker shortages) did not cause the injury it observed. Its analysis of the remaining factor, relating to purchaser consolidation, focused exclusively on domestic industry data which also did not change depending on which imports were being examined. Consequently, there was also no need for the USITC to discuss this factor further in its analysis of non-NAFTA imports.[4352]

7.1837 China argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4353] As stated in the USITC Report at page 179, Canada was the third largest supplier of FFTJ in each of the three recent years and thus was among the top five suppliers. The USITC Report also indicates that imports from Canada have accounted for an increasing share of total imports. Since 1998, imports from Canada have increased more than twice as fast (39.4%) as imports from all sources (15.6%) and Canada has accounted for 24.8% of the total increase in imports from all sources since 1998. At the same time, Mexico has been one of the top five suppliers of the product concerned and that imports had surged to an exceptionally high level in 1998 (46% higher than the next highest year during 1996-2000). At the same time (Page 172 of the USITC Report), it is indicated that in 1998 the domestic industry experienced several plant closures, and idle fitting and flange capacity. However, at no time has the USITC analysed the extent to which those specific characteristics of the Canadian and Mexican imports could have a specific impact on the injury caused to the United States industry, different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used by the United States prevented it

[4349] USITC Second Supplementary Report, p. 8; USITC Report, Table TUBULAR-C-6.

[4350] USITC Second Supplementary Report, p. 8; USITC Report, Table TUBULAR-61. The USITC also made this finding in its analysis of all imports. USITC Report, p. 176.

[4351] European Communities' first written submission, para. 625; China raises a similar objection. China's first written submission, para. 606.

[4352] United States' first written submission, paras. 873-882

[4353] China's second written submission, para. 326.

from establishing that the USITC did not attribute to non-NAFTA imports any effects due to NAFTA imports, as other factors.[4354]

(h) Stainless steel bar

7.1838 China submits that the USITC Supplementary Report does not evaluate other factors relevant to the situation of the industry concerned, does not make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and does not indicate explicitly whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements. The European Communities submits that the USITC failed to carry out a proper increased imports and causation analysis for non-FTA imports. In particular, the USITC failed to separate and distinguish the impact of excluded imports and to ensure that these are not attributed to the imports covered by the safeguard measure. The European Communities and China consider that the USITC Supplementary Report for this product "does not establish explicitly that imports from sources covered by the measure 'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards' [and] does not amount to a 'reasoned and adequate explanation of how the facts support [the] determination'", in accordance with the Appellate Body's interpretation.[4355]

7.1839 The United States asserts that the USITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries caused serious injury to the domestic stainless steel bar industry. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[4356] In its analysis of non-NAFTA imports, the USITC found that non-NAFTA imports increased by 61.1% from 1996 to 2000, and while the quantity of such imports fluctuated somewhat during the period of investigation, the largest single increase occurred from 1999 to 2000 (when they increased by 42.1%).[4357] Non-NAFTA imports of stainless steel bar increased at a greater rate than imports from all sources from 1996 to 2000 and from 1999 to 2000.[4358] Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The European Communities is also wrong to criticize the USITC for failing to find that the increase was "recent, sudden, sharp, and significant", and for failing to use full-year 2001 data[4359], because these are not the relevant criteria. The analysis of all imports also described the causal link between all imports and the serious injury in considerable detail. The USITC determined that, through price-based competition, increased imports caused domestic stainless steel bar producers to lose market share, particularly in the latter half of the period of investigation. Thus, the basic elements of the finding of causal link relating to all imports were: (1) price-based competition between imports and the like product; and (2) imports gaining market share at the expense of the domestically produced product. These elements collectively led to the stainless steel bar industry's declines in production, sales volumes and revenues, and employment, as well as its poor financial performance. In its analysis of non-NAFTA imports, the USITC found that each of the causal link elements was applicable for such imports. First, the non-NAFTA imports were even more

[4354] China's second written submission, paras. 337-338.

[4355] China's first written submission, paras. 609–611; European Communities' first written submission, paras. 622-626 and European Communities' second written submission, paras. 478-483. The detailed arguments are set out in the product-specific section on non-attribution (H.3(b)).

[4356] United States' first written submission, para. 894.

[4357] USITC Second Supplementary Report, pp. 8-9.

[4358] USITC Report, Table STAINLESS-C-4.

[4359] European Communities' first written submission, paras. 622-623.

competitive on price with the domestically-produced product than were all imports, inasmuch as the percentage of price comparisons in which underselling occurred during the period was greater for non-NAFTA imports than for all imports. The USITC found that the non-NAFTA imports undersold the domestically produced product by margins of up to 51%.[4360] The average unit values of the non-NAFTA imports fell by an even greater amount during the period of investigation than did imports from all sources.[4361] Second, the non-NAFTA imports gained market share at the expense of the domestic industry. In its analysis of causal link for all imports, the USITC emphasized the domestic industry's loss of market share to imports. In its analysis of non-NAFTA imports, the USITC found that those imports were responsible for all of this loss, as they gained all 11 percentage points of market share the domestic industry lost from 1996 to 2000.[4362] Consequently, the USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The USITC did not reach this conclusion by "jump[ing] into some generalizations", as alleged by the European Communities.[4363] Instead, the USITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.

7.1840 The United States further argues that the USITC examined three factors other than increased imports alleged to be causes of serious injury to the domestic stainless steel bar industry. It found that these other factors (changes in demand during late 2000 and 2001, increases in energy costs, and the poor operating results of two producers during the period) did not cause the injury it observed. Because the USITC's analysis of all imports contained the requisite discussion of these other factors to satisfy Article 4.2(b) of the Agreement on Safeguards, and its conclusions were not based upon the particular set of imports it examined, the USITC was not obliged to discuss these factors further in its analysis of non-NAFTA imports. Moreover, the third factor, relating to two producers' performance, related exclusively to domestic industry data which also did not change depending on which imports were being examined. Consequently, there was also no need for the USITC to discuss this factor further in its analysis of non-NAFTA imports. Thus, the USITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the USITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the USITC did not need to conduct a separate non-attribution analysis for NAFTA imports.[4364]

7.1841 China argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4365] As indicated in the USITC Report, Canada was one of the five largest suppliers of stainless steel bar during the last three full years of the period of investigation. The Report further states that Canada's growth rate in interim 2001 was 20.4% while the growth rate for all imports was a negative 17.1%. The USITC Report also notes that imports of Canadian stainless steel bar undersold domestic merchandise in seven out of ten possible price comparisons. However, at no time has the USITC analysed the extent to which those specific characteristics of the Canadian imports could have a specific impact on the injury caused to the United States industry,

[4360] USITC Second Supplementary Report, p. 9.
[4361] USITC Report, Table STAINLESS-C-4.
[4362] USITC Second Supplementary Report, p. 9; USITC Report, Table STAINLESS-C-4.
[4363] European Communities' first written submission, para. 625. China raises a similar objection. China's first written submission, para. 609.
[4364] United States' first written submission, paras. 885–893.
[4365] China's second written submission, para. 326.

different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used by the United States prevented it from establishing that the USITC did not attribute to non-NAFTA imports (in this particular case, Canada) any effects due to NAFTA imports, as other factors.[4366]

(i) Stainless steel wire

7.1842 The Europoean Communities and China submit that neither the USITC Report nor the USITC Supplementary Report contain any particular findings establishing "explicitly" that increased imports from non-NAFTA sources satisfy the conditions set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. The European Communities adds that the finding that this product does not "contribute importantly to the serious injury or threat thereof" in the USITC Report of October 2001 is not sufficient. For these reasons, the European Communities and China consider that the United States, for this product, failed to respect its obligation under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4367]

7.1843 The United States asserts that the European Communities is incorrect in complaining that the USITC did not make a finding that non-NAFTA imports of stainless steel wire fulfilled the necessary conditions for applying a safeguard measure.[4368] Both Chairman Koplan and Commissioner Bragg provided separate analyses of non-NAFTA imports relating to stainless steel wire. These analyses, read in conjunction with each Commissioner's discussion of other pertinent issues contained in his or her analysis of all imports, demonstrate that the analyses specifically considered all issues relating to imports from non-NAFTA sources. In his analysis of non-NAFTA imports, Chairman Koplan found that Canada and Mexico together accounted for a small and declining share of apparent domestic consumption over the period of investigation, while non-NAFTA imports accounted for an increasing share, with a particularly notable increase occurring between the interim periods.[4369] These were the same import volume trends he had identified in his analysis of all imports.[4370] Chairman Koplan thus found that the conclusions he had made concerning the effects of increased imports were equally applicable for non-NAFTA imports.[4371] Consequently, China's argument that the USITC Report provided no particular findings establishing serious injury by non-NAFTA imports is wrong.[4372] Chairman Koplan provided the necessary analysis by demonstrating an increase in non-NAFTA imports in the latter portion of the period and by further demonstrating the genuine and substantial causal link between non-NAFTA imports and the serious injury which threatened the domestic stainless steel wire industry. The nature of that threat of serious injury was discussed in great detail in Chairman Koplan's analysis of all imports. Chairman Koplan's analysis of all imports described the causal link between all imports and the threat of serious injury in some detail. Chairman Koplan established a direct correlation between the significant increase in the market share of all imports in interim 2001 and the substantial decline in the industry's condition in that period.[4373] In his analysis of non-NAFTA imports, Chairman Koplan found this causal link was applicable to non-NAFTA imports. Chairman Koplan specifically found that imports from Canada and Mexico did not account for substantial shares of all imports during the period of investigation. He further specifically found

[4366] China's second written submission, paras. 339-340.
[4367] China's first written submission, paras. 616-617; European Communities' first written submission, paras. 614-615.
[4368] European Communities' first written submission, para. 614; China makes a similar objection. China's first written submission, para. 616.
[4369] USITC Report, p. 260, footnote 36.
[4370] USITC Report, p. 259.
[4371] USITC Report, p. 260, footnote 36.
[4372] China's first written submission, paras. 616-617.
[4373] USITC Report, p. 258-259.

that non-NAFTA imports increased late in the period, with a particularly notable increase occurring between the interim periods, at the time the domestic industry's performance deteriorated.[4374] Chairman Koplan specifically found that non-NAFTA imports gained market share at the expense of the domestic industry. In his analysis of all imports, Chairman Koplan emphasized the loss of market share late in the period of investigation. In his analysis of non-NAFTA imports, Chairman Koplan found that non-NAFTA imports were responsible for this loss.[4375] Consequently, Chairman Koplan's analysis of non-NAFTA imports, when read in conjunction with his analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the threat of serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. Chairman Koplan examined the decline in demand as a factor other than increased imports alleged to be a cause of the threat of serious injury facing the domestic stainless steel wire industry. Chairman Koplan found, however, that the declines in the domestic industry's production and shipments were greater than the total decline in apparent domestic consumption, and the volume of imports increased despite the decline in demand.[4376] Non-NAFTA imports accounted for all of that increase. Therefore, Chairman Koplan was not obliged to discuss this factor further in his analysis of non-NAFTA imports. Thus, Chairman Koplan's analysis of non-NAFTA imports, when read in conjunction with his analysis of all imports, also establishes that he did not attribute to non-NAFTA imports any effects due to factors other than imports. In his consideration of non-NAFTA imports Chairman Koplan did not need to conduct a separate non-attribution analysis for NAFTA imports.[4377]

7.1844 The United States further argues that Commissioner Bragg performed her analysis of non-NAFTA stainless steel wire imports in the context of her like product encompassing stainless steel wire and stainless steel wire rope. Commissioner Bragg found that non-NAFTA imports increased significantly, both in terms of import levels and trends. Commissioner Bragg found that non-NAFTA imports increased by 35.2% between 1996 and 2000. She further found that non-NAFTA imports accounted for a larger share of the domestic market in 2000 than in 1996, and that their market share was larger in interim 2001 than in interim 2000. By interim 2001 non-NAFTA imports accounted for 31.1% of the United States market.[4378] Commissioner Bragg's analysis also demonstrated that there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury" by demonstrating the genuine and substantial causal link between non-NAFTA imports and the threat of serious injury facing the domestic stainless steel wire products industry. The nature of that threat was discussed in detail in Commissioner Bragg's analysis of all imports. Commissioner Bragg's analysis of all imports also described the causal link between all imports and the threat of serious injury in considerable detail. Commissioner Bragg found that increased imports at declining prices prevented domestic producers from taking advantage of increased consumption and threatened the domestic industry with serious injury.[4379] Commissioner Bragg found that this analysis was applicable for non-NAFTA imports as well. She found that prices for non-NAFTA imports declined between 1996 and 2000, and non-NAFTA imports undersold domestic products in the majority of quarterly comparisons. She also emphasized that non-NAFTA imports took market share away from the domestic industry.[4380] Consequently, Commissioner Bragg's analysis of non-NAFTA imports, when read in conjunction with her analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the

[4374] USITC Report, pp. 259-260, footnote36.
[4375] USITC Report, p. 260, footnote 36.
[4376] USITC Report, p. 259.
[4377] United States' first written submission, paras. 907-916
[4378] USITC Second Supplementary Report, pp. 22-23.
[4379] USITC Report, pp. 301-302.
[4380] USITC Second Supplementary Report, p. 23.

increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. In her analysis of all imports, Commissioner Bragg examined three factors other than increased imports alleged to be causes of the threat of serious injury to the stainless steel wire products domestic industry. Commissioner Bragg examined the general downturn in the economy, raw material costs, and the appreciation of the United States dollar.[4381] Commissioner Bragg's findings concerning these factors were based on a combination of overall United States marketplace data and domestic industry data, neither of which changed depending on which imports were being examined. Thus, there was no need for her to discuss these factors further in her analysis of non-NAFTA imports. Consequently, Commissioner Bragg's analysis of non-NAFTA imports, when read in conjunction with her analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. Her analysis also establishes that she did not attribute to non-NAFTA imports any effects due to factors other than imports. In her consideration of non-NAFTA imports Commissioner Bragg did not need to conduct a separate non-attribution analysis for NAFTA imports. The analyses of non-NAFTA imports of both Chairman Koplan and Commissioner Bragg, when read in conjunction with the analysis of all imports, establish that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the threat of serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. Chairman Koplan and Commissioner Bragg reached their conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.[4382]

(j) Stainless steel rod

7.1845 The European Communities and China submit that neither the USITC Report nor the USITC Supplementary Report contain any particular findings establishing "explicitly" that increased imports from non-NAFTA sources satisfy the conditions set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. The European Communities adds that the finding that this product does not "contribute importantly to the serious injury or threat thereof" in the USITC Report of October 2001 is not sufficient. For these reasons, the European Communities and China consider that the United States, for this product, failed to respect its obligation under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4383]

7.1846 The United States asserts that the USITC's report contains a complete and detailed analysis establishing that increased imports from non-NAFTA countries caused serious injury to the domestic industry producing stainless steel rod. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[4384] The European Communities and China overlook footnote 1437 of the USITC's analysis of all imports. In that footnote, the USITC found that imports from Canada and Mexico accounted for an extremely small percentage of total imports during the investigation period.[4385] In no single year of the period of investigation did combined imports from NAFTA sources exceed 0.08% of total imports.[4386] Exclusion of this volume of imports had no effect on the USITC's increased import determination, as the timing and the rate of the changes in import volume

[4381] USITC Report, p. 302.
[4382] United States' first written submission, paras. 917-924.
[4383] China's first written submission, paras. 612-613; European Communities' first written submission, paras. 614-619.
[4384] United States' first written submission, para. 906.
[4385] USITC Report, p. 223, footnote 1437.
[4386] USITC Memorandum INV-Y-180, Table G26 (US-40).

were essentially unchanged. Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong.[4387] Additionally, the appropriate consideration under the Agreement on Safeguards is not whether the increase in imports was "recent, sudden, sharp, and significant" in the abstract, but whether there were imports "in such increased quantities...and under such conditions as to cause or threaten to cause serious injury". The USITC provided this analysis by demonstrating the causal link between non-NAFTA imports and the serious injury experienced by the domestic industry producing stainless steel rod. The nature of that injury was discussed in great detail in the USITC's analysis of all imports. USITC's analysis of all imports described the causal link between all imports and the serious injury in considerable detail. The USITC determined that the increased quantities of imports caused domestic producers first to lose market share, then to lose revenue as they attempted to bring domestic prices into line with low-priced imports. There were several basic elements to the causal link finding: (1) high substitutability between imports and domestic merchandise in a market where price was an important consideration; (2) import increases during a period of stable demand; (3) persistent underselling by imports; and (4) consequent losses by the domestic industry of market share, production, shipments, net commercial sales and net commercial revenues. The USITC found a "clear and direct correlation" between changes in import volumes and the overall condition of the industry.[4388] In its analysis of non-NAFTA imports, the USITC found that each of these causal links was applicable to non-NAFTA imports. The USITC found specifically that exclusion of imports from Canada and Mexico did not change its volume or pricing analysis in any significant way.[4389] Non-NAFTA imports exhibited the same trends in import volume and in underselling as did imports from all sources. Consequently, the USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. In its analysis of all imports the USITC examined several factors other than increased imports alleged to be causes of serious injury to the domestic industry producing stainless steel rod. The USITC specifically examined: (1) demand declines late in the period; (2) energy cost changes late in the period; and (3) the "aberrational" performance of one domestic producer. The USITC identified and discussed in detail the nature and extent of any adverse effects attributable to each of these factors during the period of investigation and thus ensured it did not attribute to imports any injury caused by another factor. The USITC's analysis of what effects, if any, were attributable to those other factors is also equally applicable to non-NAFTA imports. In its discussion of all imports, the USITC distinguished from the serious injury attributable to imports any effects attributable to declines in demand. It noted that demand declines only occurred late in the period under investigation.[4390] By contrast, the domestic industry had experienced declines in market share, production volumes, sales, employment, and profitability before the decline in demand began but after import volumes had increased.[4391] As the USITC noted in its analysis of non-NAFTA imports, the volume and pricing of non-NAFTA imports followed the same trend over the period of investigation as did imports from all sources; indeed, non-NAFTA imports accounted for essentially all imports and all underselling observations.[4392] Thus the USITC's conclusion regarding the nature and extent of injury attributable to increased imports was unchanged, and the USITC was not obliged to further discuss demand declines in its analysis of non-NAFTA imports. The examination of the remaining two factors – increased energy costs and the poor performance of one domestic producer

[4387] European Communities' first written submission, para. 614.
[4388] USITC Report, pp. 220-221.
[4389] USITC Report, p. 223, footnote 1437.
[4390] USITC Report, p. 221.
[4391] USITC Report, p. 221.
[4392] USITC Second Supplementary Report, p. 5.

during the period of investigation – pertained exclusively to domestic industry data which did not change depending on which imports were being examined. Consequently, there was also no need for the USITC to discuss these factors further in its analysis of non-NAFTA imports. Thus, the USITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the USITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the USITC did not need to conduct a separate non-attribution analysis for NAFTA imports.[4393]

L. ARTICLE 5.2 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIII OF GATT 1994

1. Basis for determining overall quota level

7.1847 China argues that the basis upon which the United States allocated the shares of the quota for slab in setting the tariff rate quota for that product is unclear.[4394] In particular, China argues that taking into account the official United States statistics, the overall quota for the first year (5.4 million short tonnes) was fixed at a very low level in light of former trade.[4395] China argues that, except for the six first months of 2001 and for 1997 (5.3 million tons), imports in the United States were always higher than 5.3 million tons. For the other years (1996, 1999 and 2000), the volume of imports was very large (6.2 million tons, 7.3 million tons and 7.2 million tons respectively).[4396] China argues that, therefore, it was not possible to fix an overall quota at 5.4 million tons. According to China, this fixation should be considered a violation of Article 5.2 of the Agreement on Safeguards and Article XIII of the GATT 1994.[4397]

7.1848 In response, the United States argues that it based the total quota amount of 5.4 million tons on imports of slab during 2000, exclusive of FTA imports that were not subject to the safeguard measures.[4398] The United States submits that the year 2000 happened to be the year with the highest import levels of slab during the USITC's investigation period.[4399]

2. Allocation of shares of tariff rate quotas and "substantial interest"

7.1849 China also notes that it has not been granted any specific quota in respect of the safeguard measure for slab and is included in the volume allocated to "all other" countries.[4400] China points to Article 5.2 of the Agreement on Safeguards and argues that pursuant to this Article, a Member shall allot shares of the tariff rate quota to Members "having a substantial interest". The same terminology also exists in Article XIII of the GATT 1994, which provides that "the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions".[4401]

7.1850 China argues that following the approach of the Panel in the *EC – Bananas III* case, a Member having a "substantial interest" may be defined as a Member with a share of at least 10% of the total imports in the country concerned. For countries with a share between 5% and 10%, a case by

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[4393] United States' first written submission, paras. 895–905.
[4394] China's first written submission, para. 628.
[4395] China's first written submission, para. 629.
[4396] China's first written submission, para. 630.
[4397] China's first written submission, para. 631.
[4398] United States' first written submission, para. 1216.
[4399] United States' first written submission, paras. 1215 and 1226.
[4400] China's first written submission, para. 632.
[4401] China's first written submission, para. 634.

case analysis should be conducted. For countries with a share between 0% and 5%, it should be concluded *a priori* that these countries do not have a substantial interest.[4402]

7.1851 China submits that it does not seem to reach a sufficient percentage for slabs imports in order to have a "substantial interest" since China's share accounts for less than 1% during the period).[4403] However, China argues that even if it has no "substantial interest" for slabs imports, the United States should still not be allowed to discriminate between WTO Members.[4404] China notes in particular that in the *EC – Bananas III* case, the Appellate body confirmed that the non-discrimination principle applies to the allocation of shares in a tariff rate quota, and implies, in particular, that a Member cannot *"allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest"*.[4405] In this regard, China submits that, in the present case, the United States allotted shares of the tariff quota to certain Members not having a "substantial interest" for slabs. For example, China notes that the market shares of certain countries were far below 5% (Ukraine and Japan). Moreover, China submits that for Russia (7.45%) and Australia (6.38%), the assessment of their "substantial interest" was highly questionable.[4406]

7.1852 China argues that, therefore, it appears that the United States allotted shares of the tariff quota to WTO Members (at least Japan and Ukraine) not having a "substantial interest" for slabs, while they did not do the same for other Members (such as China).[4407] China, therefore, considers that the safeguard measure on slabs must be regarded as incompatible with Article 5.2 of the Agreement on Safeguards and Article XIII of the GATT 1994.[4408] In this regard, China further argues that the Panel in *US – Line Pipe* established that Article 5 of the Agreement on Safeguards and Article XIII of the GATT 1994 may be relied upon simultaneously to analyse a safeguard measure.[4409] China further notes that, according to Article XIII.5, these requirements also apply to tariff rate quotas. In particular, China argues that Article XIII.2(d), whose wording is identical to Article 5.2(a) of the Agreement on Safeguards, applies to the allocation of shares of a tariff rate quota in the context of a safeguard measure.[4410]

