10.199 However, if a Member *relies* on the findings made by *three* Commissioners and the findings of those *three* Commissioners constitute the *determination* of the competent authorities in the sense of Article 2.1 of the Agreement on Safeguards, there is a requirement for those findings to provide a reasoned and adequate explanation. A reasoned and adequate explanation is not contained in a set of findings which cannot be reconciled one with another.

10.200 In conclusion, the Panel, therefore, finds that there is a violation of the obligation under Articles 2.1 and 3.1 to provide a reasoned and adequate explanation of how the facts support the determination of increased imports, since the explanation consists of alternative explanations partly departing from each other which, given the different product bases, cannot be reconciled as a matter of their substance. Thus, the USITC Report does not contain a determination supported by a reasoned and adequate explanation of how the facts support the determination that tin mill products have been imported in such increased quantities, as required by Articles 2.1 and 3.1 of the Agreement on Safeguards.

(c) Hot-rolled bar

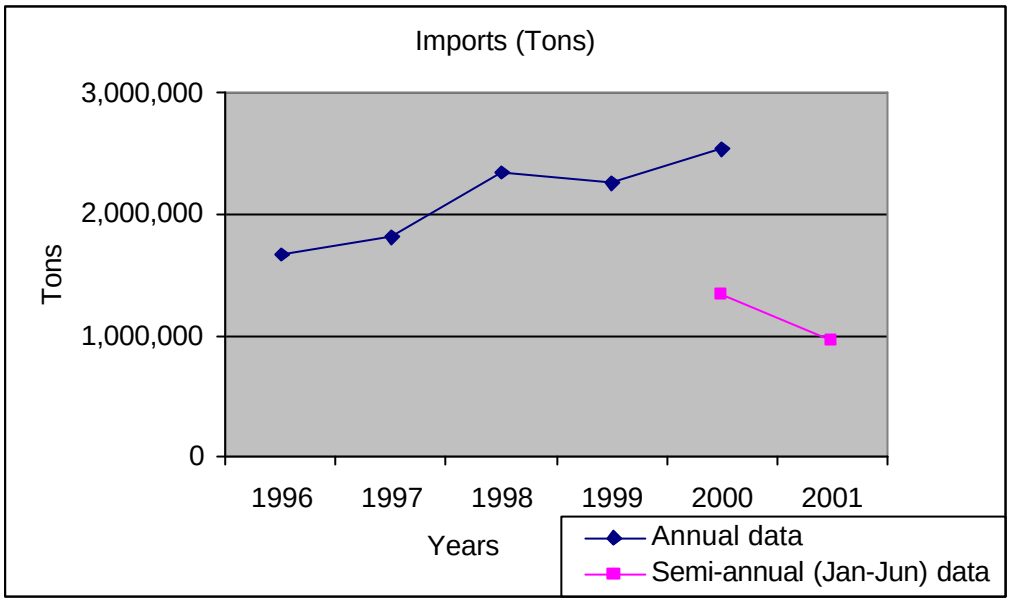
(i) The USITC's findings

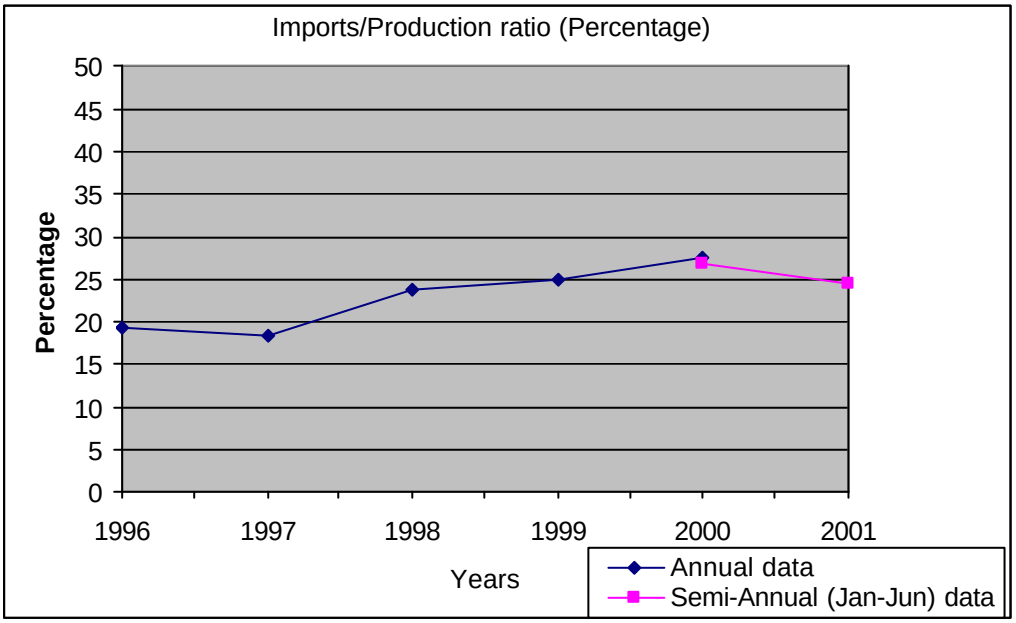
10.201 As regards increased imports of hot-rolled bar, the USITC determined:

> "We find that the statutory criterion of increased imports is met.
> Imports of hot-rolled bar increased from 1.66 million tons in 1996 to 1.81 million tons in 1997 and then to 2.34 million tons in 1998. Imports then declined to 2.26 million tons in 1999 but increased in 2000 to 2.53 million tons. Imports were lower in interim (January-June) 2001, at 952,392 tons, than in interim 2000, when they were 1.34 million tons. Imports increased by 52.5 percent from 1996 to 2000 and by 11.9 percent from 1999 to 2000.[5071]
> As a ratio to US production, imports declined from 19.2 percent in 1996 to 18.4 percent in 1997, but then rose to 23.8 percent in 1998, 24.9 percent in 1999, and 27.5 percent in 2000. The ratio was lower in interim 2001, at 24.6 percent, than in interim 2000, when it was 27.0 percent.[5072]
> Imports were higher, both in absolute terms and relative to US production, in 2000 than in any prior year of the period examined and showed a rapid and dramatic increase from the previous year. While imports declined in the interim period comparison, the ratio of imports to US production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level.
> In view of the above, we find that imports are in increased quantities and that the first statutory criterion is satisfied."[5073]

10.202 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5074]

[5071] (original footnote) CR and PR, Table LONG-5.
[5072] (original footnote) CR and PR, Table LONG-5.
[5073] USITC Report, Vol. I, p. 92.
[5074] The data represented in the following two graphs are contained in the USITC Report, in particular in Table LONG-5 at LONG-9. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of





(ii) Claims and arguments of the parties

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

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imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.

(iii) Analysis by the Panel

Absolute imports

10.204 The Panel believes that the USITC's determination on increased imports of hot-rolled bar, as published in its report[5075], does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC relied on the higher amount of imports in 2000 than in any previous year of the period examined and on the "rapid and dramatic increase" from 1999 to 2000. The decline between interim 2000 and 2001 was acknowledged, but the USITC did not give an explanation why it, nevertheless, found that there was an increase of imports in absolute numbers. It did so only with regard to imports relative to domestic production[5076], a finding with which the Panel will deal separately.

10.205 This failure to account for the most recent data from interim 2001, as far as absolute imports are concerned, is serious in the view of the Panel. The decrease from interim 2000 (1.34 million tons) to interim 2001 (952,392 tons) represented a decrease by 28.9%, whereas the increase in the year-to-year period before (1999 to 2000) that was characterized as "rapid and dramatic" was merely 11.9%. In light of this decrease in the most recent period, the Panel does not believe that the trend of imports from 1996 to 2000 (an increase by 52.5%) is sufficient to provide a basis for a finding that, at the moment of the determination, hot-rolled bar "is being imported in such increased quantities".

10.206 In the Panel's view, the trend of absolute imports between 1997 and interim 2001 is best described as an alternation of increases and decreases from year to year. Given this up-and-down movement ending with a decrease of 28.9% (in interim 2001), the Panel does not believe that the facts support a conclusion of increased imports, nor has the USITC provided an explanation to that effect. The Panel acknowledges that, until 2000, there was a net increasing trend, in other words, the two increases in 1998 and 2000 were stronger than the decrease in 1999. However, the picture changes again significantly, when one includes the decrease (by 28.9%) in interim 2001, a fact that the USITC acknowledged, but did not evaluate. Taking into account all qualitative and quantitative features of the trends of imports over the period of examination, the Panel, therefore, finds that the USITC's determination on increased imports of hot-rolled bar, as published in its Report[5077], does not contain a reasoned and adequate explanation of how the facts support a conclusion that hot-rolled bar "is being imported in such increased quantities."