7.1853 With regard to the argument that the tariff allocation system is inconsistent with Article 5.2 and Article XIII because it provided allotments to some Members that were not substantial suppliers while failing to provide allotments to other Members, including China, that were not substantial suppliers, the United States relies upon the Panel decision in *US – Line Pipe* to argue that Article 5.2, which applies to quantitative restrictions, does not apply to safeguard measures that take the form of a tariff rate quota.[4411] The United States submits in response to the assertion by China that the Panel in *US – Line Pipe* decided that Article 5 and Article XIII could apply simultaneously to analyse a safeguard measure, that the Panel actually reached the opposite conclusion with regard to safeguard measures in the form of a tariff rate quota.[4412] It notes that the Panel found that "[w]e do not consider that tariff quotas are 'quantitative restriction[s]' within the meaning of Article 5" and that "[s]ince we have already found that a tariff quota is not a 'quantitative restriction' (a broader category including

[4402] China's first written submission, para. 635.
[4403] China's first written submission, para. 636.
[4404] China's first written submission, para. 637.
[4405] China's first oral statement, para 8.
[4406] China's first written submission, para. 638.
[4407] China's first written submission, para. 639.
[4408] China's first written submission, para. 640.
[4409] China's first written submission, para. 621.
[4410] China's first oral statement, para 5.
[4411] United States' first written submission, para. 1220.
[4412] United States' first written submission, para. 1221.

quota) within the meaning of Article 5.1, it cannot constitute a 'quota' (a narrower category of quantitative restriction) within the meaning of Article 5.2(a)."[4413] However, the United States does agree that Article XIII:2 applies to the allotment of shares under a tariff rate quota in accordance with Article 5 of the Agreement on Safeguards.[4414]

7.1854 China responds by referring to the following language in the *EC – Bananas III* case: "As provided in paragraph 5, Article XIII also applies to tariff quotas. Article XIII:1 sets out a basic principle of non-discrimination in the administration of both quantitative restrictions and tariff quotas". China submits that, as a consequence, Article XIII:2(a) whose wording is identical to Article 5.2(a) of the Agreement on Safeguards, shall apply to the allocation of shares of a tariff rate quota in the context of a safeguard measure. China asserts that, therefore, should Article 5.2 of the Agreement on Safeguards not apply, as the United States claims, to safeguard measures that take the form of a tariff rate quota, the allocation of shares in this tariff rate quota should remain subject to Article XIII.2 (a) of the GATT 1994, which imposes the same requirements as those formulated in Article 5.2(a), on a Member applying a safeguard measure. China argues that, nonetheless, Article 5.2(a) whose wording is identical to Article XIII.2(a), should apply to the allocation of shares of a tariff rate quota.[4415]

7.1855 The United States notes that China ascribes to the Panel in *EC – Bananas III* an "approach" under which a Member with at least 10% of total imports is automatically a substantial supplier, a Member with less than 5% of total imports is automatically not a substantial supplier, and a case-by-case analysis is applied to Members with between 5% and 10% of total imports.[4416] In deriving a numerical test from the *EC – Bananas III* Panel Report, the United States submits that China does exactly what the Panel stated it would not do. According to the United States, the Panel not only rejected precise numerical thresholds in general, but specifically rejected the 10% threshold proposed by the complainants.[4417] The United States submits that the Panel's finding in that case that it was not unreasonable for the European Communities to conclude that Colombia and Costa Rica were the only contracting parties that had a substantial interest in supplying the European Communities banana market in terms of Article XIII:2(d) was tightly circumscribed and conditioned on the "particular circumstances" of the case. According to the United States, that finding cannot be read to create a set of presumptions as to what share of imports gives a supplier a "substantial interest in supplying the product" in the meaning of Article XIII:2(d). Accordingly, the US approach of setting a two-percent threshold for treatment as a substantial supplier in light of the conditions of the slab market, rather than using numerical thresholds based on the market for a different product, was consistent with Article XIII:2(d).[4418]

7.1856 China argues that although it is true that the Panel, in the *EC – Bananas III* case, also stated that "a determination of substantial interest might well vary somewhat based on the structure of the market", it should be underlined that a "substantial interest" cannot be determined arbitrarily and cannot correspond to negligible amounts. According to China, this analysis may entail a comparative exercise that is based on the structure of the market. This involves an assessment of the position of the different suppliers of the product concerned on this market. This, argues China, is confirmed by

[4413] United States' first written submission, para. 1220, citing Panel Report, *US – Line Pipe*, paras. 7.69 and 7.73-7.74.
[4414] United States' written reply to Panel question No. 64 at the second substantive meeting.
[4415] China's second written submission, paras. 348-351.
[4416] United States' first written submission, para. 1222.
[4417] United States' first written submission, para. 1223.
[4418] United States' first written submission, paras. 1224-1225.

the reasoning of the Panel in the *EC – Bananas III* case, which based its conclusions regarding the identification of Members having a substantial interest on the level of their market shares.[4419]

7.1857 China submits that, in this particular case, it is clear that a 2% threshold cannot be considered as corresponding to a "substantial" interest in the supply of slabs. According to China, this is particularly true considering the shares of imports of the main suppliers as determined by the United States. Based on the total of imports for 2001, Brazil's share is 39.20%, Mexico's is 23.52% and Russia's is 18.83%. Based on the total of non-NAFTA imports for 2001, Brazil's share is 51.84% and Russia's is 24.90%. In comparison to these data, China submits that it seems unreasonable to consider that Members with a share of only 2% of imports have the same "substantial" interest as these major suppliers.[4420] Accordingly, it seems reasonable to consider that the thresholds identified by the Panel in the *EC – Bananas III* case and which, in China's understanding, reflect the common practice of WTO Members, should also apply in the present case.[4421]

7.1858 China further asserts that although, according to the data provided by the United States related to the top ten suppliers, there were three countries (Canada, Venezuela and China) below the 2% level, imports from those countries were not treated in the same way, and that indeed while imports form Canada and Venezuela were finally excluded from the scope of the safeguard measures, imports from China were fully subject to the import restrictions on slabs without any specific allocation in the tariff rate quota.[4422]

7.1859 The United States counter argues that China has failed to meet its burden of proof in objecting that the 2% threshold chosen by the United States is too low. According to the United States, China appears to make the argument that a Member cannot have a substantial interest if any other source accounts for a significantly greater share of imports, which is not the standard applied by Article XIII. The United States argues that Article XIII simply states that a Member is entitled to an allotment of a tariff rate quota it is has a "substantial interest in supplying the product" and does not impose obligations regarding how a Member applying tariff rate quotas determine whether another Member has a substantial interest and so the United States was entitled to base its compliance with Article XIII solely on the volume of another Member's shipments, on its share of imports, or any other information that would establish that the other Member has a substantial interest in supplying the product. The United States argues that elsewhere even China seems to argue for an absolute rule that countries accounting for at least 10% of imports must be treated as having a substantial interest. This would mean that a Member could thereby meet this threshold regardless of whether another source accounts for a significantly greater share of imports.[4423]

7.1860 The United States argues as regards the suggestion that it treated differently Members with less than a 2% market share, that except for developing countries and FTA partners that were excluded entirely from the safeguard measure, the United States did treat these Members in the same manner.[4424]

[4419] China's written reply to Panel question No. 63 at the second substantive meeting.
[4420] China's second written submission, paras. 356-357.
[4421] China's first oral statement, paras. 10-12.
[4422] China's written reply to Panel question No. 66 at the second substantive meeting.
[4423] United States' written reply to Panel question No. 63 at the second substantive meeting.
[4424] United States' written reply to Panel question No. 66 at the second substantive meeting.

3. Period for determining "substantial interest"

7.1861 The United States submits that it considered the one-year period of 2001 to be a recent, representative period for shares of imports. Therefore, the USITC based the identification of substantial suppliers and allotments of the duty-free quantity among substantial suppliers on shares of total imports in 2001. In so doing, the United States argues that it complied fully with the obligation under Article XIII:2(d) to provide allotments to substantial supplying Members "based upon the proportions, supplied by such Members during a previous representative period".[4425] The United States submits that it decided that in light of the size of the US market for slab and the large quantity of imports, 2% of total imports was an appropriate threshold in this case. Consistent with these considerations, the United States treated as substantial suppliers all countries that exceeded 2% of total imports in 2001[4426], and provided specific allocations only to those countries that it considered to have a substantial interest.[4427] The United States notes in this regard that, with the exception of Brazil and Mexico, the share of total imports held by each source fluctuated to a large degree from year to year. The use of 2001 import share data had the additional benefit of treating as substantial suppliers only countries that had consistently supplied more than 2% of imports. Thus, according to the United States, the identification of substantial suppliers was not based on temporary fluctuations in import shares.[4428] China argues that based on full-year imports data for 2001 there would be a cluster of countries with a market share above 18%, and a cluster of countries with a market share below 6%, being understood that no other country is to be found between these two thresholds. According to the same logic, but based on the supplied quantities, on would identify a cluster of countries that have supplied over 1,000,000 tons, and a cluster of countries that have supplied less than 400,000 tons. According to China, those are also clear dividing lines.[4429] China noted that the United States based its determinations of substantial suppliers on data concerning the full year 2001, i.e. data that were supposed not to be available by the time of the adoption of the safeguard measure. However, this implies that the justifications given by the United States in its first written submission and in its answers to the questions of China are based on data that were included neither in the USITC report nor in the proclamation and therefore have not been communicated to the interested parties.[4430]

7.1862 The United States also argues that its use of data for the year 2001 for determination of "substantial interest" was not inconsistent with the USITC's analysis of whether imports increased. According to the United States, the ""substantial interest"" standard arises under Article XIII:2(d), which provides that a Member allocating a TRQ among other Members must allot shares to Members "having a substantial interest in supplying the product . . . based upon the proportions, supplied by such [Members] during a previous representative period, of the total quantity or value of imports of the product". The United States argues that, however, Article XIII provides no guidance for determining what constitutes a "previous representative period", and the Agreement on Safeguards does not require that the period used be coterminous with or subsumed within the investigation period. The United States submits that there can be no question that 2001 was "recent" at the time of the safeguard measures. Data for that year was also representative of import patterns. The United States asserts that it was, therefore, entirely consistent with Article XIII:2 for the President to use 2001 as the recent representative period.[4431]

[4425] United States' first written submission, para. 1215.
[4426] United States' first written submission, para. 1216.
[4427] United States' written reply to Panel question No. 67 at the second substantive meeting.
[4428] United States' first written submission, para. 1217.
[4429] China's second written submission, paras. 366-368.
[4430] China's second written submission, para. 359.
[4431] United States' written reply to Panel question No. 65 at the second substantive meeting.

M. ARTICLE 9.1 OF THE AGREEMENT ON SAFEGUARDS (SPECIAL AND DIFFERENTIAL TREATMENT)

1. Identification of developing countries for the purposes of Article 9.1

7.1863 China argues that the United States unilaterally and arbitrarily links developing country status of Article 9.1 of the Agreement on Safeguards with the United States' Generalised System of Preferences. In this regard, China points out that within the context of the GSP – a unilateral instrument – the donor country has clear discretion in deciding the list of beneficiaries.[4432] China further points out that there may be GSP schemes (including the United States GSP) that include criteria for country eligibility, which are unrelated to the level of development. Accordingly, if a country is excluded from the United States GSP, this does not necessarily mean that this country is not a developing country.[4433] The application of such criteria would allow a WTO Member to exclude countries, which level of development would qualify them under the generally accepted term of "developing country" from the benefit of GSP Schemes for reasons other than considerations based on the level of development, and that such criteria would allow a country to select their GSP beneficiaries and to discriminate between countries whose level of development would allow them to be objectively considered as "developing countries".[4434] Further in China's view, it is not possible that a single Member be considered a developing country by, say, the United States and not the European Communities and others in respect of the same dispute or the same provision. To proceed otherwise would deprive WTO developing country Members from all legal certainty as far as their rights and obligations under WTO Agreements are concerned. To proceed otherwise would also be in contradiction with the need for a multilateral approach of the "special and differential treatment" provisions within the WTO.[4435]

7.1864 In response, the United States argues that it is possible that a single Member be considered a developing country by, say the United States, and not the European Communities and others in respect of the same dispute or the same provision. By way of example, the United States notes that it treated Albania, Bulgaria, Croatia, the Czech Republic, Estonia, Georgia, Kyrgyzstan, Latvia, Lithuania, Moldova, Romania, Slovakia, Slovenia, Hungary, Poland, and Turkey as developing country Members in the application of its steel safeguard measures whereas the European Communities treated none of these Members as developing countries when it applied its own safeguard measures on steel.[4436] The United States argues that China itself has accepted this principle by agreeing in its Protocol of Accession to developing country treatment in some areas, and non-developing country treatment in others.[4437] The United States argues further that these differences arise from the text of Article 9.1, which does not indicate how a Member must comply with its obligations under that Article. Since it is an obligation relating to application of a safeguard measure, it falls to the Member applying a measure to identify, in the first instance, Members eligible for treatment as developing countries for purposes of Article 9.1. Since different Members may apply different procedures, they may reach different results.[4438]

7.1865 The United States acknowledges that, for each of the ten safeguard measures, it identified developing country Members in keeping with its list of countries eligible for the its GSP, a program of

[4432] China's first written submission, para. 655.
[4433] China's first written submission, para. 656.
[4434] China's first oral statement, paras. 24 and 25.
[4435] China's written reply to Panel question No. 127 at the first substantive meeting.
[4436] United States' written reply to Panel question No. 127 at the first substantive meeting.
[4437] United States' written reply to Panel question No. 126 at the first substantive meeting.
[4438] United States' written reply to Panel question No. 127 at the first substantive meeting.

benefits for developing countries.[4439] The United States notes in this regard that the WTO Agreement does not define the term "developing country" nor does it establish a procedure or method for determining when a Member qualifies for that status.[4440] The United States argues that, therefore, in assessing this claim, the Panel need not address the procedure used by the United Sates for identifying developing country Members as a general matter.[4441] According to the United States, under Article 9.1, it is the Member applying a safeguard measure that has the obligation to identify the developing country Members not subject to application of the measure. This conclusion, argues the United States, derives from the ordinary meaning of Article 9.1 and its context within the Agreement on Safeguards and WTO Agreement.[4442] The United States further argues that this conclusion is confirmed by the requirement in footnote 2 to Article 9.1 that "[a] Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards". Neither the footnote nor the Article 12 rules for making notifications provides any role in this process for exporting Members, indicating that the importing Member alone has the obligation to identify which Members are developing country Members and which of those to exclude. The United States submits that the structure of Article 12 supports this conclusion. Under that article, the Member that makes a decision or takes an action with respect to a safeguard measure is the party that provides notification of such decision or action.[4443] The United States asserts that the Appellate Body confirmed this interpretation in *US – Line Pipe*, when it stated, "[w]e agree with the United States that Article 9.1 does not indicate how a Member must comply with this obligation".[4444] Therefore, according to the United States, the Article 9.1 requirement that the Member taking a safeguard measure notify any exclusion of developing country Members demonstrates that it is the Member taking the measure that has the obligation to decide which countries qualify for exclusion.[4445]

7.1866 The United States asserts further that since the obligation falls upon the application of the measure, it is the Member applying the measure that must determine how to comply. Article 9.1 assigns no obligation concerning or role in this identification process to exporting Members, developing country or otherwise.[4446] According to the United States, this approach will seldom create difficulties because, in most cases, Members have not disagreed as to the treatment they will afford each other.[4447] The United States argues that since the Member applying the measure is responsible for compliance with Article 9.1, it must identify which Members are developing countries for the purposes of the Agreement on Safeguards, and whether imports from those sources are below the 3% threshold.[4448]

7.1867 The United States also notes that development status factors into the first, second, and third criteria for GSP eligibility under section 502(c) of the Trade Act of 1974. The United States argues that these development criteria are introduced by the phrase "shall take into account", which demonstrates that they are required criteria.[4449] Moreover, under section 502(b)(1) of the Trade Act,

[4439] United States' first written submission, para. 1258.
[4440] United States' first written submission, para. 1261.
[4441] United States' first oral statement, para. 81.
[4442] United States' first written submission, para. 1259.
[4443] United States' first written submission, para. 1264.
[4444] United States' first written submission, para. 1263.
[4445] United States' first written submission, para. 1264.
[4446] United States' first written submission, para. 1260.
[4447] United States' first written submission, para. 1262.
[4448] United States' first written submission, para. 1261.
[4449] United States' second oral statement, para 151.

specific developed countries – Australia, Canada, EU member states, Iceland, Japan, Monaco, New Zealand, Norway, and Switzerland – may not be designated as GSP beneficiaries.[4450]

7.1868 China however counter-argues that the criteria under the first second and third criteria Section 502 (c) are discretionary. Further, there are a number of other discretionary criteria which have nothing to do with development status such as Section 502 (c) (4), which deals with access to markets and export practices. China submits that there are also seven[4451] other mandatory criteria which are unrelated to development status, contained in Section 502 (b), which excludes for instance a country from GSP beneficiary status if it is dominated or controlled by international communism.[4452] China argues that allowing the United States to base their decision on the GSP–eligible beneficiaries list means that the United States would have the possibility to exclude China from the benefit of Article 9.1 for this safeguard case, or any future case, for reasons that have nothing to do with development. China argues that it is in acknowledgement of this problem that President Bush issued the 3 July Proclamation allowing the USTR to add developing countries to the United States GSP List.[4453]

7.1869 China notes that, in the present case, the US President affirmed that "For purposes of the safeguard measures established under the Proclamation, I determine that the beneficiary countries under the Generalized System of Preferences are developing countries".[4454] China argues that this statement establishes a clear link between the United States GSP and the developing country status under Art 9.1 of the Agreement on Safeguards. According to China, the United States confirmed this link by stating that:"…the President determined that the GSP list of countries encompasses all the countries eligible for treatment as developing country Member under Article 9.1,……and that the list in subdivision (d)(i) contains all developing countries that are also WTO Members". China argues that there would seem to be a contradiction between this statement and the text of a presidential proclamation of 3 July 2002. Indeed, paragraph 1 of this proclamation states that: "The USTR is authorized, upon publication of a notice in the Federal Register of his determination that it is appropriate to add WTO member developing countries to the list of countries in subdivision (d)(i) of Note 11, to add such countries to that list". According to China, this clearly demonstrates that the list in subdivision (d)(i) did not necessarily cover all the developing countries that are WTO Members.[4455] China argues that such a determination is not acceptable as far as China is concerned. Indeed, the fact that a WTO Member is excluded from the United States GSP cannot be a reason, in itself, to consider that it is not a developing country within the meaning of Article 9.1 of the Agreement on Safeguards.[4456]

7.1870 China notes in this context that, in the past, opposition had already been voiced in the WTO over the manner in which the United States had excluded a developing WTO Member from eligibility under Article 9.1 of the Agreement on Safeguards on the grounds that the developing Member was not included in the preference-giving piece of legislation. China relies upon statements made by two Members in meetings of the Committee on Safeguards, to the effect, *inter alia*, that "it had been

[4450] United States' written reply to Panel question No. 126 at the first substantive meeting.
[4451] China's second oral statement, para. 25.
[4452] China's second written submission, para. 398, China's second oral statement, para. 24.
[4453] China's second written submission, paras. 399-400.
[4454] China's first written submission, para. 653.
[4455] China's first oral statement, paras. 18-20.
[4456] China's first written submission, para. 654.

longstanding GATT practice that developing country status was self-elected, and that this practice had not changed since the coming into force of the WTO".[4457]

7.1871 With respect to the argument that the long-standing practice under the GATT and the WTO has been that the determination of a Member's development status is by self-selection, the United States submits that China provides no evidence of such a practice in defining or interpreting the rights and obligations of Members. Instead, China has offered, in support, a statement representing the views of two Members. China fails to establish the legal relevance of such a practice even if it existed, since that "practice" would not contribute to the definition of a developing country Member but only indicate individual Members who considered that they met the definition. The United States submits that the statements referred to by China are not an authoritative, or even indicative, statement of the practice of the Members. According to the United States, in fact, the WTO does not even have an established procedure for Members to register their claim to be a developing country Member. Under China's reasoning any and all WTO Members could claim benefits intended for developing countries which would effectively read out of Article 9.1 the term "developing".[4458]

7.1872 The United States also argues that China has not established that its identification of developing country members in keeping with the GSP list is inconsistent with the Agreement on Safeguards. In this regard, the United States argues that it applied Article 9.1 in keeping with the list of developing countries that are eligible for special and differential treatment under the US GSP. The United States asserts that there is nothing about the US GSP list that establishes an inconsistency with Article 9.1.[4459]

7.1873 China argues that the US President affirmed that: "For purposes of the safeguard measures established under the Proclamation, I determine that the beneficiary countries under the Generalized System of Preferences are developing countries".[4460] China notes that the US President did not say that, "for the purposes of the safeguard measures established under the Proclamation, "developing countries" within the meaning of Article 9.1 of the Agreement on Safeguards are the beneficiary countries under the GSP".[4461] China argues that such a particularly convoluted wording from the United States authorities reveals that a WTO Member that is not a beneficiary country under the United States GSP may still be classified as developing country in the context of Article 9.1 of the Agreement on Safeguards.[4462]

7.1874 China also notes that the "positive list" of developing countries excluded from the application of the United States measures is given, in subdivision d(i) of point 11 of the Annex to the Presidential Proclamation, with the following statement: "… the following developing countries that are members of the World Trade Organization shall not be subject to the rates of duty and tariff-rate quotas provided for therein".[4463] China asserts that this statement also reveals that not all the developing countries that are Members of the WTO are excluded from the United States' measures.[4464]

7.1875 The United States argues that the relevant documents do not support China's claim that the United States failed to exclude members that the United States considered to be developing country members. China notes that the introductory text to subdivision (d)(i) states that "the following

[4457] China's first written submission, para. 658.
[4458] United States' first written submission, para. 1261.
[4459] United States' first written submission, para. 1270.
[4460] China's first written submission, para. 661.
[4461] China's first written submission, para. 662.
[4462] China's first written submission, para. 663.
[4463] China's first written submission, para. 664.
[4464] China's first written submission, para. 665.

developing countries that are members of the World Trade Organization shall not be subject to the rates of duty and tariff-rate quotas provided therein". China considers that the use of "the following" in this statement indicates that the list does not contain all developing country WTO Members. The United States submits that this is incorrect. The statement merely reflects that the subsequent list represents a subset of the group of all developing countries, namely, those developing countries that are also WTO Members. Indeed, not all beneficiary countries under the US GSP program are WTO members.[4465] The United States argues that the President determined that the GSP list of countries encompasses all the countries eligible for treatment as developing country Members under Article 9.1, and that the list in subdivision (d)(i) contains all developing countries that are also WTO Members.[4466]

7.1876 The United States argues that none of the Complainants have established a *prima facie* case of inconsistency with the Safeguards Agreement. In order to do so, they would have had to show that the safeguard measures were applied to a developing country Member accounting for less than three percent of total imports, when total imports from such countries did not exceed nine percent of total imports. Neither China nor Norway has met this threshold requirement. Norway does not identify any developing country Member that it believes was improperly subjected to a safeguard measure. China, for its part, argues only that it has designated itself a developing country Member for purposes of Article 9.1.[4467]

7.1877 In response to a question posed by the Panel, the United States acknowledged that the United States GSP is not always the basis upon which the United States identifies developing countries for the purposes of provisions on special and differential treatment contained in other WTO Agreements. The United States also acknowledged that the GSP list did not represent developing countries for WTO purposes. By way of explanation, the United States notes that some of the countries on the GSP list – such as Comoros, Equatorial Guinea, and Ethiopia – are not WTO Members. Nevertheless, the United States notes that there is no list of developing countries in the WTO against which to compare its GSP list.[4468]

2. Qualification of China as a developing country

7.1878 According to China, self-designation should apply and entitle that Member to benefit of the WTO special and differential treatment provisions available for developing countries as long as this right is not challenged specifically by another Member on the basis of an adequate and reasoned explanation.[4469] China notes that its claim that it qualifies as a developing country for the purposes of Article 9.1 is based on the self-designation by China as a developing country for the purposes of the WTO Agreements.[4470] China argues that this situation is reflected in the report of the Working Party on the accession of China, as well as in the Protocol of Accession.[4471]

7.1879 China argues that by referring to documents related to its Protocol of Accession, it is clear that China has provided sufficient evidence that it has met its burden of proof that the United States failed to comply with Article 9.1 of the Agreement on Safeguards.[4472] China also notes that the reports of the Working Party have been accepted and adopted by WTO Members, including the

[4465] United States' first written submission, para. 1275.
[4466] United States' first written submission, para. 1276.
[4467] United States' first oral statement, paras. 82-83.
[4468] United States' written reply to Panel question No. 124 at the first substantive meeting.
[4469] China's written reply to Panel question No. 121 at the first substantive meeting.
[4470] China's written reply to Panel question No. 121 at the first substantive meeting.
[4471] China's written reply to Panel question No. 121 at the first substantive meeting.
[4472] China's second written submission, para. 378.

United States. China argues that, consequently, all these documents are an integral part of the WTO Agreement.[4473]

7.1880 With regard to China's self-designation as a developing country, China notes that although important achievements have been made in its economic development, China is still a developing country and, therefore, should have the right to enjoy all the differential and more favourable treatment accorded to developing country Members pursuant to the WTO Agreement. Accordingly, some WTO Members felt the need to address China's specific situation through a pragmatic and "tailored" approach . This approach, says China, is reflected in China's Protocol of Accession. China submits that this reflects the agreement reached between China and other WTO Members that China, for certain specific WTO Agreements, would not benefit from certain WTO provisions available only to developing countries. China submits that this underlines the fact that WTO Members acknowledged that China is a developing country and was entitled to benefit from the special and differential treatment provisions contained in the WTO Agreements and available only to developing countries but also, that the benefits linked to this status should simply be excluded for certain WTO Agreements. These specific Agreements included those related to agriculture, TRIMs and subsidies. China notes that, however, there was no specific provision in the Accession Protocol related to the Agreement on Safeguards and the application of Article 9.1 and that, unlike the other three specific areas, nobody questioned the fact that China could benefit from special and differential treatment in other areas , during China's accession process.[4474]

7.1881 China submits that this is particularly true in the context of Article 9.1 of the Agreement on Safeguards. More particularly, China submits that such a conclusion is all the more understandable that Article 9.1 should be considered as being pragmatic enough. Indeed, if a developing country is above the 3% threshold, that country will not benefit from Article 9.1. Accordingly, accepting the status of developing country for China in the context of Article 9.1 has limited consequences, since the *de minimis* test acts as a "safety net" for the Member applying the measure.[4475] China submits that China's self-designation should, therefore, have remained valid in the context of this Agreement. In any event, the United States should have provided a reasoned and adequate explanation as to why it was possible to exclude China from the benefit of Article 9.1.[4476]

7.1882 The United States submits that China's sole argument in support of its claim to be a developing country Member is the assertion that it is, and has always claimed to be, a developing country Member, especially when it acceded to the WTO. The United States argues that although China may consider itself a developing country Member, its Protocol of Accession to the WTO clearly indicates that Members took a different view of China's situation. Members indicated that because of significant size, rapid growth and transitional nature of the Chinese economy, a pragmatic approach needed to be taken in determining China's need for recourse to transitional periods and other special provisions in the WTO Agreement available to developing country WTO members. "Each agreement and China's situation should be carefully considered and specifically addressed". This is precisely the approach taken throughout China's accession documents.[4477] The United States asserts that in particular instances, under certain WTO agreements, China has explicitly abandoned any claims to treatment as a developing country.[4478] The United States contends that China has admitted that the Protocol does not specifically address treatment under the Safeguards Agreement. Thus, in

[4473] China's second written submission, para. 389.
[4474] China's second written submission, para. 386.
[4475] China's second written submission, para. 387.
[4476] China's written reply to Panel question No. 122 at the first substantive meeting.
[4477] United States' first written submission, para. 1267.
[4478] United States' first written submission, para. 1268.

the United States' view, the only possible conclusion is that the Protocol and Working Party Report do not establish China's entitlement to treatment as a developing country for purposes of Article 9.1.[4479]

7.1883 The United States submits that these commitments demonstrate that China is not invariably treated as a developing country Member for purposes of the covered agreements. Thus, it cannot rely on a pattern of developing country treatment to support a claim for that status. Since it has provided no other basis for asserting developing country status, the United States submits that China has not met its burden of proof to establish that the US was required under the Agreement on Safeguards to exclude exports from China from the United States' safeguard measures.[4480]

7.1884 In this regard, the United States notes that it has not taken a position in this dispute as to how any other Member would establish that it would be entitled to treatment as a developing country under Article 9.1. Nor is it necessary to resolve that question, as no other Member has claimed to be a developing country Member that has been subject to the steel safeguard measures in a manner inconsistent with Article 9.1.[4481]

3. Qualification of China under the *de minimis* test

7.1885 China argues, in response to a question posed by the Panel, that although it was not primarily up to China to apply the *de minimis* test, it appears, on the basis of preliminary calculations and of USITC statistics available to the United States' President, that China had a share of imports into the United States accounting for less than 3%, with the de minimis exporting developing country Members collectively accounting for no more than 9% of total imports, for at least the following products: slab, hot-rolled steel sheets, coated steel, hot-rolled bar, cold-rolled bar, rebar, tin mill products, stainless steel bar and stainless steel rod.[4482] China argues that, therefore, for a large number of products, China should have been excluded from the scope of application of the safeguard measure. China alleges that the necessary statistical data were available to the USITC at the time of the adoption of the measures from which the United States failed to draw the proper conclusions.[4483] The fact that the *de minimis* test was not alleged is due to the fact that, as a first step, the United States denied China's right to be a "developing country" within the meaning of Article 9.1 and that, therefore, there was no need to examine the second step (i.e. the de minimis test) when the United States denied the right to benefit from the first step.[4484]

4. Relationship between Articles 9.1 and 3.1 of the Agreement on Safeguards

7.1886 China argues that Article 9.1 of the Agreement on Safeguards needs to be read in connection with Article 3.1 of the Agreement, which provides that: "The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".[4485] China is of the opinion that Article 3.1 of the Agreement on Safeguards covers the elements of Article 9.1 because Article 3.1 contains both a requirement of "due process" (rights of interested parties, access to non-confidential files…), which might be limited to the investigation, but also a requirement to provide a "reasoned and adequate explanation", which cannot be limited to the mere "investigation".[4486] China also argues that Article 9.1's coverage is confirmed by the fact that the first

[4479] United States' oral statement at the second substantive meeting, para. 150.
[4480] United States' first written submission, para. 1269.
[4481] United States' written reply to Panel question No. 154 at the first substantive meeting.
[4482] China's second oral statement, para. 7.
[4483] China's second written submission, paras. 376-377.
[4484] China's written reply to Panel question No. 123 at the first substantive meeting.
[4485] China's first written submission, para. 642.
[4486] China's written reply to Panel question No. 120 at the first substantive meeting.

sentence of Article 3.1 refers to Article X of GATT 1994, indicating that Article 3.1, in this aspect, is nothing more than a *lex speciales* of Article X in the specific context of safeguard.[4487]

7.1887 China argues that this approach is confirmed in *US – Lamb* case where the Appellate Body found that: "Article 3.1 requires competent authorities to set forth findings and reasoned conclusions on 'all pertinent issues of fact and law' in their published report".[4488] China further relies upon the Appellate Body decisions in *US – Lamb* and *US – Cotton Yarn* to argue that the standard of review under Article 11 of the DSU in relation to claims under the Agreement on Safeguards is such that "panels must examine whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data".[4489] In China's view, whether a Member is a developing country accounting for less than 3% of total imports is a pertinent issue in the application of Article 9.1 and, therefore, must be subject to "findings and reasoned conclusions" published in accordance with Article 3.1.[4490]

7.1888 China argues that the obligation of the United States authorities in this case was twofold: to explain in an adequate and reasoned manner the reasons why China is not a developing country; or to explain in an adequate and reasoned manner the reasons why Chinese products did not meet the *de minimis* test of Article 9.1 of the Agreement on Safeguards.[4491] China submits that the existence of a "developing country", on the one hand, and the fact that the *de minimis* test is met, on the other hand, are in its view "pertinent issues of fact" under Article 3.1, for the application of a safeguard measure.[4492] China argues that it follows that the published report of the competent authorities under that provision must contain an adequate and reasoned explanation as to how the facts support their determination.[4493]

7.1889 China argues that, however, in the present case, the United States authorities failed to provide a reasoned and adequate explanation of how the facts support their determination that Article 9.1 of the Agreement on Safeguards is not applicable to China.[4494] In particular, China argues that the United States authorities failed to provide a reasoned explanation as to how the facts support their determination on Article 9.1 with regard to China and why Chinese products did not meet the de minimis test of Article 9.1 of the Agreement on Safeguards. In this regard, China argues that since China is a developing country and has always claimed itself as such, in particular when it joined the WTO, the United States authorities could not reasonably exclude China from the benefit of Article 9.1 of the Agreement on Safeguards, unless in its published report the United States authorities were able to explain, in an adequate and reasoned manner, the reasons why China had to fall within the scope of the United States' measures.[4495]

7.1890 The United States submits that China is mistaken. The "pertinent issues of fact and law" under Article 3.1 are those related to the investigation and determination of serious injury by the competent authorities. Issues related to the application of the safeguard measure under Article 5.1 – an inquiry that the Appellate Body has found to be "separate and distinct" from the finding of serious

[4487] China's second written submission, para. 410.
[4488] China's first written submission, para. 643.
[4489] China's first written submission, paras. 644-645.
[4490] United States' first written submission, para. 1283.
[4491] China's first written submission, para. 668.
[4492] China's first written submission, para. 670.
[4493] China's first written submission, para. 671.
[4494] China's first written submission, para. 672.
[4495] China's first written submission, paras. 652 and 667.

injury – are not subject to Article 3.1.[4496] The United States argues further that compliance with Article 9.1 is not part of the investigation or determination of serious injury. The obligation is phrased in terms of the application of the safeguard measure to developing country Members. Thus, China is mistaken in its view that "the existence of a 'developing country' . . . and the fact that the de minimis test is met" are "pertinent issues of fact" to be addressed under Article 3.1. These matters may be pertinent to a non-application determination under Article 9.1, but they are not issues pertinent to the conduct of an investigation under Article 3.1.[4497] The United States argues that, moreover, nothing in the reasoning of the Appellate Body reports cited by China supports China's conclusion that the reports indicate an obligation to explain an Article 9.1 determination as part of an Article 3.1 report. Indeed, in each of the citations noted by China, the Appellate Body is addressing the requirement of Article 3.1 that competent authorities publish a report containing the findings and conclusions reached in an investigation. The Appellate Body findings do not indicate that the competent authorities must address whether the application of a measure is consistent with Article 5.1, or whether non-application of the measure is required under Article 9.1. Thus, these findings of the Appellate Body do not support China's views.[4498]

7.1891 China argues that the United States is trying to create an illogical line of reasoning between the investigation and the application of the measure. In particular, China argues that the United States wrongly asserts that the question of non-application of the measure to the developing countries under Article 9.1 comes after the investigation. In China's view, this is misleading, as all imports are subject to investigation. The imports from developing countries, in particular, are placed under the scrutiny of the competent authorities whose role is to determine which individual country's imports are under the 3% threshold, and whether the sum of the imports from developing countries does or does not exceed 9%. China asserts that, clearly, the findings on Article 9.1 are not only relevant when the measure is applied, but these findings constitute a part of the investigation process, and therefore must be covered by the obligation expressed in Article 3.1 of providing a reasoned and adequate explanation.[4499]

5. Time/period during which developing countries identified

7.1892 Norway argues that the safeguard measures in question are inconsistent with Article I:1 of the GATT 1994 and Article 9.1 of the Agreement on Safeguards. In this regard, Norway submits that GATT 1994 Article I:1 sets out the general MFN principle, which is also applicable within the sphere of the Agreement on Safeguards. According to Norway, any deviation from this principle must have a legal basis, one of them being the possibility to exclude certain developing countries found in Article 9 of the Agreement on Safeguards.[4500]

7.1893 Norway submits that the pivotal question in Article 9.1 is what the correct recent representative reference period is for the establishment of the exclusions.[4501] Norway argues that in the present case, the United States used import figures for various years and not the same years as the period of investigation (1996-2000) when establishing which developing countries had imports under

[4496] United States' first written submission, para. 1284.
[4497] United States' first written submission, para. 1285.
[4498] United States' first written submission, para. 1286.
[4499] China's second oral statement, paras. 28-30.
[4500] Norway's first written submission, para. 398.
[4501] Norway's first written submission, para. 399.

the threshold in Article 9.1. During consultations, the United States explained that they had mostly relied on import statistics for 1996-97 to determine the import levels of developing countries.[4502]

7.1894 Norway points to the statement by the Appellate Body in *US – Line Pipe*, where it made reference to the fact that the United States should have looked at "the latest data available at the time the line pipe measure took effect" . Norway believes that the statement of the Appellate Body in *US – Line Pipe* implies that the United States in the present case should have computed their percentages based on 2000 or 2001 figures, not 1996-97.[4503] Norway submits that, having failed to do so, the United States breached Article 9.1 of the Agreement on Safeguards, and thus also Article I.1 of the GATT 1994.[4504]

7.1895 The United States argues that the Appellate Body has found that the Agreement on Safeguards does not indicate how a Member must comply with Article 9.1 and that it is for the importing member to decide how to apply the safeguard measure.[4505]

7.1896 In counter-response, Norway argues that it must be flatly rejected that it is for the importing member to decide how to implement Article 9:1. All obligations under the covered agreements are the subject of multilateral control. According to Norway, this is the very purpose of the Agreement on Safeguards, as stated explicitly in the preamble.[4506]

7.1897 The United States submits that the period 2000 through interim 2001 was one in which the USITC found that increased imports caused or were threatening to cause serious injury. The United States considered that, as a general matter, this period did not reflect normal flows of imports and would accordingly lead to an aberrational calculation as to whether developing countries qualified for non-application of the safeguard measures under Article 9.1. By way of example, the United States asserts that for certain carbon flat-rolled steel, imports from developing countries had reached a level in 2000 at which those countries accounting for less than 3% of total imports collectively accounted for more than 9% of total imports. If that period were used, no developing country would be eligible for exclusion from the safeguard measure on certain carbon flat-rolled steel. The 1996-1997 period predates the beginning of the increase in imports for most products subject to the steel safeguard measures. Therefore, the United States considered this period particularly appropriate for applying the Article 9.1 criteria.[4507]

7.1898 The United States argues that Norway has not established that the United States' use of 1996-97 as the period for calculating the 3% threshold for non-application was inconsistent with Article 9.1. The United States argues that Norway misreads both Article 9.1 and the Appellate Body Report. The text of Article 3.1 does not specify any particular period for calculating whether developing country Members' imports meet the 3% and 9% thresholds.[4508] The 1996-1997 period was consistent with these requirements. Since that period predates the increase in imports, it allows an evaluation of import levels undistorted by the increased imports or the serious injury they caused to the domestic industries. By using such a period, the United States could accurately evaluate whether particular developing country Members qualified for non-application.[4509] The United States further submits that Norway misreads the *US – Line Pipe* Report when it states that the Appellate Body

[4502] Norway's first written submission, para. 400.
[4503] Norway's first oral statement on behalf of all complainants, para. 5.
[4504] Norway's first written submission, para. 401.
[4505] United States' first written submission, para 1260.
[4506] Norway's first oral statement on behalf of all complainants, para. 4.
[4507] United States' written reply to Panel question No. 125 at the first substantive meeting.
[4508] United States' first written submission, para. 1279.
[4509] United States' first written submission, para. 1280.

"made reference to the fact that the United States should have looked at 'the latest data available.'" The Appellate Body was not making a normative statement about what data a Member should consider, but responding to the Panel's citation to particular data. Moreover, it considered that data primarily to evaluate whether the US mechanism for excluding developing countries would work "automatically", a question that has not been raised in this dispute.[4510]

7.1899 Norway further argues that Article 9.1 uses the present tense "as long as its shares of imports … does not exceed 3 per cent". Norway argues that this indicates that import figures for the 'very recent past ' are relevant.[4511] The United States counter argues that the use of the present tense in Article 9.1 does not preclude the possibility of using any period within the investigation period, and that in this case the United States chose a period prior to the increase in imports. The United States also questions the significance of the use of the present tense in the English language version of this provision. The French text of Article 9.1 is written, in part, in the future tense ("tant que la part de ce Membre dans les importations du produit considéré du Membre importateur ne *dépassera* pas 3 pour cent") ("as long as the share of the imports of the product concerned in the importing Member *will not exceed* 3 percent") (emphasis added). Thus, according to the United States, it appears that the negotiators did not attach great significance to the tense of the obligation under Article 9.1.[4512]

6. Conclusions

7.1900 China argues that in view of all the above, it would not be appropriate to consider that the United States authorities fulfilled their obligations under Article 9.1 and 3.1 of the Agreement on Safeguards because it failed to provide adequate and reasoned explanation as to how the facts support the exclusion of China from the benefit of Article 9.1 of the Agreement on Safeguards.[4513] China argues that accepting the conclusion of the United States authorities would allow a WTO Member to unilaterally and arbitrarily define another Member's status under the WTO. China submits that this would be a grave concern to all Members, particularly developing countries. China further argues that allowing such a practice runs the risk of opening a back door to nullifying or impairing WTO benefits accruing to individual Members.[4514] For all the above reasons, China argues that the Panel should reach the conclusion that the determination made by the United States authorities is inconsistent with the specific requirements of both Articles 9.1 and 3.1 of the Agreement on Safeguards.[4515]

7.1901 The United States argues that it is well established that under the WTO Agreement the burden of proof rests upon the party who asserts the affirmative of a particular claim or defence. In this instance, China and Norway are asserting that the United States failed to comply with Article 9.1. Thus, according to the United States, they bear the burden of proof, which would require a showing that the United States has applied the measure to a developing country Member that accounts for less than 3% of total imports. The United States argues that neither China nor Norway has met that burden.[4516] According to the United States Norway does not identify any developing country Member that it believes was improperly subjected to a safeguard measure and China argues only that is has designated itself a developing country for purposes of Article 9.1, which is not how Article 9.1 works.[4517]

[4510] United States' first written submission, para. 1281.
[4511] Norway's second written submission, para. 204.
[4512] United States' written reply to Panel question No. 68 at the second substantive meeting.
[4513] China's first written submission, para. 676.
[4514] China's first written submission, para. 666.
[4515] China's first written submission, para. 674.
[4516] United States' first written submission, para. 1266.
[4517] United States' first oral statement, para. 83.

N. ARTICLE I:1 OF THE GATT 1994 AND ARTICLE 2.2 OF THE AGREEMENT ON SAFEGUARDS (NON-DISCRIMINATION)

1. Exclusion of imports from free-trade areas

(a) The MFN principle

7.1902 Japan and Korea argue that according to the plain meaning of "irrespective of its source" in Article 2.2 of the Agreement on Safeguards, safeguard measures must be applied on an MFN basis, subject only to the special treatment of customs union members[4518] and the Article 9 exception for developing countries[4519] and even then only in certain circumstances.[4520] More specifically, the MFN principle embodied in Article 2.2 requires that once a Member conducts an investigation of total products imported and the effects of imports on its domestic industry and reaches an affirmative determination[4521], any safeguard measures imposed on the basis of that investigation must be applied to imports from all sources, even imports from countries with which the Members have a specific agreement prohibiting the application of safeguard measures.[4522] Japan and Korea argue that Article 2.2 prohibits Members from exempting other countries, such as those with which the Member has signed a free trade agreement.[4523]

7.1903 Japan submits that like Article 2.2 of the Agreement on Safeguards, Article I:1 of GATT 1994 requires Members to treat imports from other Members similarly. If an "advantage, favour, privilege or immunity" is granted to any Member, the same courtesy must be accorded "immediately and unconditionally" to all other Members. In the context of a safeguards measure, this MFN principle requires the United States to treat imports equally. If the President decides to exclude countries that are members of a free trade agreement which is clearly an "advantage, favour, privilege or immunity" because the free trade agreement countries would not be subject to the measure – the President must also extend the exclusion to other WTO members (absent an exception, such as those afforded to customs union members and developing countries, in certain circumstances).[4524]

7.1904 Japan and Korea assert that, in this case, the United States violated the MFN principle by exempting Canada and Mexico, which are signatories to the North American Free Trade Agreement, and Israel, which is a signatory to the United States-Israel Free-trade area from the measures.[4525] Japan argues that safeguards measures are intended to be global in nature. Any country-specific exclusion (with the exception of developing countries under Article 9) violates this principle. Provisions within free trade agreements are no exception and cannot justify the departure from the non-discrimination principle. The United States plainly breached its obligation to apply the safeguard measure to a product "irrespective of its source".[4526]

(b) Application of Article XXIV of GATT 1994

7.1905 With respect to arguments by Japan and Korea that Article I and Article 2.2 embody the MFN principle of the WTO and that this principle prevents the exclusion of any Member (other than a

[4518] Japan's second written submission, para. 170.
[4519] Japan's first written submission, para. 329; Korea' first written submission, para. 172.
[4520] Japan's second written submission, para. 170.
[4521] Japan's second written submission, para. 170.
[4522] Japan's first written submission, para. 329.
[4523] Japan's first written submission, paras. 330-331.
[4524] Japan's first written submission, para. 330.
[4525] Japan's first written submission, para. 331; Korea's first written submission, para. 173.
[4526] Japan's first written submission, para. 334

developing country Member subject to Article 9.1) from a safeguard measure, the United States argues that Article XXIV creates an exception to the MFN obligation for parties to a free trade agreement, allowing them to terminate duties and other restrictive regulations of commerce – including safeguard measures – between them. Footnote 1 of the Agreement on Safeguards establishes that "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994". Therefore, the United States' exclusion of products of Canada, Mexico, Israel, and Jordan from the steel safeguard measures is not inconsistent with GATT 1994 or the Agreement on Safeguards.[4527]

7.1906 The United States submits that the text of GATT 1994 is clear on this point. Article XXIV:4 recognizes "the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration" among Members, consistent with the objective of 'facilitating trade between the constituent territories' of the free trade area[4528] while not raising barriers to trade with other Members. To this end, Article XXIV:5 provides that "the provisions of this Agreement shall not prevent" the formation of a free-trade area, provided that certain conditions are met.[4529] The United States further argues that to the extent that Articles I or XIX can be interpreted to contemplate the application of safeguard measures to products from all sources, Article XXIV creates a limited exception. This is because under the express terms of Article XXIV:5, no other provision of the GATT 1994, including Article XIX, can be read to prevent participants in an FTA from carrying out their mutual commitments to exempt each other's trade from trade restrictive measures, including safeguard measures.[4530]

7.1907 The United States argues that the United States' free trade agreements with Canada, Mexico, Israel, and Jordan clearly meet the requirements of Article XXIV.[4531] In this regard, the United States asserts that no complainant has disputed that the safeguard exclusion is an integral component of the elimination of trade restrictive measures incorporated in NAFTA, the Israel FTA, and the Jordan FTA, or that the United States acted in compliance with these agreements in excluding FTA partners' goods from the steel safeguard measures. The United States submits that, therefore, the exclusion of the products of each of these countries from the steel safeguard measures is part of the general elimination of duties and restrictive regulations of trade in those agreements, and falls within the purview of Article XXIV. By virtue of Article XXIV:5, this application by the United States of the safeguards exclusion is not foreclosed either by the requirements of Articles I or XIX.[4532]

7.1908 The United States argues that while Article 2.2 of the Agreement on Safeguards also creates a nondiscrimination requirement, this requirement does not supersede the Article XXIV authorization for Members to exclude free trade agreement partners from safeguard measures. The last sentence of footnote 1 of the Agreement on Safeguards deals with the relationship between Article XXIV and the Agreement on Safeguards. It specifies that "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994". Thus, issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles.[4533] The United States submits that application of the customary rules of treaty interpretation supports this conclusion. According to these rules, the words in footnote 1 of the Agreement on Safeguards must be interpreted in good faith in accordance with their ordinary meaning in their

[4527] United States' first written submission, para. 1228.
[4528] United States' second oral statement, para 141.
[4529] United States' first written submission, para. 1229.
[4530] United States' first written submission, para. 1231.
[4531] United States' first written submission, para. 1232.
[4532] United States' first written submission, para. 1240.
[4533] United States' first written submission, para. 1241.

context and in the light of the object and purpose of the Agreement on Safeguards. The ordinary meaning of the first four words of the footnote, "nothing in this Agreement", is to place a limitation on the entire agreement by indicating something that it does not do. The end of the sentence indicates what is being limited – "the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994".[4534] The United States submits that, in other words, the footnote means that the provisions of the Agreement on Safeguards are not intended to disturb the relationship between the GATT 1994 rules addressing safeguard measures on the one hand and the rights and obligations of the participants in a free trade agreement on the other.[4535]

7.1909 The United States notes that the Panel in *US – Line Pipe* addressed this question and concluded that the information presented by the United States established a prima facie case that NAFTA is in conformity with Article XXIV:5(b) and (c), and with Article XXIV:8(b). According to the United States, it found further that "the United States is entitled to rely on an Article XXIV defence against Korea's claims under Articles I, XIII and XIX regarding the exclusion of imports from Canada and Mexico from the scope of the line pipe [safeguard] measure". The United States submits that the Panel also found, based on footnote 1 of the Agreement on Safeguards, that "Article XXIV can provide a defence against claims of discrimination brought under Article 2.2".[4536] The United States asserts that the Appellate Body declared these findings "moot". Accordingly, the DSB did not adopt these findings when it adopted the Panel Report, as modified by the Appellate Body Report. However, the Appellate Body at no point criticized the Panel's reasoning, which the United States says it finds persuasive on these issues.[4537]

7.1910 Japan submits that the reliance by the United States on the Panel decision in *US – Line Pipe* is misplaced. First, the Appellate Body declared that the Panel's finding was moot and had no legal effect. Second, according to Japan, the Panel's reasoning in *US – Line Pipe* is flawed; it is shallow and conclusory rather than convincing.[4538]

7.1911 In response, the United States argues that the declaration that a finding is moot means only that it need not have been made. Such a finding does not signify any infirmity in the reasoning underlying the substantive finding. The United States argues that, therefore, the Panel's findings on Article XXIV in *US – Line Pipe*, like an unadopted panel report, may provide guidance to a later panel.[4539]

7.1912 Japan further argues that the United States' assertion that footnote 1 to Article 2 of the Agreement on Safeguards does not disturb the exceptions permitted by GATT 1994 Article XXIV is misguided and that the United States both misreads footnote 1 and misinterprets prior decisions on this issue. First, Japan notes that footnote 1 is inapplicable to free-trade areas (or their members). It does not define a "Member" as a free-trade area or a country belonging to one; nor does it mention free-trade areas in any other way. According to Japan, the United States claims, in essence, that the last sentence of footnote 1 has nothing to do with the rest of the footnote, and that it covers free-trade areas as well as customs unions. In Japan's view, this sentence, however, merely states that "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994". It says nothing about free-trade areas. If the Members meant for the same rules to apply to both customs unions and free-trade areas, they would have said so quite

[4534] United States' first written submission, para. 1242.
[4535] United States' first written submission, para. 1245.
[4536] United States' first written submission, para. 1247.
[4537] United States' first written submission, para. 1248.
[4538] Japan's second written submission, para. 171.
[4539] United States' second oral statement, para. 143.

clearly. Japan argues that the use of the Article XXIV exception is strictly conditioned with respect to customs unions. The Appellate Body in *Argentina – Footwear (EC)*, citing *Turkey – Textiles*, said that, under certain conditions, "Article XXIV may justify a measure which is inconsistent with certain other GATT provisions". ... [T]his defence is available only when it is demonstrated by the Member imposing the measure that "the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV" and "that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue". Japan submits that, therefore, it would be anomalous, indeed, if free-trade areas and their members (which are not even mentioned in footnote 1) were subject to no restrictions conditioning their ability to use the defense of Article XXIV while customs unions (which are specified in the text) could benefit from the defence only in limited circumstances.[4540]

7.1913 Korea agrees that by its explicit terms, footnote 1 applies to customs unions. Further there is no basis to conclude that footnote 1 is actually two footnotes that must be read separately, as the United States suggests, but never demonstrates. According to Korea, the last sentence of footnote 1 cannot be read as separate and apart from the entire footnote – which by its terms applies to customs unions alone. Thus, Korea argues that footnote 1 deals with the particular circumstances of safeguard investigations conducted by a customs union as to all the elements of an investigation when conducted on the basis of a single market.[4541]

7.1914 Norway argues that safeguard measures based on GATT 1994 Article XIX and the Agreement on Safeguards may be excluded as between free trade partners, although such an exclusion is not required.[4542] The Agreement on Safeguard requires that where such an exclusion is undertaken that the imports from these countries also be excluded from the safeguards findings and determinations. In this regard, Norway argues that GATT 1994 Article XXIV applies to the Agreement on Safeguards as it applies to GATT 1994 Article XIX.[4543] According to Norway, the correct understanding and application of GATT 1994 Article XXIV:8(b) has been somewhat disputed for a long time, but particularly since the 1970s. Norway notes that itself, and its European free trade partners have routinely exempted their partners from safeguard actions, based on GATT 1994 Article XXIV:8(b) and the provisions of the respective FTA mandating such preferential treatment. Norway submits that the Agreement on Safeguards did not change the relationship between Article XXIV and Article XIX. The last sentence of footnote 1 to Article 2 of the Agreement on Safeguards indicates that nothing was changed and nothing was finally agreed during the Uruguay Round. The sentence itself and the history behind it implies, like Article XXIV itself does, that the possibility for exemption applies both to customs unions and free trade areas.[4544] Norway argues that this follows from the general nature of the wording, which refers to the whole of paragraph 8, not only to paragraph 8(a) that concerns customs unions or only to 8(b) that concerns free trade areas. This also follows from the fact that the footnote is attached to the word "Member" in paragraph 1. If it should apply only to customs unions, and thus override Article XXIV and limit the rights of Member States, it would have had to state so explicitly. Thus, Norway submits, the non-discrimination requirement of Article 2.2 of the Agreement on Safeguards does not supersede the authorisation of Article XXIV for Members to exclude free trade area partners from safeguard measures.[4545]

[4540] Japan's second written submission, paras. 172-175.
[4541] Korea's second written submission, para. 223.
[4542] Norway's written reply to Panel question No. 117 at the first substantive meeting.
[4543] Norway's second written submission, para. 188.
[4544] Norway's second written submission, paras. 189-190.
[4545] Norway's second oral statement on behalf of all complainants, para. 4.

7.1915 Norway notes that the issue has been touched upon in *Turkey – Textiles* and *Argentina – Footwear (EC)*, both of which, however, concerned "customs unions" and not Free Trade Agreements. Norway notes that the issue was raised once more in *US – Line Pipe*, where the Appellate Body explicitly declined to rule on this point However, Norway notes that in *Turkey – Textiles* the Appellate Body and the Panel admitted that an Article XXIV defence in principle exists – but found that the conditions for its application were not met in that specific case.[4546]

7.1916 Japan and Korea argue that, even if one assumes that the last sentence of footnote 1 applies to free-trade areas, the Article XXIV defense is not available to the United States.[4547] Korea argues that Article XXIV is intended to preserve the rights of members to form free trade areas. Article XXIV.5 is intended to protect members' rights to enter into free trade areas by assuring that the provisions of the Agreement on Safeguards do not prevent it, as long as the establishment of a free trade area does not make the duties and other regulations of commerce applicable to WTO members higher than prior to the formation of such a free trade area. Korea submits that in this case, the inclusion of NAFTA members in safeguard measures would not "prevent" the formation of NAFTA – NAFTA specifically permits NAFTA members to decide unilaterally whether or not to include each other in safeguard measures on an *ad hoc* basis. Therefore, Korea argues that regardless of the full meaning of Article XXIV, the United States does not need to invoke Article XXIV to ensure that "this Agreement shall not prevent the formation of a free trade area". Korea submits that this defence is, therefore, unavailable to the United States and the United States is therefore in violation of Article 2.2 of the Agreement on Safeguards.[4548]

7.1917 Article XXIV:8(b) defines an FTA as a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories. In response to a question from the Panel as to the significance of the fact that Article XIX is not mentioned in the brackets of Article XXIV:8(b), Japan asserts that assuming, for purposes of argument, that an FTA member must eliminate application of safeguard measures to its FTA partners by virtue of the brackets, Members would also have to eliminate other measures not enumerated in the brackets, particularly anti-dumping and countervailing duty measures. Clearly, the United States has not eliminated – and has no intention to eliminate – anti-dumping and countervailing duty measures against Canada, Mexico and Israel.[4549] Japan argues that, on realising this, the United States changes its position and expects to back away from its contention that it *must* eliminate safeguard measures as a "restrictive regulation of commerce" because they are not among the measures that a Member is permitted to retain.[4550]

7.1918 In response to the same question, Korea argues that the measures mentioned in the parenthetical clause in Article XXIV:8(b) of the GATT 1994 are illustrations of the measures available even among the members of an FTA. It is not an exhaustive list. The measures specifically identified in the parenthetical clause are those that by their very nature do not prevent the formation of free trade areas and, therefore, are permitted, if necessary. As to any other measures not listed, the fundamental question is: Does the maintenance of those measures prevent the formation of a free trade area? Each measure and the circumstances of its imposition must be examined for all measures not explicitly permitted. In the case of NAFTA and the other FTAs at issue, the imposition of safeguard measures between members would not have prevented the formation of NAFTA, etc. To

[4546] Norway's second written submission, paras. 189-191.
[4547] Japan's second written submission, para. 176; Korea's second written submission, para. 224.
[4548] Korea's second written submission, paras. 225-226.
[4549] Japan's written reply to Panel question No. 117 at the first substantive meeting.
[4550] Japan's second written submission, para. 179.

the contrary, the members of NAFTA and the FTAs explicitly preserved the right of members to impose safeguard measures against each other.[4551]

7.1919 The United States argues that the formation of a free trade area does not rest on the elimination of any single measure. The United States relies upon Article XXIV:8(b) in asserting that formation of a free trade area requires the elimination of a package of duties and other restrictive regulations of commerce that collectively covers substantially all trade. This standard does not require an analysis of each distinct measure but, rather, the group. The United States notes that Article XXIV does not require the elimination of all duties and other restrictive regulations of commerce. Some restrictive regulations, if they fall within the enumerated exceptions, may be applied "where necessary". The remaining restrictive regulations must be eliminated on substantially all trade. The United States argues that if FTA parties can achieve the Article XXIV:8 threshold (covering "substantially all trade") without including all duties and other restrictive regulations of commerce, they may retain such duties and regulations. Thus, as with any duty or other restrictive regulation of commerce, retention of safeguard measures, in whole or in part, is consistent with Article XXIV:8(b) as long as those measures that are eliminated cover substantially all trade among the parties. According to the United States, the only significance associated with the absence of Article XIX from the bracketed text in Article XXIV:8(b) is that, unlike the measures described within the brackets, Article XIX measures are not automatically exempt from the requirement to eliminate duties and other restrictive regulations of commerce on substantially all trade. They may still be retained if the parties to an free trade agreement otherwise meet the requirements of Article XXIV:8. The United States asserts that this was the case for the NAFTA.[4552]

7.1920 Japan further argues that, assuming that Article XXIV applies to the exclusion of free trade agreement partners from safeguard measures, the phrase "are eliminated", as used in Article XXIV:8(b), appears to indicate that safeguard measures should be excluded unconditionally at the time a free trade agreement is negotiated[4553], and that this wording makes clear that a general exception from safeguard measures must be written into an FTA in order for the Article XXIV exception to be applicable.[4554] Japan argues that, moreover, if the measure is not subject to general exemption, how would one judge whether or not the "substantially all" requirement under Articles XXIV:8(b) is met in terms of such conditional elimination? Safeguard measures were not eliminated in either United States FTA. According to Japan, Article 802.1 of the NAFTA conditions exemption of Canada and Mexico from a safeguard measure to situations where imports from them do not account for "a substantial share of total imports" and they do not "contribute importantly" to the serious injury. Similarly, Article 5.3 of the United States-Israel Free Trade Agreement limits exemption from a safeguard measure to situations where imports from Israel are not "a substantial cause of the serious injury". Japan argues that the conditional exemption in certain cases when certain subjective conditions are satisfied does not meet the requirements for asserting Article XXIV:8(b) as a defense to Article 2.2 of the Agreement on Safeguards and GATT 1994 Article I:1.[4555] Korea adds that even if a NAFTA member unilaterally decides that it wishes to exempt another NAFTA member from the application of a safeguard measure on a case-by-case basis, it is not required to do so by its obligations under the free trade agreement. In other words, safeguard measures could be preserved against other NAFTA members at the discretion of each national authority and so it cannot be said to be an integral component of the elimination of trade restrictive measures, argues Korea.[4556]

[4551] Korea's written reply to Panel question No. 117 at the first substantive meeting.
[4552] United States' written reply to Panel question No. 117 at the first substantive meeting.
[4553] Japan's written reply to Panel question No. 118 at the first substantive meeting.
[4554] Japan's second written submission, para. 176.
[4555] Japan's second written submission, paras. 176-178.
[4556] Korea's second written submission, para. 229.

Consequently, no "exception" to the clear mandate of Article 2.2 is established for NAFTA safeguard measures by Article XXIV. Korea further adds that the United States cannot "invoke" Article XXIV on a case-by-case basis depending on whether the United States decides to exempt Canada and/or Mexico based on its own internal regulation.[4557] The fact that the United States cannot "invoke" an Article XXIV defence on a case-by-case basis is further confirmed by the review procedures established by the NAFTA itself. Further, Korea notes that such determinations to include NAFTA members in a safeguard measure are even exempted from review by NAFTA dispute settlement panels.[4558]

7.1921 The United States argues that Article XXIV would permit only a safeguard exclusion that is permitted under the terms of the FTA.[4559] Further, according to the United States, the *US – Line Pipe* Report addresses and disposes of all the arguments raised by Japan and Korea.[4560] In addition, , the United States notes that Japan and Korea both claim that NAFTA did not truly "eliminate" safeguard measures because it would allow inclusion of Canada and Mexico in certain limited circumstances. However, the United States claims, what Japan and Korea fail to recognize is that NAFTA requires elimination of safeguard measures in particular circumstances. If those circumstances exist, one party must exclude another from any safeguard measures. There is no choice. The United States further submits that, contrary to Korea's view, this obligation is subject to dispute settlement under NAFTA. According to the United States, there is, in fact, nothing in Article XXIV that requires complete elimination of a duty or other restrictive regulation of commerce. In fact, Article XXIV:8 envisages the retention of some such measures in that it requires elimination on "substantially all" – not all – trade among FTA parties. Indeed, it is not uncommon for Members who enter into FTAs to retain certain trade restrictive measures in whole or in part.[4561]

7.1922 Norway submits that the relevant issue is not whether the free trade partners may be excluded from safeguard actions, but which criteria apply to make such an exclusion permissible. Norway submits that there are three main criteria. [4562] Firstly, that NAFTA itself must fulfil the requirements of an FTA under the GATT 1994 Article XXIV:8(b) , which is not contested.[4563] Secondly, according to Norway, Article XXIV:8(b) implies that the general exclusion from the GATT 1994 Article XIX safeguards must follow from the FTA itself, either directly or implicitly (i.e by way of a prohibition on all restrictions on commerce). Norway submits that a GATT 1994 Article XXIV exception can, of course, only cover as much as is covered by the FTA itself.[4564] Norway argues that the proscription of safeguards under GATT 1994 Article XIX must, therefore, be contained in the free trade agreement in order for Article XXIV to apply. According to Norway, this does not mean that the specific safeguard measure (for e.g. regarding steel) should be dealt with in the free trade agreement but, rather, that the agreement should only contain provision(s) dealing with the exclusion from safeguards. Norway agrees with Korea that conditional exclusions or permissions to exclude, as under NAFTA, do not sit well with GATT 1994 Article XXIV, as the United States is not required under the FTA to exclude its free trade partners.[4565] According to Norway, Article 802.1 of the NAFTA conditions exclusion of Canada and Mexico from a safeguard measure to situations where imports from them do not account for "a substantial share of total imports" and they do not "contribute importantly" to the serious

[4557] Korea's written reply to Panel question No. 118 at the first substantive meeting.
[4558] Korea's second written submission, para 231.
[4559] United States' written reply to Panel question No. 118 at the first substantive meeting.
[4560] United States' second oral statement, para. 144.
[4561] United States' second oral statement, paras. 144-146.
[4562] Norway's second written submission, para. 192.
[4563] Norway's second written submission, para. 193.
[4564] Norway's second written submission, para. 194.
[4565] Norway's written reply to Panel question No. 118 at the first substantive meeting.

injury.[4566] Similarly, Article 5.3 of the United States-Israel Free Trade Area limits exemption from a safeguard measure to situations where imports from Israel are not "a substantial cause of the serious injury". Norway submits that these Agreements, particularly the NAFTA, with their conditional exceptions, do not fit well with this second criterion – as it is difficult to ascertain from their provisions whether the exclusion from safeguards (based on GATT 1994 Article XIX and Agreement on Safeguards) is required by the FTA in a particular case – and thus that this exclusion conforms to Article XXIV. Norway argues that, therefore, the second condition does not seems to be fulfilled by the Agreements of the United States.[4567] As for the third criteria, Norway links this with the application of the principle of parallelism and non-attribution.[4568]

7.1923 As a separate argument, Japan and Korea reiterate that this claim is a separate and distinct claim from the Article 2.2 and 2.1 "parallelism" claim.[4569] Japan also note that, with regard to the exclusion of imports from Israel, this is Japan's only claim. Therefore, Japan submits that exercise of judicial economy with respect to this claim would not be appropriate because, as stated by the Appellate Body in *Australia – Salmon*: 'The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute" [DSU Article 3.7]. To provide only a partial resolution of the matter at issue would be a false judicial economy.'[4570]

2. Exclusion from the benefit of Article 9.1 of the Agreement on Safeguards

7.1924 China argues that due to the fact that Chinese products were unfairly and illegally included in the scope of application of the United States safeguard measures while, at the same time, imports originating from other developing countries were excluded, China considers that the United States violated the Most Favored Nation treatment provided by Article I:1 of the GATT 1994.[4571] In the view of China, there is a discrimination, and therefore a violation of Article I.1 of the GATT 1994 as well as Article 2.2 of the Agreement on Safeguards, when a country is excluded from the benefit of Article 9.1 while all criteria of this provision are met. This is the case if not all the de minimis exporting developing country Members are excluded.[4572]

7.1925 The United States argues that China fails to recognize that Article I:1 and Article 2.2 require most favoured nation treatment – the same treatment to all Members. When a Member affords developing country Members the same treatment as developed country Members, it is acting *in conformity with* Article I:1 and Article 2.2. Article 9.1 acts to require differential treatment inconsistent with those Articles, and provides a defense against a claim from developed countries that Article I:1 or Article 2.2 entitles them to the same differential treatment. Therefore, the United States argues, if a Member fails to provide treatment consistent with Article 9.1 to a developing country Member, it has acted inconsistently with Article 9.1, but not with Article I:1 or Article 2.2.[4573]

[4566] Exhibited by the United States in Exhibit US-50.
[4567] Norway's second written submission, para. 194-195.
[4568] Norway's second written submission, para. 197-199.
[4569] Japan's second written submission, para 181; Korea's second written submission, para. 220.
[4570] Japan's second written submission, para. 181.
[4571] China's first written submission, para. 677.
[4572] China's written reply to Panel question No. 119 at the first substantive meeting.
[4573] United States' second written submission, para. 244.

O. DECISION-MAKING

1. Articles 2.1 and 4.2(b) of the Agreement on Safeguards

7.1926 Brazil and Japan submit that Articles 2.1 and 4.2(b) require an exact correspondence between the injury determination, the like product definition, and the measure imposed.[4574] In particular, Japan argues that according to the plain meaning of Articles 2.1 and 4.2(b) of the Agreement on Safeguards, a safeguard measure cannot be applied to imports of a product without an affirmative injury or threat determination based on an examination of the domestic industry producing the like or directly competitive product. Japan asserts that, in other words, there must be a one-to-one relationship between the injury determination and the like product definition.[4575]

7.1927 The United States argues that, for purposes of determining whether increased imports are causing serious injury to a domestic industry, the "determination of the competent authorities" is a matter of the Member's domestic law. There is a well-established practice under US law that when USITC Commissioners disagree with respect to the like product definition, the USITC determination is based on the overlap of the determinations of the individual Commissioners. Here, the six Commissioners produced three affirmative and three negative individual determinations concerning stainless steel wire. Under US domestic law, the President may treat the USITC's equally divided determination as an affirmative determination. An overlap of decisions is acceptable as long as each decisionmaker addressed the goods in question and found that the increased imports caused serious injury or threat of serious injury.[4576]

7.1928 The United States further argues that in *US – Line Pipe*, the Appellate Body found that if a Member has taken a safeguard action that satisfies the requirements of the Agreement, the particular manner in which the decision is reached by the competent authorities is of no consequence. In that dispute, the Appellate Body found that a combination of individual determinations based on serious injury and threat of serious injury was sufficient to support an overall affirmative determination.[4577]

(a) Tin mill products

7.1929 According to Brazil and Japan, exact correspondence between the injury determination, the like product definition, and the measure imposed did not exist in the case of tin mill products given the very different findings of the commissioners on injury, like product and the measure recommended with respect to tin mill products.[4578]

7.1930 Brazil and Japan argue that in this case, the commissioners did not agree on either the like product definition or the injury findings for tin mill products. In particular, two commissioners, Bragg and Devaney, treated tin mill products as part of the CCFRS product category.[4579] They, in turn, made an affirmative injury determination concerning this broader category.[4580] The other four

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[4574] Brazil's first written submission, para. 250; Japan's first written submission, paras. 153-154. Japan claimed Article X:3(a) violation as well as Articles 2.1 and 4.2(b) violation for the like product determinations on tin mill and stainless wire products, Ibid. para. 152. See also paras.7.1954-7.1974

[4575] Japan's first written submission, para. 154.

[4576] United States' written reply to Panel question No. 78 at the second substantive meeting.

[4577] United States' first written submission, para. 1005, citing Appellate Body Report, *US – Line Pipe*, para. 171.

[4578] Brazil's first written submission, para. 250; Japan's first written submission, para. 156.

[4579] USITC Report at 273 (Bragg on tin mill), 277 (Bragg on stainless wire), 36 footnote 65 (Devaney on tin mill), and 335 (Devaney on stainless wire) (Exhibit CC-6).

[4580] Japan's first written submission, para. 155.

commissioners considered tin mill products as a separate like product from the CCFRS product category. Three of these four commissioners made negative injury determinations on the tin mill products. Commissioners Hillman, Okun, and Koplan found that imports of tin mill products were not injuring the domestic tin mill industry; only Commissioner Miller found otherwise.[4581] Brazil and Japan argue that, in other words, only one commissioner found that imports of tin mill products unbundled from other products injured the domestic industry making those products.[4582] Brazil and Japan assert that the overall injury votes on tin mill products was three-to-three. However, the decision on the proper like product definitions for the products was four-to-two in favor of treating them as their own like product categories: tin mill was separate from other flat products. Brazil and Japan argue further that the injury votes on the preferred like product definition were three-to-one negative determinations.[4583] [4584]

7.1931 Japan argues that the USITC's injury determinations on these products were improperly treated by the President as three-to-three ties.[4585] Japan notes that the votes on tin mill products should only have been viewed as tied if they were based on the same like product definition, given how critical this definition is to the ultimate outcome of the analysis.[4586] Japan argues that the President applied what he believed was his discretion under Section 330(d)(1) of the Tariff Act of 1930, as amended, to treat the votes on tin mill products either as affirmative or as negative decisions. Japan asserts that, in this instance, the President chose the former. The President, however, announced a remedy for tin mill products separate from his remedy for CCFRS products, thereby indicating his agreement with the four commissioners who treated tin mill products as a separate like product.[4587] Japan submits that, yet, only one commissioner found that imports of these products injured the relevant domestic industry.[4588] Japan asserts that the President's reliance on tie votes that did not correspond to the separate like product definitions with which he implicitly agreed violates Articles 2.1 and 4.2(b). According to Japan, the measure is not supported by an affirmative injury determination on the tin mill category itself.[4589]

7.1932 The United States argues that the Appellate Body's conclusion is also instructive with regard to the affirmative votes made by those Commissioners whose respective starting point for their assessment of serious injury began with a different definition of the relevant like products. By way of example, both Commissioners Bragg and Devaney defined a like product that consisted of a broad grouping of flat-rolled steel products, including tin mill steel. They both analyzed increased imports corresponding to the like product, as they defined it, considered the conditions of competition, and assessed whether the domestic industry was suffering or threatened with serious injury and lastly considered the causal link, if any, between any such injury and the increased imports. The United States argues that, as discussed in more details in sections on injury and causation, their legal findings fulfilled the requirements of Articles 2.1 and 4.2 of the Agreement. Therefore, they satisfied the applicable requirements set forth in the Agreement to be completed by the competent authorities in this regard. At the same time, four other Commissioners defined a like product consisting exclusively of tin mill steel and conducted the same methodical analysis required by Articles 2 and 4 of the Agreement. One of the four Commissioners concluded that increased imports of tin mill steel were

[4581] USITC Report, Vol. I, at 25 (Hillman, Okun, and Koplan) and 307 (Miller's separate views).
[4582] Brazil's first written submission, para. 248; Japan's first written submission, para. 156.
[4583] USITC Report, Vol. I, at 49.
[4584] Japan's first written submission, para. 157.
[4585] Japan's first written submission, paras. 158-159.
[4586] Japan's oral statement for the second substantive meeting, para. 24; see also Japan's second written submission, paras. 50-51.
[4587] Japan's first written submission, para. 159.
[4588] Japan's first written submission, para. 160.
[4589] Japan's first written submission, para. 161.

causing serious injury to the domestic industry producing tin mill steel as discussed in the injury and causation.[4590]

(b) Stainless steel products

7.1933 Japan argues that, in this case, the commissioners did not agree on either the like product definition or the injury findings for stainless steel wire products. In particular, two commissioners, Bragg and Devaney, treated stainless wire products as a part of a combined stainless wire/wire rope category.[4591] They, in turn, made an affirmative injury determination concerning this broader category.[4592] The other four commissioners considered stainless wire as separate from stainless wire rope. Three of these four commissioners made negative injury determinations on the stainless wire products. Commissioners Hillman, Okun, and Miller found that imports of stainless wire were not injuring the domestic stainless wire industry; only Commissioner Koplan found otherwise.[4593] Japan argues that, in other words, only one commissioner found that imports of tin mill products and stainless wire products, unbundled from other products, injured the domestic industry making those products.[4594] Japan asserts that the overall injury votes on stainless steel products was three-to-three. However, the decision on the proper like product definitions for the products was four-to-two in favor of treating them as their own like product categories: stainless steel wire was separate from stainless wire rope. Japan argues further that the injury votes on the preferred like product definition were three-to-one negative determinations.[4595] [4596]

7.1934 Japan argues that the USITC's injury determinations on these products were improperly treated by the President as three-to-three ties.[4597] Japan notes that the votes on stainless wire products should only have been viewed as tied if they were based on the same like product definition, given how critical this definition is to the ultimate outcome of the analysis.[4598] Japan argues that the President applied what he believed was his discretion under Section 330(d)(1) of the Tariff Act of 1930, as amended to treat the votes stainless products either as affirmative or as negative decisions. Japan asserts that, in this instance, the President chose the former. However, for stainless wire, the President had to treat it as a separate like product since the Commission had voted four-to-two that stainless wire rope imports were not injuring the domestic stainless wire rope industry.[4599] [4600] Japan argues that the President's choice to impose a separate measure on stainless wire products shows that he agreed with a majority of commissioners that stainless wire was a separate like product. Japan submits that, yet, only one commissioner found that imports of these products injured the relevant

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[4590] United States' first written submission, para. 1006.

[4591] USITC Report at 273 (Bragg on tin mill), 277 (Bragg on stainless wire), 36 footnote 65 (Devaney on tin mill), and 335 (Devaney on stainless wire) (Exhibit CC-6).

[4592] Japan's first written submission, para. 155.

[4593] USITC Report, Vol. I, p. 27 (Hillman, Okun, and Miller) and 256 (Koplan's separate views).

[4594] Japan's first written submission, para. 156.

[4595] USITC Report, Vol. I, p. 49.

[4596] Japan's first written submission, para. 157.

[4597] Japan's first written submission, paras. 158-159.

[4598] Japan's oral statement for the second substantive meeting, para. 24; see also Japan's second written submission, paras. 50-51.

[4599] USITC Report at 27 (Koplan, Bragg, and Devaney affirmative determination on stainless wire and Okun, Miller, and Hillman negative determination with respect to stainless wire); *also*, p. 27 footnote 13 (Bragg and Devaney indicate that stainless wire and wire rope are one like product) and 277 (Bragg's separate views for stainless steel wire products) along with 335 (Devaney's separate views with respect to stainless steel wire and wire rope). *See also* ibid., p. 26 (Koplan, Okun, Miller and Hillman determine that stainless rope does not cause serious injury to the domestic industry) (Exhibit CC-6).

[4600] Japan's first written submission, para. 159.

domestic industry.[4601] [4602] Japan submits that, therefore, in fact, the President made his decision based on the vote of a single Commissioner.[4603] Japan asserts that the President's reliance on tie votes that did not correspond to the separate like product definitions with which he implicitly agreed violates Articles 2.1 and 4.2(b). According to Japan, the measure is not supported by an affirmative injury determination on the stainless steel wire category itself.[4604]

2. Article X:3(a) of GATT 1994

(a) Like product determinations

(i) Comparison with determinations in other anti-dumping and countervailing duty cases

7.1935 Japan argues that because the USITC adopted a like product analysis contrary to its 15 years of precedent in the anti-dumping and countervailing duties context, its actions are inconsistent with Article X:3(a) of GATT 1994.[4605] In particular, Japan argues that plate, hot-rolled, cold-rolled, and corrosion-resistant steel have traditionally been treated as separate like products by the USITC in other recent trade remedy cases.[4606] The factual findings in these cases confirm the factual findings in this case about physical properties, production processes, and end-uses.[4607] Japan argues the USITC has consistently found that no individual CCFRS is commercially interchangeable with any other CCFRS product. Indeed, the USITC considered and rejected making even cut-to-length plate and plate-in-coil (a hot-rolled steel product) a single like product, citing "differences in physical characteristics and end-uses", "some limitations on…interchangeability", and "differences in production facilities".[4608] [4609] Japan asserts that the USITC, however, chose to completely ignore this precedent. More particularly, Japan argues that nowhere in its Section 201 determination does the USITC attempt to square its finding of a single CCFRS product with its innumerable factual findings from previous anti-dumping and countervailing duties cases demonstrating the contrary. According to Japan, nowhere does the USITC rebut, or even address, arguments that the USITC's like product factual findings from past anti-dumping and countervailing duties cases are relevant for its consideration of the same products and factors in the Section 201 context.[4610]

7.1936 Japan also asserts that inconsistent with its previous decisions, the USITC failed to perform its like products analysis of CCFRS products in a "uniform", "impartial", or "reasonable" manner, consistent with Article X:3(a) of GATT 1994. The analysis was not "uniform" because it did not treat

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[4601] Treated as a separate like product, imports of tin mill products were found by Commissioner Miller to be seriously injuring the domestic tin mill industry. Ibid. at 307. Likewise, stainless wire was regarded by Chairman Koplan as a separate like product and found the domestic stainless wire industry to be seriously injured. Ibid. at 256.

[4602] Japan's first written submission, para. 160.

[4603] Japan's oral statement for the second substantive meeting, para. 24; see also Japan's second written submission, para. 56.

[4604] Japan's first written submission, para. 161.

[4605] Japan's first written submission, para. 125.

[4606] *See, e.g.,* USITC *Hot-Rolled (Final)* USITC Pub. 3446 (August 2001) (Exhibit CC-30), USITC *Hot-Rolled (Final)* USITC Pub. 3468 (November 2001) (Exhibit CC-31), USITC *Flat-Rolled (Preliminary)* USITC Pub. 2549 (August 1992) (Exhibit CC-32), USITC *Cold-Rolled (Final)* USITC Pub. 3283 (March 2000) (Exhibit CC-34).

[4607] Japan's first written submission, para. 132.

[4608] *Certain Carbon Steel Plate from China, Russia, South Africa, and Ukraine*, Inv. Nos. 731-TA-753-756 (Final), USITC Pub. 3076 (December 1997), at 5-7 (Exhibit CC-41).

[4609] Japan's first written submission, para. 134.

[4610] Japan's first written submission, paras. 135-136.

imports the same under similar circumstances. Nor was it "reasonable" to break with its past factual findings on the same CCFRS and like product factors without explanation.[4611] Japan argues that based on past precedent, and its own factual findings, the USITC could only have determined that each CCFRS product constitutes a separate like product. Its failure to do so constitutes an inconsistency with the US obligation under Article X:3(a) to apply its laws in a uniform, impartial, and reasonable manner.[4612]

7.1937 According to Japan, the analysis was not "impartial" because the USITC's omission of these factual findings was not accidental oversight, but a wilful gambit to facilitate an affirmative injury determination on CCFRS products to benefit the US domestic industries over their foreign competitors. Japan submits that under the safeguards statute, the USITC cannot render an affirmative determination unless it finds: (1) an increase in imports, either actual or as a percentage of domestic production; (2) the domestic industry producing the like product is suffering serious injury; and (3) imports were a substantial cause of the serious injury.[4613] In Japan's view, in analysing the question of increased imports, the USITC traditionally compares import volume and the ratio of imports to domestic production in the first and last full years of its period of investigation[4614]; in this case, it compared 1996 and 2000.[4615] [4616] Japan argues that had the USITC made each CCFRS product a separate domestic like product, consistent with past practice, then it could not have found the requisite increase in import volume for plate – plate import volume declined 50.9% between 1996 and 2000[4617] – and would have had to somehow explain away the decline in the ratio of imports to domestic production for cold-rolled steel and corrosion-resistant steel.[4618] With a single CCFRS like product, the USITC was able simply to note that imports increased from one end-point to another, both absolutely and as a ratio to domestic production[4619] (though, as discussed below, this increased imports analysis fails to meet the standard established by the Agreement on Safeguards, as interpreted by the Appellate Body).[4620]

7.1938 Japan also argues that had the USITC made each CCFRS product a separate like product, it could not have established causation for many of the products. For example, slab import volume increased the most of any CCFRS product between 1996 and 2000, but almost all of these imports were purchased by domestic producers themselves, because they could not produce sufficient volumes of slab to meet booming steel demand[4621]; in this way, slab imports actually benefited domestic producers.[4622] [4623] Japan argues that the USITC also could not have found cold-rolled steel imports a "substantial cause" of serious injury to the domestic cold-rolled steel industry, when it had just

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[4611] Japan's first written submission, para. 137.
[4612] Japan's first written submission, para. 142.
[4613] 19 U.S.C. §§2252(c)(1)(A-C) (Exhibit CC-47).
[4614] USITC Report, pp. 32-33 (Exhibit CC-6).
[4615] Ibid., p. 49.
[4616] Japan's first written submission, para. 138.
[4617] USITC Report, Vol. I, FLAT-9.
[4618] Ibid., FLAT-11 (cold-rolled import volume as a share of domestic production declined from 7.5% to 7.3%), and FLAT-13 (corrosion-resistant import volume as a share of domestic production declined from 13.3% to 11.8%.).
[4619] Ibid., pp. 49-50.
[4620] Japan's first written submission, para. 139.
[4621] USITC Report, Vol. I., p. 56 ("steelmakers themselves are the only purchasers of slabs").
[4622] Ibid., p. 62 ("The domestic industry includes a number of producers who rely on imported certain carbon flat-rolled steel–especially slab–for use as raw materials in the production of further processed certain carbon flat-rolled steel. Some of these producers may have benefited from the decline in import prices during the POI.").
[4623] Japan's first written submission, para. 140.

determined that cold-rolled steel imports had not caused material injury to the domestic industry in its March 2000 anti-dumping determination for cold-rolled steel[4624], under a lower causation standard.[4625] By combining the major CCFRS products into a single domestic like product, the USITC was able to ignore conditions of competition unique to individual CCFRS products, thereby facilitating its affirmative determination.[4626]

7.1939 In response to the argument that the USITC's like product definitions were not reasonable because the agency departed from a like product determination made in earlier investigations involving dumped and subsidized steel products, the United States relies upon the Panel's decision in *US – Stainless Steel* to argue that the requirement of reasonable administration of laws and regulations is not violated merely because, in the administration of those laws and regulations, different conclusions were reached based upon differences in the relevant facts.[4627] More particularly, the United States argues that with respect to differing like product determinations issued by the USITC in prior anti-dumping and countervailing duty cases, Article X:3(a) does not require "uniform" administration between different laws. It requires the uniform, impartial, and reasonable administration of each law. Otherwise, the complainants' approach would require all laws, no matter how different in their texts, purposes, and scope, to be administered in the same way with the same substantive outcome.[4628]

7.1940 In counter-response, Japan argues that the safeguards law, like the anti-dumping and countervailing duty laws, is a trade remedy law. Although the standards are not identical, the basic purposes of the laws are similar. Of particular importance, all three laws focus on the economic effect of imports on the competing domestic industry producing like or substitutable/directly competitive/similar products. Thus, given the similarities, decisions regarding like products in the context of one of these trade remedy laws are highly relevant to analysing the uniform application requirement of Article X:3(a).[4629]

7.1941 The United States argues that the fact that the USITC has reached different like product determinations in different cases does not establish a violation of Article X:3(a). First, the USITC would not violate Article X:3(a) even if it had reached different like product findings in different safeguards cases. In applying the United States' safeguards law, the USITC has applied the same five factors to define the domestic "like product" as it has applied for decades. Thus, its application of the safeguards law is uniform, in compliance with Article X. The United States submits that if the facts in two different cases differ, or if the scope of the petition in two cases differs, this may lead to two different like product findings. Such an outcome is completely consistent with a uniform application of the law to different facts. Second, Article X is not violated simply because the interpretation of the term "like product" may differ across different statutes. Article X refers to the administration of laws, not the substance of the underlying laws themselves. There is no obligation under Article X to define the same term in the same way in different statutes. Thus, if the underlying laws define the term "like product" differently, then there is no obligation to administer the laws in a way that ignores these differences. The United States submits that, in the case at hand, the US unfair trade laws approach the

[4624] USITC *Cold-Rolled (Final)* USITC Pub. 3283 (March 2000), at 24 (Exhibit CC-34).

[4625] In anti-dumping investigations, the USITC need only find that a domestic industry is suffering material injury "by reason of" subject imports. 19 U.S.C. § 1677(7)(A) (defining "material injury" as "harm which is not inconsequential, immaterial or unimportant."). In Section 201 investigations, the USITC must find that imports are a "substantial cause" of "serious injury" meaning "a cause which is important and not less than any other cause." 19 U.S.C §2252(b)(1)(B) (Exhibit CC-47).

[4626] Japan's first written submission, para. 141.

[4627] United States' first written submission, para. 1303.

[4628] United States' first written submission, para. 1304.

[4629] Japan's written reply to Panel question No. 136 at the first substantive meeting.

term "like product" differently than the United States' safeguards law. The USITC explicitly addressed some of these differences in its determination. Third, even if the underlying statutes did not directly address how the term "like product" should be interpreted, Article X would not require the USITC to interpret the term uniformly across different statutes. Requiring uniform interpretation across different laws would ignore essential differences between the laws and the situations in which they are applied. Finally, even if Article X required the USITC to interpret the term "like product" the same way for purposes of the anti-dumping, countervailing duty, and safeguard statutes, this would not necessarily mean that the USITC would reach the same "like product" findings in all cases. The United States submits that each case must be judged on its individual facts. The facts of an anti-dumping or countervailing duty cases may differ significantly from the facts of a safeguard case.[4630]

7.1942 In counter-response, Japan submits that the question at stake is whether the USITC administered its laws concerning like product delineations appropriately. The United States appears to be saying that like product means something different in the anti-dumping and countervailing duties context, but never explains why this is necessarily so. In this regard, Japan notes that the United States explained in the like product discussion that, under both laws, the purpose is to discern the clear dividing line between products. Japan questions why the clear dividing line would be different in an anti-dumping and countervailing duties context from a safeguard context unless the USITC was interested in justifying the difference where it otherwise was unjustifiable.[4631]

7.1943 The United States responds by stating that Article X:3 applies only to administration of a particular law. It does not require a Member to administer its safeguards law in the same manner as its anti-dumping laws, food safety laws, or any other laws. The United States submits that, indeed, there are good reasons why the same term may be interpreted and applied differently under different laws, especially if those laws have different objectives. In the view of the United States, adoption of Japan's interpretation of Article X:3 would disregard these differences, and commit Panels to a boundless review of Members' entire legal systems to determine whether terms received identical treatment in every law. The United States submits that it sees no indication that Article X:3 imposes such a requirement.[4632]

(ii) Comparison with other determinations in the same case

7.1944 Japan argues that because the USITC adopted a like product analysis contrary to like product distinctions for other products in this case, its actions are inconsistent with Article X:3(a) of GATT 1994.[4633] More particularly, Japan argues that the USITC made similar factual findings for semi-finished flat, long, and stainless steel products under its like product factors, but failed to render similar like product determinations.[4634]

7.1945 By way of elaboration, Japan submits that while the USITC lumped semi-finished flat steels – or slab – into the same like product as finished flat steels, it decided to treat semi-finished long products and semi-finished stainless products as separate like products, apart from finished products. Carbon billets, which bear the same relationship to carbon long products as does carbon slab to carbon sheet products in that both are the input for further rolling into the next stage product, were found to be a separate like product from finished long products. Stainless slab, which bears the identical relationship to stainless plate and other CCFRS products as carbon slab bears to finished carbon flat

[4630] United States' written reply to Panel question No. 136 at the first substantive meeting.
[4631] Japan's oral statement at the second substantive meeting, para. 34.
[4632] United States' second written submission, para. 243.
[4633] Japan's first written submission, para. 125.
[4634] Japan's first written submission, para. 143.

products, was found to be a different like product than stainless plate and other flat-rolled stainless products. Likewise, within the CCFRS category, although both tin mill products and corrosion resistant products use a cold rolled substrate, they were treated as separate like products. According to Japan, such treatment was not uniform, reasonable or impartial.[4635]

7.1946 Japan argues that the USITC combined semi-finished slab with the major finished CCFRS products made from slab – hot-rolled steel, plate, cold-rolled steel, and corrosion-resistant steel – into a single CCFRS like product by ignoring the findings of its own analysis of like product factors.[4636] According to Japan, these findings demonstrated that slab is not "like" any of the finished CCFRS products in terms of physical characteristics, end-uses, production processes, channels of distribution, and tariff classifications. In terms of physical characteristics, slab is much thicker than any finished CCFRS product, all of which are reduced in thickness via rolling.[4637] In terms of production processes, slab is continuously cast, whereas all finished CCFRS products are rolled[4638], and some are coated.[4639] In terms of channels of distribution and end-uses, nearly all slab is internally consumed by domestic producers themselves for the production of downstream products.[4640] By contrast, most corrosion-resistant steel and plate is sold to end-users and distributors, as is a substantial proportion of hot-rolled and cold-rolled steel, destined for a variety of end-use applications.[4641] Japan submits that the USITC folded all CCFRS products into a single like product in part because most finished CCFRS products are sold into the automotive and construction markets, but this logic does not apply to slab. Finally, as with all CCFRS products, slab is classified under its own tariff classification numbers.[4642]

7.1947 Japan argues that the USITC's like product findings for semi-finished carbon steel, semi-finished long products (billets) and semi-finished stainless products should have resulted in determinations that all three were not "like" the corresponding finished steel products. Yet, the USITC did not render like product determinations consistent with these findings: semi-finished long and stainless products were made separate like products, but carbon slab was not.[4643] [4644] Japan argues that likewise, within the CCFRS category, both tin mill products and corrosion-resistant products use a cold-rolled substrate.[4645] Tin mill products are coated with tin or chromium; corrosion-resistant products are coated with zinc or zinc-aluminum alloys. Yet, they were treated as separate like products, with all commissioners treating corrosion-resistant products as part of the larger flat product category, and four commissioners treating tin mill products as its own separate like product.[4646] Japan submits that, if anything, it would make more sense to consider tin mill and corrosion-resistant products as a single like product given their physical characteristics, their location in the production chain, and their sometimes common treatment in the HTS. Japan submits that, however, the USITC made the odd leap to consider, effectively, slab and plate to be more comparable to corrosion-resistant steel than tin mill products.[4647]

[4635] Japan's second written submission, para. 75.
[4636] USITC Report at 36 (Exhibit CC-6).
[4637] Ibid., at OVERVIEW – 8.
[4638] Ibid., at OVERVIEW – 10.
[4639] Ibid.
[4640] Ibid., p. FLAT – 1.
[4641] Ibid., p. OVERVIEW – 13, Table OVERVIEW – 2.
[4642] Japan's first written submission, para. 144.
[4643] USITC Report, Vol. I, p. 36 (flat), p. 83 (long), p. 193 (stainless).
[4644] Japan's first written submission, para. 145.
[4645] *Compare* USITC Report, Vol. I, p. 42 (discussing cold-rolled products) to 48 (discussion of tin mill products).
[4646] Ibid., p. 48 (with Commissioner Devaney not joining in the views of the Commission in tin mills).
[4647] Japan's first written submission, para. 146.

7.1948 In response, the United States argues that in evaluating the complainants' arguments that the USITC's determinations were not "uniform, impartial and reasonable", the Panel should apply the ordinary meaning of these terms as used in Article X:3: "uniform" means "of one unchanging form, character or kind;" "impartial" means "not partial; not favouring one party or side more than another; unprejudiced; unbiased; fair;" and "reasonable" means that the actions must be rational and not absurd.[4648]

7.1949 The United States argues that, in claiming that the USITC failed to provide uniformity when it included slab in a single like product with finished CCFRS, while placing semifinished and finished products in separate like products for other steel products, Japan has shown only that the results were different, and has demonstrated no difference in the way the USITC applied the relevant legal standard to the facts. According to the United States, the record before the USITC fully supported both the conclusions reached for each product, and the differences among those conclusions. Thus, the different outcomes all reflect the application of a uniform test to distinct facts.[4649]

7.1950 Japan also argues that the USITC's like product analysis of CCFRS products increased the probability of an affirmative injury determination because it made slab part of a single domestic like product encompassing finished CCFRS products, while making semi-finished long and stainless products separate like products; and it made corrosion-resistant products part of the CCFRS like product, while making tin mill products a separate like product. Japan submits that in all such instances, the USITC did not administer the safeguards law in a "uniform, impartial, and reasonable manner", as required by GATT 1994 Article X:3(a).[4650]

7.1951 Japan states that the USITC's decisions were not "uniform" or "reasonable" because the USITC had no principled reason for relying on its analysis of like product factors for semi-finished long, semifinished stainless products, and tin mill products while ignoring the same analysis for slab and corrosion-resistant products, based on the allegedly greater degree of vertical integration for those products. It was not "impartial" because the USITC's decision to combine all CCFRS products, including slab, into a single like product was calculated to facilitate an affirmative injury determination – under WTO-inconsistent application of US law – based on a wrongful like product definition and resulting in the application of safeguard measure to a wider range of imports than should have been lawfully allowed under the Agreement on Safeguards.[4651]

7.1952 The United States argues that the USITC provided a uniform, impartial, and reasonable like product analysis by applying the same legal standards to the distinct facts of each case and reaching legal conclusions supported by the facts of the case..[4652] According to the United States, relying upon the Panels' decisions in *Argentina – Hides and Leather* and *US – Stainless Steel*, Article X:3(a) requires that the administration of a measure be uniform, and not that the results of the measure be the same each time it is applied. The United States submits that the USITC applied the same like product factors that it uses in every safeguard investigation to each group of imports in the steel investigation. Based on the facts, the USITC determined that those factors justified the product definitions that it used.[4653]

[4648] United States' first written submission, para. 1298.
[4649] United States' first written submission, para. 1300.
[4650] Japan's first written submission, para. 125.
[4651] Japan's first written submission, para. 147.
[4652] United States' first written submission, para. 1298.
[4653] United States' first written submission, para. 1299.

7.1953 The United States also submits that the complainants have failed to establish that the USITC's product definitions were anything other than impartial. According to the United States, the USITC showed no favoritism to either side. In several instances the Commissioners decided in favor of foreign producers by rejecting domestic producer requests to join or subdivide product categories. The claims to the contrary are unsupportable.[4654] The United States also argues that the complainants have also failed to establish that the USITC product definitions are "unreasonable". Rather, the agency fully explained its findings, and supported them with record evidence.[4655]

(b) Treatment of affirmative votes

(i) General

7.1954 Japan argues that the treatment of USITC votes by the President is one of the key areas to which Article X:3(a) applies. According to Japan, there is no doubt that the US domestic rules on the President's treatment of USITC tie votes falls within the scope of paragraph 1 of Article X:3(a) – "administrative laws, regulations, decisions and rulings" pertaining to "restrictions or prohibition on imports".[4656] In this regard, Japan argues that section 330(d)(1) of the Tariff Act of 1930 specifies, in pertinent part, that when the USITC determines "whether increased imports *of an article* are a substantial cause of serious injury … and the commissioners voting are equally divided with respect to such determination", then the President can choose either of the two decisions.[4657] "An article", according to a majority of commissioners, was clearly defined as: (i) tin mill products, separate from all other CCFRS products; and (ii) stainless wire, separate from stainless wire rope. Japan submits that only one of four commissioners found imports of these separate articles to injure the relevant domestic industries. However, the President treated the Commission's decision as a tie vote and accordingly an affirmative injury determination and he imposed a safeguard measure on imports of tin mill and stainless wire.[4658]

7.1955 Japan argues that such treatment is an unreasonable administration of the safeguard law, because the President regarded the vote in this particular case as a tie when two of the affirmative votes were based on a like product definition with which he disagreed. According to Japan, such a decision simply strains logic. Japan also argues that the President's treatment also constitutes non-uniform administration of the safeguard law because the President's treatment of the divided votes as "equally divided" within the meaning of Section 330(d)(1) of the Tariff Act is a clear departure from the ordinary and longstanding practice in the administration of United States' safeguard law. For the President to treat the Commission's determination in this instance as a tie vote and an affirmative injury determination and to impose a safeguard measure on imports of tin mill and stainless wire products is considered to be at least unreasonable and non-uniform and therefore is inconsistent with Article X:3(a).[4659] Japan adds that, as required by Article X:3, the President has an obligation to treat divided USITC votes in a consistent and transparent way, given that the result of the investigation, including whether the US eventually imposes a safeguard measure or not, depends on such vote treatment.[4660] Japan asserts that for the President to rely on the inappropriate mixture of votes based on different like product definitions in this case does not represent a uniform or reasonable application

[4654] United States' first written submission, para. 1302.
[4655] United States' first written submission, para. 1303.
[4656] Japan's first written submission, paras. 151 and 162.
[4657] Japan's first written submission, para. 163.
[4658] Japan's first written submission, para. 164. For Japan's argument for the United States' violation of Articles 2.1 and 4.2(b) of the Agreement on Safeguards, see paras. 7.1926-7.1934, and *supra*. footnote 4574
[4659] Japan's first written submission, para. 164.
[4660] Japan's first written submission, paras. 151 and 162.

of US law, as required by Article X:3(a) of GATT 1994. Japan submits that, left unchecked, such action impermissibly would erode the predictability and stability of the administration of the safeguard law.[4661]

7.1956 With respect to arguments that the President's "treatment" of the USITC votes on tin mill and stainless steel wire as "a tie" was inconsistent with Article X:3(a) because Section 330(d)(1) of the Tariff Act did not permit such treatment, the United States relies upon the panel decision in *US – Stainless Steel* to argue that Article X:3(a) does not bring within the mandate of a panel the allegation that a Member has acted inconsistently with its own domestic legislation.[4662] The United States argues that it is also noteworthy that a US court recently held that the USITC's counting of affirmative and negative determinations by individual Commissioners in the safeguard investigation on tin mill steel was consistent with US law. Moreover, the Court specifically held that Commissioners Devaney and Bragg considered tin mill products in their analysis, and thus made affirmative injury and causation findings with respect to tin mill products. The United States submits that this same reasoning applies to the divided vote on stainless steel wire products.[4663]

7.1957 With respect to arguments that the USITC made a negative determination by a vote of 3-1 on tin mill product and that the President included tin mill in the remedy based on what is alleged to be just one affirmative vote[4664] and that, with respect to stainless steel wire, the President did not consider the determinations of two of the Commissioners since their determinations were based on a broader domestic industry, consisting of producers of stainless steel wire and stainless steel wire rope, and that the President's decision was based on the decision of only one Commissioner, the United States submits that none of the complainants provide support for their claims, either in the text of the Agreement on Safeguards, or in panel or Appellate Body reports, that the USITC's method of counting votes – cumulating the votes of the individual Commissioners – is within the purview of a panel, or explain how it is inconsistent with Articles 2.1 and 4.2 of the Agreement. The United States submits that nor do they provide support for their underlying claim that the findings of the different decision-makers must be exactly the same on all issues in order to be aggregated.[4665]

7.1958 In counter-response, Japan submits that in addition to the legal flaw that consistency with WTO obligations is not dependent on a domestic court's declaration that action is consistent with a domestic law, the US argument is, in essence, that the absence of standards and criteria in a law renders it impossible to find that the law was administered in a non-uniform, partial and unreasonable manner. Japan submits that, to the contrary, the unfettered ability to apply different standards is as massive a violation of the requirements of GATT Article X:3(a) as can be imagined. The treatment of some so-called tie votes as affirmative and others as negative is not only obviously non-uniform but also partial and unreasonable, particularly without any explanation from the President, as the competent authority, as to why he made inconsistent decisions. Japan submits that, furthermore, the decision to rely on three affirmative votes when only one of those votes agreed with the President's like product delineations is clearly unreasonable.[4666]

7.1959 In response to a question from the Panel, the United States argues that the President does not cast a "tie-breaking vote". He is not a "competent authority" under Articles 3 and 4 of the Agreement on Safeguards and does not vote on whether the increased imports are a substantial cause of serious

[4661] Japan's first written submission, para. 165.
[4662] United States' first written submission, para. 1309.
[4663] United States' first written submission, para. 1310.
[4664] United States' first written submission, para. 999.
[4665] United States' first written submission, para. 1001.
[4666] Japan's second written submission, para. 78.

injury or threat of serious injury. Instead, the President simply identifies which of two evenly supported determinations is the determination of the Commission. Second, the United States submits that the President clearly acted consistently with US law. The United States' safeguard statute states that when "the commissioners voting are equally divided with respect to such determination, then the determination, agreed upon by either group of commissioners may be considered by the President as the determination of the Commission". The Commissioners were equally divided with respect to the determinations on tin mill and stainless steel wire products. In fact, the US Court of International Trade recently found that the USITC vote on tin mill was, in fact, evenly divided despite the fact that the Commissioners voting in the affirmative reach different like product findings. Therefore, the President had the authority under the statute to decide which determination was the determination of the USITC. The United States submits that, finally, interpreting US law is not an appropriate function of the Panel in this dispute. In the case at hand, the WTO agreements do not address the question of how a Member may designate which among multiple findings constitutes the determination of the competent authorities under the Agreement on Safeguards. Whether the President acted consistently with US law is not relevant to the question of whether the United States complied with its WTO obligations. The United States submits that, consequently, there is no basis for the Panel to engage in an examination of whether the President's actions were consistent with US law.[4667]

7.1960 In response to the same question from the Panel, Japan submits that the issue is not whether US law permits the President to treat tie votes by the Commission as affirmative. It is that in this proceeding, with respect to tin mill and stainless wire, the President should not have treated the Commission action as a tie vote because the Commissioners had differing views about the proper scope of the like product. Japan argues that, by acting as he did, the President's decision contravened Articles 2.1, 3.1 and 4.2 of the Agreement on Safeguards and Article X:3(a) of GATT 1994.[4668]

7.1961 With respect to the argument that Article X:3(a) does not permit the "inappropriate integration" by the USITC or the President of affirmative votes from Commissioners who defined the like product differently from each other (see paragraph 7.1970), the United States submits that it is unclear exactly why the complainants consider this to be "inappropriate".[4669]

7.1962 The United States submits that if the complainants' point is that it is impermissible to treat an injury determination regarding a product (such as stainless steel wire products) as applicable to a subset of that product (such as stainless steel wire), that would seem to be an issue of interpreting the Agreement on Safeguards, and not Article X.[4670] The United States submits that even if this substantive decision somehow fell within Article X:3(a), it certainly represents a uniform, impartial, and reasonable application of the law. This analysis of individual Commissioners' determinations based on different like products applies in every case, making it uniform. It is also impartial, in that it does not favor one side over the other. Finally, the US practice follows the logical principle that an affirmative (or negative) determination with regard to a product also covers subsets of that product. Although complainants may disagree with this logic, it is plainly reasonable.[4671]

7.1963 The United States further submits that if the complainants' impermissible integration point refers to their argument that the President agreed with one set of Commissioners in defining the like products for tin mill and stainless steel wire, but another set in deciding how to treat the injury votes, they misunderstand the President's action. The President did not evaluate and separately endorse parts

[4667] United States' written reply to Panel question 132 at the first substantive meeting.
[4668] Japan's written reply to Panel question 132 at the first substantive meeting.
[4669] United States' first written submission, para. 1311.
[4670] United States' first written submission, para. 1311.
[4671] United States' first written submission, para. 1312.

of the USITC determination. With regard to the like products subject to safeguard measures, he accepted the findings of the USITC majority as presented, without agreeing or disagreeing with them. With regard to the divided votes, he considered the determinations of both sides, including the use of different like product definitions in the affirmative determinations for tin mill and stainless steel wire. US practice recognizes that determinations based on different like products may be equally valid, albeit different, ways of analysing imports, and this practice is uniform, impartial, and reasonable. For the President to consider a determination based on this principle to be the determination of the USITC is, therefore, also uniform, impartial, and reasonable.[4672]

7.1964 The United States argues that there is no basis to Japan's claim that the President's actions deviated from an "ordinary and longstanding practice in the administration of US safeguards law". According to the United States, Japan does not cite or otherwise identify this alleged practice, nor is there any authority to cite. The United States reiterates that a US court upheld the President's action in accepting these tie votes as affirmative determinations. In any event, it is impossible for the panel to determine whether the President acted inconsistently with a practice which has not been identified with specificity.[4673]

7.1965 The United States also argues that the fact that the President designated some divided determinations as affirmative (tin mill and stainless steel wire) and others as negative (tool steel and stainless fittings and flanges) does not establish an inconsistency with Article X:3(a). Panels have found that Article X:3(a) requires identical treatment, not identical outcomes. Indeed, where the facts of two cases differ, uniform treatment might require different outcomes. Thus, the mere fact that administration of a law or regulation in different cases leads to different results cannot by itself establish inconsistency with Article X:3(a).[4674] The United States submits that in the case of the four divided determinations, there is no question that the facts differed tremendously. The four domestic industries produced different products, under different market conditions, and with greatly different performance levels of revenue, sales, market share, profits, and other performance indicators. Two of the Commissioners recognized that the four domestic industries might warrant different findings. Commissioner Miller issued an affirmative determination with regard to tin mill, but not the other three divided votes. Chairman Koplan issued an affirmative determination with regard to stainless steel wire, tool steel, and stainless steel fittings and flanges, but not with regard to tin mill. Therefore, by doing nothing more than to observe that the divided votes in different factual situations had different results, the United States argues that the complainants have failed to meet their burden of proof to establish an inconsistency with Article X:3(a).[4675]

7.1966 The United States also argues that according to the complainants, a tie vote must always be treated as a negative determination, or always be treated as an affirmative determination. The United States submits that as the complainants would have it, the President should not have the flexibility to make decisions based on the unique facts and merits of each particular case. According to the United States, the complainants' position is untenable. The United States submits that each tie vote must be judged on its merits. Article X:3(a) cannot require the same outcome in all tie vote situations, just as it could not require, for example, the same injury findings in all safeguards cases or the same dumping margin in all dumping cases. The United States submits that, in fact, Article X:3(a) requires uniform

[4672] United States' first written submission, para. 1313.
[4673] United States' first written submission, para. 1314.
[4674] United States' first written submission, para. 1315.
[4675] United States' first written submission, para. 1316.

administration of the law, not uniform outcomes, and where the facts of two cases differ, uniform treatment might actually require different outcomes.[4676]

7.1967 In response to the United States' claims Japan argues that the United States fails to comprehend that for the two products where the President chose the affirmative side (tin mill and stainless steel wire), the Commissioners did not agree on the product definition. The Commission was therefore not, in fact, evenly divided. Furthermore, even if the Panel were to decide that the USITC was in fact, evenly divided, the President still failed to provide an explanation for his decision. Therefore the Article X:3(a) violation is attributable to the way in which the President treated the affirmative votes of individual Commissioners based on differing views about the proper scope of the like product definitions. Absent a common basis for the affirmative votes, the United States cannot contend that the President administered the law in a uniform, impartial and reasonable manner.[4677]

(i) Tin mill products

7.1968 Brazil and Japan explain that the President decided to impose safeguard measures on tin mill products based on his treatment of the USITC's tie vote on injury as an affirmative determination. Brazil, Japan and Korea argue that the Commission's decision on tin mill products, however, should not have been treated as equally divided, and does not support the measures.[4678] Brazil and Japan argue that, in effect, the President agreed with the three affirmative votes on tin mill products. However, in doing so he also agreed with the four commissioners who found tin mill products to be separate like products. Hence, he effectively imposed a measure on products for which only one out of four commissioners with whom he agreed in terms of the like product definition (treating the tin mill and stainless wire products as separate products) had made an affirmative determination.[4679] Similarly, Korea argues that the President of the United States considered the situation in relation to tin mill products to be a "tie" vote – three affirmative and three negative – even though the majority of Commissioners who examined the like product adopted by the President–tin mill products – reached a negative injury determination.[4680]

7.1969 Further, Korea argues that since both the USITC and the President determined that the relevant like product was tin mill products, the President had to rely on the causation and serious injury decisions related to the tin mill industry. The President did not (and could not) impose safeguard measures on that basis. Instead, he based his decision on the combination of a single affirmative injury vote by Commissioner Miller together with the votes of two other Commissioners who rendered their affirmative decision based on a different, unadopted like product. Korea argues that it was, in fact, a double counting of the votes of Commissioners Bragg and Devaney in the sense that their affirmative votes were counted both for the injury determination on CCFRS products and again for the injury determination on tin mill products.[4681]

7.1970 Brazil and Japan argue that the WTO Agreements, particularly Article X:3(a) of the GATT 1994, require the President to administer the safeguard law in a uniform, impartial and reasonable manner. According to Brazil and Japan, the rights of other WTO Members to fundamental fairness and due process envisioned under Article X:3(a) were breached when the President treated the USITC

[4676] Korea's written reply to Panel question 134 at the first substantive meeting.
[4677] Japan's second written submission, paras. 48 and 76.
[4678] Brazil's first written submission, para. 248; Japan's first written submission, para. 149; Korea's first written submission, para. 170.
[4679] Brazil's first written submission, para. 249; Japan's first written submission, paras. 149 and 152.
[4680] Report Submitted to the US Congress at Tin Mill Products (March 2002) (Exhibit CC-89).
[4681] Korea's first written submission, para. 170; see also Japan's first written submission, paras. 155-157.

votes on tin mill as "evenly divided" based on an inappropriate integration of affirmative votes premised on different like product definitions.[4682] Similarly, Korea argues that the US statute was not administered in a "uniform, impartial and reasonable manner" and, the United States violated its Article X:3(a) obligation.[4683]

7.1971 In response, the United States argues that the USITC and the President permissibly exercised their authority under US law in their treatment of divided votes. Although two of the Commissioners based their analyses on like product definitions different from those adopted by the remaining four Commissioners, all six of them rendered a determination that included imported tin mill and stainless steel wire. According to the United States, US legislation permitted the USITC to count each of these individual determinations in deciding whether the determination of the USITC was affirmative, negative, or divided. The legislation also permitted the President to accept the determination of the USITC as reported to him. For the divided votes, the President also had the authority to consider the Commission determination to be affirmative or negative. That he made different designations with regard to the four divided votes does not call into question the uniformity, impartiality, or reasonableness of his action, since the individual Commissioners' determinations were based on the distinct facts related to each domestic industry.[4684]

(ii) Stainless steel wire

7.1972 Japan argues that the President decided to impose separate safeguard measures on stainless steel wire products based on his treatment of these products as subject to USITC's tie-vote injury determinations. Japan submits that, the Commission's decisions on these products, however, should not have been treated as equally divided, and do not support the measures. Japan argues that for stainless wire products, two commissioners considered these products as part of a combined stainless wire and wire rope like product and issued an affirmative determination on these products. The other four commissioners considered them separate like products. All four voted in the negative for stainless wire rope, resulting in a majority negative determination for this product. One of the four, however, made an affirmative determination for stainless wire; the other three voted in the negative for stainless wire. Overall, therefore, the vote was tied at three-to-three for stainless wire; but for stainless wire as a separate like product, the vote was three-to-one negative.[4685]

7.1973 Japan argues that the WTO Agreements, particularly Article X:3(a) of the GATT 1994, require the President to administer the safeguard law in a uniform, impartial and reasonable manner. According to Japan, the rights of other WTO Members' to fundamental fairness and due process envisioned under Article X:3(a) were breached when the President treated the USITC votes on stainless steel products as "evenly divided" based on an inappropriate integration of affirmative votes premised on different like product definitions.[4686]

7.1974 In response, the United States argues that the USITC and the President permissibly exercised their authority under US law in their treatment of divided votes. Although two of the Commissioners based their analyses on like product definitions different from those adopted by the remaining four Commissioners, all six of them rendered a determination that included imported tin mill and stainless steel wire. According to the United States, US legislation permitted the USITC to count each of these individual determinations in deciding whether the determination of the USITC was affirmative,

[4682] Brazil's first written submission, para. 251; Japan's first written submission, para. 150.
[4683] Korea's first written submission, para. 170.
[4684] United States' first written submission, para. 1306.
[4685] Japan's first written submission, para. 149.
[4686] Japan's first written submission, para. 150.

negative, or divided. The legislation also permitted the President to accept the determination of the USITC as reported to him. For the divided votes, the President also had the authority to consider the Commission determination to be affirmative or negative. That he made different designations with regard to the four divided votes does not call into question the uniformity, impartiality, or reasonableness of his action, since the individual Commissioners' determinations were based on the distinct facts related to each domestic industry.[4687]

(c) Exclusion of NAFTA imports

7.1975 Korea notes that the USITC found that, under Section 311(a) of the US NAFTA Implementing Legislation, imports of other welded pipe (among other products) from Canada accounted "for a substantial share of total imports and contribute importantly to the threat of serious injury caused by the imports".[4688] According to Korea, the USITC also found that, under Section 311(a) of the US NAFTA Implementing Legislation, imports of CCFRS (among other products) from Mexico accounted for a substantial share of total imports and contributed importantly to the serious injury.[4689] [4690] [4691]

7.1976 Korea states that irrespective of the finding of the USITC, the President of the United States determined that imports from Canada and Mexico did not account for a substantial share of total imports nor did they contribute importantly to the serious injury for any product that was subject to a safeguard measure.[4692] Korea argues that in reversing the determination of the USITC, the President of the United States did not provide any explanation for the manifest discrepancy between the USITC determination and the determination of the President. Indeed, the President made a blanket exemption for all products subjected to safeguard measures regardless of the determination by the USITC. It was on the basis of such a determination by the President that the United States excluded imports from Canada and Mexico.[4693]

7.1977 Korea argues that although the USITC and the President should administer the same legal standard under sections 311(a) and 312(b) of the US NAFTA Implementing Legislation[4694] when assessing the same factual situation, the two authorities came to totally different decisions with respect to flat steel products and other welded pipe. If the two authorities' application of the same legal standard to the same set of facts had been uniform, impartial and reasonable, they would have come to the same conclusion. In Korea's view, since the two authorities' decisions were contradictory, the United States is in violation of Article X:3(a) of the GATT 1994.[4695]

7.1978 In response, the United States submits that the USITC's findings are not subject to Article X:3 since, under Section 311, they have no legal effect and they do not change any party's legal rights, impose or remove any burden on imports, or require any other agency or government officer to take action. Therefore, according to the United States, they are not a law, regulation, judicial decision or

[4687] United States' first written submission, para. 1306.
[4688] USITC Report, Vol. I, p. 166 (Exhibit CC-6). The Commission was evenly divided on whether those imports contributed importantly to the threat of serious injury.
[4689] USITC Report, Vol. I, pp. 66-67 (Exhibit CC-6).
[4690] USITC Report, Vol. I, p. 66 (Exhibit CC-6).
[4691] Korea's first written submission, para. 175.
[4692] Proclamation 7529, 67 Fed. Reg. 10553, 10555-56 (2002), para. 8 and clause (2) (Exhibit CC-13).
[4693] Korea's first written submission, para. 176.
[4694] Codified at 19 U.S.C. §§ 3371-3372, Implementing Chapter 8, Article 801 of the North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of Mexico (Exhibit CC-47).
[4695] Korea's first written submission, para. 177.

administrative ruling of general application. The United States submits that, similarly, their lack of effectiveness means that the USITC findings with respect to Canada and Mexico are not part of the "administration" of such measures. Since the USITC findings on "substantial share" and "contribute importantly" have no legal effect, any difference between them and the Presidential determination would not represent a legally cognizable lack of uniformity, impartiality, or reasonableness in the "administration" of a measure.[4696]

7.1979 The United States argues that, in any event the President did not, as Korea alleges, apply "the same legal standard to the same set of facts". The United States submits that, unlike the USITC, the President based his determination on the original report and the supplemental responses, which were not available when the USITC made its findings. In addition, although the USITC is subject to a statutory standard almost identical to the one applicable to the President, nothing required the USITC and the President to reach identical results in applying that statutory standard. Reasonable minds may differ in applying the law to the same set of facts. Thus, even if it were assumed that different levels of government reached different results, that difference does not implicate Article X.[4697]

7.1980 In counter-response, Korea notes the following facts that it considers to be salient:[4698] In relation to CCFRS products, Korea notes that Mexico was one of the top five sources of CCFRS; Mexico's import volume increased 26.9% during the 1996-2000 period; Mexico's rate of increase of imports was higher than the rate of increase of non-NAFTA imports; and Mexico's AUV for CCFRS was consistently below the AUVs of other imports.[4699] In relation to pipe and tube, Korea notes that Canada was the largest single supplier for the three most recent years in the period examined; the quantity of imports from Canada between 1998-2000 was 141% greater than the quantity from the second largest supplier; between 1998-2000, Canada accounted for at least 35% of the imports; and imports from Canada increased their market share from 10.8% in 1999 to 14.2% in 2000.[4700] Korea states that the evidence concerning the significance of NAFTA imports of CCFRS and pipe and tube calls into question whether, indeed, the President's decision to exclude imports from these sources was reasonable and not arbitrary, when the United States itself admits that the decision was based on the USITC Report.[4701] [4702]

(d) Explanation/publication

7.1981 Brazil and Japan note that the President provided no explanation for why he treated these purported "tie votes" as affirmative determinations for tin mill products and stainless steel products while treating tie votes on two other products – tool steel and stainless flanges/fittings – as negative determinations.[4703] Brazil and Japan argue that with no explanation of his decision to treat some tie votes as affirmative and some as negative, the President's decisions in this regard are inconsistent with one another. They, therefore, violate the requirement under Article X:3(a) of the GATT that each Member must administer its laws in a uniform, impartial, and reasonable manner.[4704] [4705]

[4696] United States' first written submission, para. 1319.
[4697] United States' first written submission, para. 1320.
[4698] Korea's second written submission, para. 235.
[4699] USITC Report, Vol. I, p. 66-67 (Exhibit CC-6).
[4700] USITC Report, Vol. I, pp. 166-167 (Exhibit CC-6).
[4701] United States' first written submission, para. 1320.
[4702] Korea's second written submission, para. 236.
[4703] Brazil's first written submission, para. 249; Japan's first written submission, paras. 152 and 166.
[4704] *Argentina –Hides and Leather*, paras. 11.78-11.101.

7.1982 According to Japan, the decisions here are not uniform for the obvious reason that they are inconsistent: two tie votes are treated as affirmative; two are treated as negative. This is not a uniform administration of US law. Absent the required explanation for the President's decision, one can only surmise that the decisions are also not impartial. Finally, the decisions are by nature unreasonable because, as discussed above, they were not supported by the requisite reports and analyses. It is not a reasonable administration of US law to make a decision without explaining the basis for that decision. The decisions are therefore inconsistent with the requirements of Article X:3(a).[4706]

7.1983 The United States argues that there is no reason in the text (or even in the "spirit") of Article X to support Japan's conclusion that "impartial" and "reasonable" administration of measures listed in Article X:1 requires the publication of "principled reasons" for reaching a decision. Article X explicitly requires publication only in paragraph 1, which is limited to regulations, rulings, judicial decisions and administrative rulings of general application. Even this explicit obligation only requires publication "in such a manner as to enable governments and traders to become acquainted with" the measures. In other words, as long as the measure explains what it does, a Member need not explain why it was adopted. In contrast, Article X:3 contains no reference to publication, suggesting that the words that are actually there – "administer in a uniform, impartial and reasonable manner" – do not require publication. Moreover, a Member can meet the Article X:1 publication requirement by indicating what the measure does, without describing why it took the measure. Thus, if any publication requirement can be read into Article X:3, it would seem to involve only the description of action taken by a Member, and not an explanation of how the measure complies with municipal or WTO rules.[4707]

7.1984 Korea asserts that the President ignored the findings of the USITC with respect to Mexico and Canada and rendered a conclusion that imports from Canada and Mexico did not account for a substantial share of total imports nor contribute importantly to the serious injury.[4708] However, the United States failed to provide any explanation of how it reached this directly contrary conclusion on this important and pertinent issue of fact and law. Thus the determination is in violation of Articles 3 and 4.2(c) of the Agreement on Safeguards as well as Article X:3(a) of the GATT 1994.[4709]

7.1985 The United States argues that Article X:3 does not oblige a Member to "explain" the reasons for administering a law, regulation, judicial decision, or administrative ruling in a particular manner. Thus, the absence of such an explanation for the President's decision on the application of the substantial share and contribute importantly standards cannot establish the existence of an inconsistency with Article X:3.[4710]

(e) Scope of the obligations imposed by Article X:3(a) of GATT 1994

7.1986 Japan argues that unlike most provisions of GATT 1994, which are concerned with the content of a government's laws, regulations, decisions and rulings, Article X of GATT 1994 focuses

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[4705] Brazil's first written submission, para. 253; Japan's first written submission, para. 173. Japan claimed GATT 1994 Article X:3(a) violations as well as Articles 3.1 and 4.2(c) violation for the lack of explanation. Ibid. para. 166. See also paras. 7.1996-7.2018.

[4706] Japan's first written submission, para. 174.

[4707] United States' first written submission, para. 1294.

[4708] Proclamation 7529, 67 Fed. Reg. 10553, 10555 (2002), para. 8 (Exhibit CC-13).

[4709] Korea's first written submission, para. 180.

[4710] United States' first written submission, para. 1321.

on the administration of those laws, regulations, decisions, and rulings.[4711] According to Japan, Article X articulates the basic principles of what is widely known as due process or fundamental fairness.[4712] [4713] Japan further argues that the words "uniform", "impartial", and "reasonable" form the essence of the Article X:3(a) obligations.[4714] They are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context of its object and purpose".[4715] Japan submits that with respect to the administration of laws which Article X:3(a) governs, "impartial" ensures that authorities do not favor particular parties over others[4716]; "reasonable" is directed at the nature of the administration itself and ensures that authorities do not administer a law in an inappropriate manner, such as applying a penalty in a disproportionate manner[4717]; and "uniform" ensures that authorities do not administer laws in different ways under similar circumstances.[4718] Collectively, these obligations ensure due process.[4719] Based on the Appellate Body's interpretation of Article X:3 in *US – Shrimp*[4720], Japan argues that the Appellate Body considers the standards contained in Article X:3 to represent in one sense the notion of good faith and in another sense the "fundamental requirements of due process".[4721]

7.1987 Japan further agues that the Article X:3(a) due process rights may be viewed as a specific incorporation of the fundamental international legal principle of *abus de droit.* Japan submits that

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[4711] The Appellate Body referenced this distinction in *EC – Bananas III*, at para. 200 ("Article X applies to the *administration* of laws, regulations, decisions and rulings." (emphasis in original)).

[4712] The term "due process" has been used extensively in WTO dispute settlement proceedings. *See, e.g.*, Appellate Body Report, *India – Patents (US)*, at para. 94; and Panel Report, *US – FSC*, at para. 6.3.

[4713] Japan's first written submission, para. 126.

[4714] The *New Shorter Oxford Dictionary* defines these important terms as:

"impartial" — Not partial; not favouring one party or side more than another; unprejudiced, unbiased; fair, at 1318;

"reasonable" — 1. Endowed with the faculty of reason, rational. 2. In accordance with reason; not irrational or absurd. 3. Proportionate. 4. Having sound judgment; ready to listen to reason, sensible. Also, not asking for too much. 5. Within the limits of reason; not greatly less or more than might be thought likely or appropriate; moderate, at 2496;

"uniform" — "1. Of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times, . . . 4. Of the same form, character, or kind as another or others; conforming to one standard, rule, or pattern; alike, similar" at 3488.

[4715] Vienna Convention, art. 31.1. Article 26 also establishes the concept of *pacta sunt servanda* stating "Every treaty in force is binding upon the parties to it and must be performed by them in good faith", and it appears in Part III of the Vienna Convention titled, "Observance, Application and Interpretation of Treaties." Ibid. The Vienna Convention governs the interpretation of the provisions of the WTO Agreements, including GATT 1994. *See* DSU Article 3.2; *see also* AD Agreement, Article 17.6 (i) (requiring Members' authorities to evaluate facts in "an unbiased and objective manner"); Article 17.6(ii) (directing Panels interpreting the Agreement to use "customary rules of interpretation of public international law", *i.e.*, the Vienna Convention). Most recently, the Panel in *Korea – Procurement* recognized the implicit development of Vienna Convention Article 26 *pacta sunt servanda* in respect of the GATT 1947 and the WTO Agreements, at para. 7.93.

[4716] *Argentina – Hides and Leather*, para. 11.95, 11.100 (noting that "impartiality" prohibits an authority from giving unfair advantage to one party).

[4717] *Argentina – Hides and Leather*, para. 11.86 (holding that the meaning of "reasonableness" relates to how a law or regulation is actually administered). Panel Report, *US – Stainless Steel*, para. 6.51 ("the requirement of uniform application of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situation").

[4718] Ibid.

[4719] Japan's first written submission, paras. 127-131.

[4720] Appellate Body Report, *US – Shrimp*, (emphasis in original), at para. 182.

[4721] Japan's first written submission, para. 128.

abus de droit, or abuse of law, prohibits a state from engaging in an abusive exercise of its rights.[4722] According to Japan, this principle was recognized by the Appellate Body in the *US – Shrimp* case. "It noted that good faith" is a "general principle of law and a general principle of international law [that] controls the exercise of rights by states"[4723] and that *abus de droit* is one application of this general principle.[4724] [4725] Japan asserts that in this way, the Appellate Body adopted the concept of good faith as a tool for interpreting WTO provisions so as to guarantee the due process rights of WTO Members. Specifically, good faith precludes unreasonable, abusive, or discriminatory interpretation of WTO rights and obligations. These principles prove even more crucial when a particular law endows a national authority with discretion.[4726] An exercise of discretion in good faith must include a consideration of the parties' interests. In this way, the concept of good faith imposes a duty upon Members to implement the provisions in a reasonable and equitable manner.[4727]

7.1988 In response, the United States argues that Japan's analysis omits a key aspect of the reasoning in *US – Shrimp*. According to the United States, the Appellate Body cited Article X:3 not in response to a claimed inconsistency with that Article, but as context for the interpretation of Article XX(g). The United States submits that the Appellate Body appears to have distinguished between "certain minimum standards" that Article X:3 actually "establishes" and other due process ideals that are part of the "spirit, if not the letter" of that Article. According to the United States, the Appellate Body did not have to clarify this distinction, as consistency with Article X was not subject to the appeal.[4728] The United States further submits that in line with the Appellate Body's repeated cautions against reading into the Agreement words that are not there, a panel cannot add new terms or change the meaning of existing terms. Accordingly, the United States reads the Appellate Body's guidance in *US – Shrimp* as a recognition that Article X provides only "certain minimum standards of transparency and procedural fairness" – namely, those expressly provided by its terms. The United States submits that it does read the Appellate Body's reference to the "spirit" of Article X – a "spirit" not found in the "letter" (i.e., the text) – as justifying the importation into Article X of alleged due process concepts that are not expressly provided. "[4729]

7.1989 The United States further submits that there is nothing in Article X to suggest that it incorporates international law principles of *abus de droit* or "good faith". According to the United States, as a general matter, the DSU is specific when it incorporates customary rules of international law, which it does only in Article 3.2, and only with regard to rules of interpretation. *Abus de droit*

[4722] Sir Robert Jennings, *Oppenheim's International Law*, Vol. I, p. 407 (9th ed. 1992) (an abuse of right occurs when a state avails itself of a right in an arbitrary manner).

[4723] *US – Shrimp*, at para. 158; *see also US – FSC*, at para. 166; *US – Gasoline*, at 18. This principle is set out at Article 26 ("pacta sunt servanda") of the Vienna Convention, which requires states bound by treaties to perform them in good faith.

[4724] As the Appellate Body concluded, "(a)n abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the Treaty obligation of the Member so acting." *US – Shrimp*, at para. 158.

[4725] Japan' first written submission, para. 129.

[4726] The same leading treatise used by the Appellate Body in *US – Shrimp* explains, "wherever the law leaves a matter to the judgement of the person exercising the right, this discretion must be exercised in good faith, and the law will intervene in all cases where this discretion is abused … Whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which means that it must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interests of others." *B. Cheng, General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, p. 133, (Exhibit CC-48).

[4727] Japan's first written submission, para. 130.

[4728] United States' first written submission, para. 1292.

[4729] United States' first written submission, para. 1293.

does not fall into that category. Moreover, the Appellate Body noted in *US – Shrimp* that this concept "enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'" However, Article X applies to any measure described in its first paragraph – including a measure that liberalizes trade. Thus, according to the United States, it cannot be understood as the incorporation of a legal principle directed exclusively at measures that prejudice other signatories to an Agreement.[4730]

7.1990 Japan argues that the Agreement on Safeguards requires the competent authority to determine whether or not increased imports cause serious injury to the domestic industry before taking a safeguard measure. Under US law, the USITC is responsible for the injury determination. Thus, the USITC determination falls under the scope of Article X:3, since the administration of the laws, regulations, decisions and rulings related to the United States' safeguard system mainly consists of the USITC determination based on its investigation as well as the subsequent decision on the application of the measure by the President.[4731]

7.1991 The United States argues that Article X:3 does not apply to the substantive content of laws, regulations, judicial decisions and administrative rulings of general application. More particularly, the United States argues that none of the claims raised in relation to Article X:3(a) is implicated by Article X:3(a), as they involve substantive findings or determinations, and not the administration of laws, regulations, judicial decisions or administrative rulings of general application.[4732] The United States submits that the Panel should not even reach the complainants' factual allegations that specific decisions by the President and the USITC were not uniform, impartial, and reasonable. It further submits that should the Panel decide to reach that question, the facts show that with regard to each of these claims, the complainants have failed to meet their burden of proof to establish an inconsistency with Article X:3(a).[4733]

7.1992 According to the United States, the argument that some of the decisions by the USITC or the President under Section 201 or Section 312 are not "uniform", "impartial", or "reasonable" and, consequently, are inconsistent with Article X:3(a) are based on the mistaken view that Article X:3(a) requires "decisions" to be uniform and ignores the text of Article X:3(a) which applies to "administering" laws relating to international trade. According to the United States, panels and the Appellate Body have made clear that Article X:3 applies exclusively to the administration – in the sense of procedures applied – of the laws, regulations, judicial decisions, and administrative rulings of general application described in Article X:1.[4734] The United States relies upon comments made by the Appellate Body in *EC – Poultry* and the panel in *Argentina – Hides and Leather* to argue that the Article X obligations are of a limited nature. On the basis of those decisions, it argues that, Article X:1 covers only certain "laws, regulations, judicial decisions and administrative rulings of general application", generally those pertaining to international trade. With regard to these measures, the only obligations are that a Member publish them promptly and, for certain of them, not enforce the measure until after its official publication. Article X:3(a) applies not to the measures described in Article X:1 themselves, but to their administration, which must be "uniform, impartial and reasonable".

7.1993 Relying upon the Appellate Body's decision in *US – Shrimp*, the United States further argues that Article X:3 does not require substantive decisions to be uniform. Indeed, a uniform, impartial,

[4730] United States' first written submission, para. 1295.
[4731] Japan's first written submission, para. 131.
[4732] United States' first written submission, para. 1296.
[4733] United States' first written submission, para. 1297.
[4734] United States' first written submission, para. 1287.

and reasonable administration of laws will often require different outcomes because of different facts or other circumstances.[4735] According to the United States, other provisions of the covered agreements specify the substantive requirements, and these must be the basis for a claim that the substantive aspects of a Member's actions are inconsistent with WTO obligations. To the extent that the complainants are complaining that a particular outcome is inconsistent with a provision of a covered agreement, they have the burden of proof in establishing that breach, and that would not be a claim under Article X:3(a).[4736]

7.1994 In counter-response, Japan argues that to the extent that the *Argentina – Hides and Leather* Panel implied that a measure was either administrative (procedural) or substantive, Japan believes this to be erroneous and unsupported by any Appellate Body precedent. That a substantive measure can be administered in a manner that is not uniform, impartial and reasonable is self-evident. According to Japan, GATT Article X:3(a) is meant to address and prevent precisely this type of procedural protectionism.[4737] [4738] Japan also submits that the United States' contention that the customary international law principles of good faith and *abus de droit* are not applicable to GATT Article X:3(a)[4739] is expressly contradicted by the declaration of the panel in *Korea – Procurement* that principles of customary international law apply to WTO provisions unless they are explicitly excluded by the text of a WTO Agreement.[4740] Japan argues that, moreover, in its prior decisions, the Appellate Body has declared both that the demands of due process are implicit in the DSU[4741] and that the principle of good faith indeed informs the WTO Agreement in general.[4742] [4743] Japan concludes that, in light of the foregoing, it is indisputable that the international law principles of due process and good faith are embedded in GATT Article X:3(a). Thus, in analysing how the US administered its safeguard law in this dispute, the Panel should examine the US conduct closely, with an eye to whether the United States administered its law in a way that respected its due process and good faith obligations.[4744]

7.1995 Japan argues that the United States must administer its safeguard law in a uniform, impartial and reasonable manner. The same standards must be applied in every instance. When applied to different facts, the outcome may differ. However, different outcomes when faced with the same or highly similar facts do not meet the requirements of Article X:3(a).[4745] Similarly, Korea argues that

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[4735] United States' first written submission, para. 1290.

[4736] United States' first written submission, para. 1287.

[4737] The erroneous nature of the US argument is also illustrated by the Panel and Appellate Body reports in *US – Underwear.* There, the Panel and Appellate Body said that the administrative (procedural) obligations of GATT Articles X:1 and X:2 applied in the context of a textile safeguard restraint measure (a substantive measure). Appellate Body Report, *US – Underwear*, at pp. 20-21 and Panel Report, *US – Underwear*, at paras. 7.64-7.66. Though Article X:3(a) embodies a different administrative (procedural) obligation than Articles X:1 and X:2, like them it applies that administrative (procedural) obligation to substantive measures of general application.

[4738] Japan's second written submission, paras. 65-67.

[4739] United States' first written submission, at para. 1295.

[4740] Panel Report, *Korea – Procurement*, at para. 7.97 (decision not appealed).

[4741] Appellate Body Report, *India – Patents (US)*, at para. 94.

[4742] Appellate Body Report, *US – Hot-Rolled Steel*, at para. 101; Appellate Body Report, *US – FSC*, at para. 166.

[4743] Japan's second written submission, para. 68.

[4744] Japan's second written submission, para. 69.

[4745] Japan's written reply to Panel question No. 134 at the first substantive meeting.

while Article X:3(a) does not require uniformity in outcome in every case there, nevertheless, has to be consistency in administration so that the results are also consistent.[4746]

3. Articles 3.1 and 4.2(c) of the Agreement on Safeguards

(a) Treatment of affirmative votes

7.1996 Brazil, Norway and Japan argue that even assuming that the President's reliance on three affirmative votes based on differing like product definitions for tin mill products and stainless steel wire was legitimate, the decision was inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards because the President failed to identify which determinations "set[s] forth the findings and reasoned conclusions reached on all pertinent issues of law and fact". He, therefore, also failed, as required by Article 4.2(c), to provide "a detailed analysis of the case under investigation as well as a demonstration of the factors examined".[4747] Japan argues that anytime the President makes a decision that departs from or lacks an USITC majority – which applies with respect to the tin mill and stainless wire products – then he must provide an explanation for the decision. Japan submits that, in this case, the President provided no explanation as to why he agreed with those Commissioners voting in the affirmative for tin mill and stainless wire, while agreeing with those voting in the negative for tool steel and stainless flanges and fittings.[4748]

7.1997 Referring to relevant parts of the USITC Report, the United States argues that the determinations of the three USITC Commissioners who made affirmative determinations on tin mill products[4749] and stainless steel wire[4750] are supported by findings and conclusions and a detailed analysis that fully meets the requirements of Articles 3.1 and 4.2(c) of the Agreement on Safeguards. More particularly, the United States argues that the competent authorities (i.e., the USITC) made an affirmative determination with regard to tin mill and stainless steel wire under US law and fully complied with Article 3.1 by publishing "a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". The report addressed all of the factors necessary for an affirmative determination consistent with Articles 2.1 and 4. Since the views of the Commissioners and data in the USITC Report provided findings and reasoned conclusions in support of the affirmative determinations, Article 3.1 did not require further explanation by the President. This, says the United States, is in keeping with the President's role in the US statutory process – not to make a separate determination, but to decide on which of the determinations already made by the Commissioners to rely as the determination of the USITC as a whole.[4751]

7.1998 In addition, the United States submits that the President did not make a decision that "departs from" the USITC's decision. Instead, he simply identified which votes constituted the determination of the USITC. Further, in deciding that an affirmative determination constitutes the determination of the USITC, the President decides which of two determinations – one negative and one affirmative, each of them potentially consistent with US law – shall be the collective determination of the USITC. He does not pick and choose among the Commissioners who supported that determination, adopt one set of views, or adopt one set of conclusions as his own. The United States submits that this is entirely consistent with the Agreement on Safeguards, provided that the Commissioners' written

[4746] Korea's written reply to Panel question No. 134 at the first substantive meeting.
[4747] Brazil's first written submission, para. 252; Japan's first written submission, paras. 166 and 167. For Japan's related argument for the United States' violation of Articles X:3(a), see 7.1981-7.1983 and *supra*. footnote 4705
[4748] Japan's oral statement for the first substantive meeting, para. 12.
[4749] United States' first written submission, paras. 982-989.
[4750] United States' first written submission, paras. 990-997.
[4751] United States' first written submission, para. 1017.

views provide explanations (albeit alternative explanations) demonstrating the legal sufficiency of the determination that the President selected.[4752]

7.1999 Japan and Norway assert that a question arises in this case as to who is the "competent authority" in the United States in safeguard investigations. Although the USITC conducts the injury investigation, the President makes the ultimate decision on whether and how to impose the measure. This distinction will sometimes not matter if the President agrees with the USITC and imposes the remedy they recommend he impose. However, anytime the President makes a decision that departs from or lacks an USITC majority – which applies with respect to the tin mill and stainless wire products, and his choice of remedy for all products – then he must provide an explanation for the decision. Japan submits that the 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 United States Government of the obligation to abide by Articles 3.1 and 4.2(c). If the President chooses a course unsupported by an USITC majority, he must issue his own report or, at least, provide a reasoned analysis or identify whose reports and analysis he is adopting. Otherwise, as here, the measure is unsupported and violates Articles 3.1 and 4.2(c).[4753] More particularly, Japan argues that, under the WTO Agreement, if the President disagrees with the USITC's analysis, then he effectively takes the role of the competent authority within the meaning of Article 3.1 of the Agreement on Safeguards, because his decision becomes the injury determination of the United States. Therefore, under such circumstances, the President must abide by Articles 3.1 and 4.2(c) and any other obligations applicable to competent authorities.[4754]

7.2000 Japan submits that the crux of its argument on this point is that the requirements of the Agreement on Safeguards must be followed by each Member regardless of the internal decision-making process for the Member. According to Japan, if the President disagrees with the USITC analysis, then he effectively takes the role of the competent authority within the meaning of Article 3.1 of the Agreement on Safeguards, because his decision becomes the injury determination of the United States.[4755] Furthermore, Article 2.1 provides that "a Member may apply a safeguard measure only if that Member has determined" which makes clear that a measure can only be taken after an investigation is performed pursuant to Article 3.1, and consistent with the result of that investigation. Japan submits that it is not sufficient for the President to point his finger at the USITC and say "they're the competent authority, not me". This approach, submits Japan, would apply to all cases in which the President's measure lacks support in the USITC's explanation.[4756]

7.2001 Similarly, Korea argues that it is not relevant how the internal decision-making process is organized by a Member. However, there must be a determination that meets all the requirements of the Agreement on Safeguards and compliance must be judged by reference to the authorities' published report. If that decision contains internal inconsistencies which are not resolved within the report, or legally inconsistent findings, then the requisite legal basis for a safeguard measure has not been met. Korea submits that, for this reason, when there are conflicting legal recommendations and even inconsistent factual findings, the President may not simply pick out any of the findings that support serious injury, causation, etc. If not even a majority of the Commission agrees that serious injury, causation, or increased imports exists then there are questions raised as to the existence of the necessary pre-conditions for safeguard relief. The failure of the President to either seek a clarification from his authorities or otherwise explain the decision to nonetheless find serious injury, causation, etc.

[4752] United States' written reply to Panel question No. 93 at the second substantive meeting.
[4753] Japan's first written submission, para. 168; Norway's first written submission, para. 342.
[4754] Japan's oral statement for the second substantive meeting, para. 27.
[4755] Japan's second written submission, paras. 59-61.
[4756] Japan's written reply to Panel question No. 69 at the second substantive meeting.

renders the decision-making process not in accord with the Agreement on Safeguards. The necessary prerequisites for safeguard relief have not been met.[4757]

7.2002 China argues that, pursuant to Article 3.1 of the Agreement on Safeguards, the competent authorities are required to provide a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. These findings represent the legitimate basis for the imposition of a safeguard measure. Thus, the Agreement on Safeguards requires that the reasons why a measure is applied be adequately explained and transparent. According to China, if the authority applying the measure (in this case the President) decides to depart from the findings of the investigating authority by imposing a higher remedy, it has to provide an adequate explanation. Such an explanation is necessary in order to provide a legitimate basis for its decision, and in order to ensure transparency. China submits that the absence of explanation would allow the authority to arbitrarily modify the outcome of the investigation and impose remedies of higher extent than necessary.[4758]

7.2003 Norway submits that it is the United States that is the Member of the WTO, not the USITC nor the President. The United States has an obligation to ensure that Articles 3.1 and 4.2(c) is adhered to. Any decision must be supported, as required by the Agreement on Safeguards, and that support must be published as required by Articles 3.1 and 4.2(c). Internal US legislation on "bifurcation" of decision making power or on confidentiality of commissioner's recommendations are irrelevant, and cannot override the obligations of the US as a Member of the WTO.[4759]

7.2004 In response, the United States submits that the Appellate Body in *US – Line Pipe* made it clear that the internal decision making process of a Member is entirely within the discretion of that Member and an exercise of its sovereignty. The United States argues that, on the basis of that decision, the Agreement leaves the decision-making process to the Members, including the identification of what constitutes a decision under its municipal law, provided that the determination, "however it is decided domestically", meets the requirements of the Agreement.[4760] The United States argues that the United States implementing legislation provides for the USITC to conduct investigations and make injury determinations and for the President to make the decision on remedy and certain other matters. It provides that when the USITC is equally divided in its injury determination, the President may consider as the USITC determination either the determination of the Commissioners voting in the affirmative or those voting in the negative.[4761]

7.2005 The United States also argues that the President is not a "competent authority" for purposes of Articles 3 and 4. He does not participate in the investigatory process or cast a vote. He merely decides which explanation by those who did participate in the investigation carries the greater weight.[4762] The United States further argues that even if the President were a "competent authority", the Agreement on Safeguards does not require a report, or even written views, from each member of a competent authority. Thus, even if the President facing a tie vote of the USITC could be treated as a competent authority under Articles 3 and 4, he would bear no obligation to explain his views separately.[4763]

[4757] Korea's written reply to Panel question No. 69 at the second substantive meeting.
[4758] China's written reply to Panel question No. 69 at the second substantive meeting.
[4759] Norway's written reply to Panel question No. 69 at the second substantive meeting.
[4760] United States' first written submission, para. 980.
[4761] United States' first written submission, para. 981.
[4762] United States' oral statement for the second substantive meeting, para. 136.
[4763] United States' oral statement for the second substantive meeting, para. 137.

7.2006 The European Communities and Korea agree that it is of no matter whether the determination results from a decision by one or one hundred, individual decision-makers under the municipal law of that WTO Member. However, the European Communities and Korea submit that, in accordance, with the Appellate Body decision in *US – Line Pipe*, what matters is whether the determination, however it is decided domestically, meets the requirements of the Agreement on Safeguards.[4764] The European Communities submits that one of the requirements of the Agreement on Safeguards is the provision of a reasoned and adequate explanation in a report. If having a bifurcated or any other system makes compliance more difficult with this obligation, then that is the problem of the Member imposing the safeguard measures and cannot be used as an excuse to lower the standards contained in the Agreement on Safeguards.[4765]

7.2007 The United States argues that it has never asserted that the "bifurcation" of the process allows the President to escape responsibility under the Agreement on Safeguards. The Agreement on Safeguards itself divides the process into two stages: (a) the investigation (Article 3) and the determination of serious injury or threat thereof (Article 4); and (b) application of the safeguard measure (Article 5). The United States submits 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, the United States submits that 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. Thus, the President, who administers this second step, was under no obligation to provide such an explanation. The United States further argues that the bifurcation of the proceedings between the USITC and the President is not pertinent. In fact, 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.[4766]

7.2008 The United States submits that the complainants fail to address or even acknowledge the recent finding of the Appellate Body in *US – Line Pipe*, in which the Appellate Body both confirmed that the decision-making process is left to the discretion of the Members and found no inconsistency between the requirements of the Agreement and the manner in which the USITC counts votes, at least in the instance of its present injury and threat of injury determinations.[4767] According to the United States, in that case, the Appellate Body said that if a Member has taken a safeguard action that satisfies the requirements of the Agreement, the particular manner in which the decision is reached by the competent authorities is of no consequence.[4768]

7.2009 The United States argues that that decision is instructive in relation to stainless steel wire insofar as it indicates that the fact that Commissioner Bragg found that increased imports constituted a threat of serious injury while Commissioner Devaney determined that such imports cause serious injury does not in any way diminish the sufficiency of their findings for purposes of Article 2.1.[4769]

[4764] European Communities' written reply to Panel question No. 128 at the first substantive meeting; Korea's written reply to Panel question No. 128 at the first substantive meeting

[4765] European Communities' written reply to Panel question No. 128 at the first substantive meeting

[4766] United States' written reply to Panel question No. 128 at the first substantive meeting.

[4767] United States' first written submission, para. 1002.

[4768] United States' first written submission, para. 1005.

[4769] United States' first written submission, para. 1005.

According to the United States, the Appellate Body's conclusion is also instructive with regard to the affirmative votes made by those Commissioners whose respective starting point for their assessment of serious injury began with a different definition of the relevant like products, as in the case of tin mill products.[4770] The United States submits that since each Commissioner's determination fulfilled the requirements of Articles 2 and 4, each provides a valid basis under both US law and the Agreement for determining whether increased imports are a cause of serious injury to a domestic industry. Accordingly, the USITC was warranted in combining all of the affirmative votes and all of the negative votes to determine the collective decision of the agency. In the case of both tin mill steel and stainless steel wire, this process resulted in an evenly divided Commission with each grouping of Commissioners, consisting of three votes.[4771]

7.2010 The United States submits that, as in *US – Line Pipe*, a multiple number of USITC Commissioners reached the same conclusion that domestic producers of tin mill and domestic producers of stainless steel wire, either by themselves or as part of a larger group of producers, are seriously injured or threatened with serious injury by increased imports. As in *US – Line Pipe*, they reached the same result, albeit based on different findings on certain discrete subject matter. Each group of three determined, based on the facts in the case, that the right to apply a safeguard measure on imports of tin mill and stainless steel wire had been established.[4772] The United States asserts that the essence of what has been argued is that the USITC should hold two votes – one on the definition of industry and the other on whether the industry as defined by the majority is seriously injured or threatened with serious injury by increased imports. The United States submits that this is not how the USITC votes or counts votes or a subject to which the Agreement speaks. Moreover, the vote-counting methodology they appear to advocate could have the unintended consequence, in other cases, of changing the USITC's decision from a negative one to an affirmative one.[4773]

7.2011 Japan also agrees with the Appellate Body that the Agreement on Safeguards is silent regarding how a Member must undertake its decision-making process. However, Japan submits that this case presents new and different facts. First, there was only one decision that appears to have supported each of the President's decisions on tin mill and stainless wire products (Commissioner Miller for the first and Commissioner Koplan for the second) since these are the only Commissioners who agreed with the President on both the like product definition and affirmative injury. Japan questions whether a reasoned and adequate analysis could exist when the decision of only one of six Commissioners provides the basis on which the President imposes a measure. Japan states, secondly, that even if this were deemed sufficient, it is still required, when the Commission is split among themselves, that the President indicate which explanation he has adopted as his own. Otherwise, his decision is not supported by the report required by Article 3.1. In this regard, it is instructive that the United States does not appear to know itself which decision the President relies upon, as it defends in its first submission the views of all the Commissioners voting in the affirmative for these products.[4774]

7.2012 Further, Japan argues that the US attempt to analogize these facts to the *US – Line Pipe* case is inapt. In that case, the question was whether a current injury finding by some Commissioners and a threat of injury finding by others could be viewed as being consistent with one another. The Appellate Body decided that they could. Actual "serious injury" and "threat" may be "distinct concepts" under the Agreement, but if the competent authority appropriately determines that an import increase of the same particular product is causing either of these distinct effects to the

[4770] United States' first written submission, para. 1006.
[4771] United States' first written submission, para. 1008.
[4772] United States' first written submission, para. 1009.
[4773] United States' first written submission, para. 1010.
[4774] Japan's written reply to Panel question No. 128 at the first substantive meeting.

domestic industry producing like or directly competitive products, both determinations would be supportive of a measure on that product. Japan argues that the question in the present case, in stark contrast, is whether an affirmative decision based on one like product definition can be viewed as consistent with an affirmative decision based on another like product definition where these distinct decisions consist of only three affirmative votes altogether out of six. Japan submits that they cannot. This is because like product definitions alter all subsequent analyses – the increased imports analysis, the serious injury analysis, and the causation analysis. Thus, aggregation of the results of these analyses based on differing like product definitions would affect the ultimate result on whether a safeguard measure should be applied on a particular product.[4775]

7.2013 In counter-response, the United States submits that the Appellate Body in *US – Line Pipe* concluded that findings of "serious injury" and "threat of serious injury" are "two distinct concepts that must be given distinctive meanings in interpreting the Agreement on Safeguards".[4776] In particular, these concepts "refer to different moments in time"[4777] – "[p]resent serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury".[4778] Accordingly, the Appellate Body expressed no disagreement with the *US – Line Pipe* panel's finding that the concepts are "mutually exclusive".[4779] Nevertheless, the Appellate Body stated that it does not matter whether the decision is based upon "serious injury" or "threat" because either finding supports the right to apply safeguard measures.[4780] [4781] The United States submits that *US – Line Pipe* clearly establishes that individual decision-makers within the competent authorities need not agree on whether there is "serious injury" or "threat" – even though these are distinct concepts with distinct meanings – because either finding supports application of a safeguard measure. Together, the decision-makers need only agree that there is *either* serious injury or threat thereof. By analogy, when the decision-makers agree that increased imports caused serious injury, but differ on the rationale for that conclusion, the question for the Panel is not whether the individual conclusions are the same, but whether each conclusion supports application of a safeguard measure. As long as the conclusions of each decision-maker supporting an affirmative determination are consistent with the Agreement on Safeguards, as was the case for tin mill steel and stainless steel wire, the overall determination of the competent authorities is valid.[4782]

7.2014 Japan notes that the Commission in this case was equally divided in its injury determination with respect to four products: tin mill, stainless steel wire, tool steel, and stainless flanges/fittings. On the first two – tin mill and stainless wire – the President sided with the affirmative votes. On the third and fourth – tool steel and stainless flanges/fittings – the President agreed with the negative votes.[4783] Japan and Norway argue that no explanation was provided at all by the President, in his proclamation or elsewhere, as to why he agreed with one or the other side of these tie votes.[4784] Japan postulates that perhaps it could be inferred in some cases that the President agreed with one side or the other because of the existence of just two reports – one signed by three Commissioners, the other signed by the other three. In such instances, one could say that he implicitly adopted the report of the

[4775] Japan's oral statement for the second substantive meeting, para. 23.
[4776] Appellate Body Report, *US – Line Pipe*, para. 167.
[4777] Ibid., para. 166.
[4778] Ibid., para. 168.
[4779] Ibid., paras. 162 and 164 ("This is not to say that we believe that 'serious injury' and 'threat of serious injury' are the same thing, or that competent authorities may make a finding that both exist at the same time").
[4780] Ibid., para. 171.
[4781] United States' second written submission, para. 234.
[4782] United States' second written submission, para. 235.
[4783] Japan's first written submission, para. 169.
[4784] Japan's first written submission, para. 170; Norway's first written submission, para. 344.

side with which he agrees. Japan submits, however, that here, there were more than two reports. Japan and Norway note, however, that for tin mill and stainless wire products there were four different reports, three of which supported affirmative decisions[4785] and the reports address different combinations of like product categories.[4786] [4787] Japan argues that, it is impossible, therefore, to know with which Commissioner's or Commissioners' analysis the President agreed. The President failed to state which of the multiple reports issued by the Commission he adopted. Thus, it is impossible to know the basis for his decision. In the parlance of Article 3.1, the President failed to identify which report "set[s] forth the findings and reasoned conclusions reached on all pertinent issues of law and fact". He has therefore also failed, as required by Article 4.2(c) to provide "a detailed analysis of the case under investigation as well as a demonstration of the factors examined".[4788]

7.2015 In response to a question from the Panel as to whether it is possible to satisfy the requirements for reasoned and adequate explanations under Articles 3.1 and 4.2(c) of the Agreement on Safeguards with a report that is comprised of individual determinations of multiple decision-makers that are divergent, the European Communities states that it would not exclude that this is possible provided that the prevailing determination and reasoned and adequate explanation can be determined with certainty.[4789] However, Japan argues that where the individual determinations are based on different like products, as in this proceeding with respect to tin mill and stainless wire, the answer is no. The ultimate question, as the Appellate Body found in *US – Line Pipe*, is whether the decisions are inconsistent with one another. When they involve serious injury versus threat, as in *US – Line Pipe*, they are not inconsistent. When they involve affirmative versus negative determinations or differences of opinion as to a critical threshold question such as like product, then such inconsistencies matter and therefore require additional consideration and reasoned and adequate explanations.[4790] Similarly, Korea argues that the answer to this question depends upon whether the divergent opinions are legally consistent. If they are legally consistent, as the Appellate Body held in *US – Line Pipe* with respect to serious injury and threat of serious injury, then the decisions are legally sufficient. However, to the extent that the opinions reached are not legally consistent, such as a finding of serious injury and a finding of no serious injury or distinct like product determinations, they cannot be reconciled nor do they meet the requirements of Articles 3.1 and 4.2(c) of the Agreement on Safeguards.[4791]

7.2016 In response to the same question, the United States argues that it is possible to satisfy the requirements for reasoned and adequate explanations under Articles 3.1 and 4.2(c) of the Agreement on Safeguards with a report that is comprised of individual determinations of multiple decision-makers that are divergent. First, as indicated by the Appellate Body's decision in *US – Line Pipe*, the Agreement on Safeguards allows multiple decision-makers to be involved in an investigation and determination of injury. Second, the fact that certain decision-makers may have issued dissenting views is not pertinent. For purposes of determining compliance with the Agreement on Safeguards, the Panel need only examine the views of the Commissioners that support the determination of the competent authorities. The United States submits that the dissenting views that are not part of these

[4785] USITC Report at 269 (Bragg's separate views), 307 (Miller's separate views), 311 (Devaney's separate views, 256 (Koplan's separate views) (Exhibit CC-6). Together, four separate reports comprised the reasoning of the marginal 3-3 affirmative determinations in the tin mill and stainless wire products.

[4786] Ibid. at 36 (identifying tin mill as a separate product from the flat products category), and 190 (identifying ten domestic industries producing stainless steel articles of which stainless wire was distinguished as a separate industry).

[4787] Japan's first written submission, para. 171; Norway's first written submission, para. 344.

[4788] Japan's first written submission, para. 172; Norway's first written submission, paras. 344-345.

[4789] European Communities' written reply to Panel question No. 130 at the first substantive meeting.

[4790] Japan's written reply to Panel question No. 130 at the first substantive meeting.

[4791] Korea's written reply to Panel question No. 130 at the first substantive meeting.

determinations are not relevant for determining consistency of the US measures with the Agreement on Safeguards. Third, the fact that a single determination may be comprised of the views of multiple concurring decisions does not in itself mean that the determination in its entirety is not reasoned or that it does not provide an adequate explanation. Given the complexity of this case, opinions may reasonably differ as to how the facts and relevant legal requirements should be interpreted and applied. As long as each of the opinions comprising the determination, standing on their own, is consistent with the Agreement on Safeguards including Article 3.1 and 4.2(c), then the determination as a whole is consistent with the Agreement. Finally, the mere existence of dissenting or concurring opinions should have no bearing on the question of whether the overall determination of a competent authority was properly reasoned or explained. The United States submits that it is common in domestic and international court systems for judges to render dissenting or concurring views, but this does not in itself call into question the reasoning of the official decision of the court. Dissenting views have even been rendered by WTO panels, but this in itself does not mean that the adopted reports reflecting the conclusions of the majority of the panel did not properly "set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations" as required by Article 12.7 of the Dispute Settlement Understanding.[4792]

7.2017 The United States also argues that Articles 3.1 and 4.2(c) do not require the President to issue a report explaining the basis for his decision to treat certain tie votes as affirmative determinations. The United States notes that section 330 of the *Tariff Act* allows the President, when faced with a divided vote, to consider the vote to be either an affirmative or negative determination by the USITC as a whole. He does not conduct his own investigation, or render his own determination. Instead, he chooses whether the negative or affirmative determinations and their supporting views – each side complete and potentially valid under US law – will be the determination of the USITC. In this case, Proclamation 7529 states that he considered "the determinations of the Commissioners with regard to tin mill products and stainless steel wire", and refers to no other factors.[4793] The United States submits that permitting the President to designate the determination of the USITC in the case of a divided vote is part of the US internal process for deciding what is the determination of the competent authorities. The Agreement on Safeguards does not contain an obligation on this process.[4794]

7.2018 With respect to arguments that the President acted impermissibly when he "considered" or "treated" these votes as divided votes, the United States submits that it was the USITC that decided that the votes were equally divided. Proclamation 7529 indicates that the President recited this characterization by the USITC, and did not make an independent decision as to whether the vote was divided.[4795]

(b) Treatment of NAFTA imports

7.2019 Korea further argues that in making his determination, the President declared that with respect to imports of every product subject to the safeguard measures, imports from Canada and Mexico "do not account for a substantial share of total imports or do not contribute importantly to the serious injury or threat of serious injury found by the USITC".[4796] In fact, however, there is nothing in either

[4792] United States' written reply to Panel question No. 130 at the first substantive meeting.
[4793] United States' first written submission, para. 1012.
[4794] United States' first written submission, para. 1013.
[4795] United States' first written submission, para. 1014.
[4796] Proclamation 7529, 67 Fed. Reg. 10553, 10555-56 (2002), para. 8 and clause 2 (Exhibit CC-13).