10.207 It may well be that the increase occurring from 1997 to 1998, or from 1996 to 1998, taken by itself, would qualify as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards. However, at the time of the determination, this development was not a recent development. Given how the trends in imports developed after 1998, the increase up to 1998 is not a sufficient factual basis to support a determination in October 2001 that hot-rolled bar is "being imported in (such) increased quantities".

Relative imports

10.208 The Panel also considers that the USITC's determination on increased imports of hot-rolled bar relative to domestic production[5078] does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC's conclusion relied on the statement that imports

[5075] USITC Report, Vol. I, p. 92.
[5076] USITC Report, Vol. I, p. 92.
[5077] USITC Report, Vol. I, p. 92.
[5078] USITC Report, Vol. I, p. 92.

relative to domestic production in 2000 were "higher than in any prior year of the period examined and showed a rapid and dramatic increase from the previous year." We note with puzzlement that the attributes "rapid and dramatic" refer to an increase from 24.9% (1999) to 27.5% (2000). The decline in imports in interim 2001 was acknowledged, but according to the USITC "the ratio of imports to US production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level."

10.209 The Panel is not convinced by this statement and does not consider it to be a reasoned and adequate explanation supporting the determination of increased imports, given that the ratio of imports to domestic production in the most recent period, interim 2001 (24.6%), not only declined compared with full-year or interim 2000 (27.5% and 27.0% respectively) but was also lower than in 1999 (24.9%) and nearly as low as in 1998 (23.8%). Therefore the facts do not support a conclusion that hot-rolled bar "is being imported in such increased quantities, … relative to domestic production".

Conclusion

10.210 The Panel consequently finds that the USITC Report[5079] did not provide an adequate and reasoned explanation of how the facts support the determination that hot-rolled bar was being imported in "increased quantities", contrary to the requirements of Article 2.1 Agreement on Safeguards that the product "is being imported in (such) increased quantities".

(d) Cold-finished bar

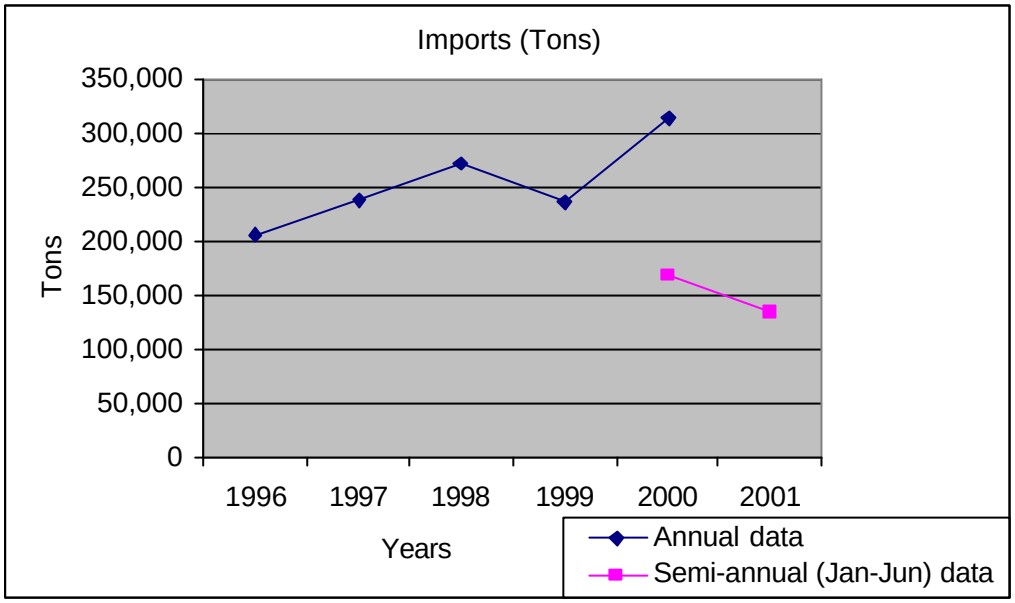
(i) The USITC's findings

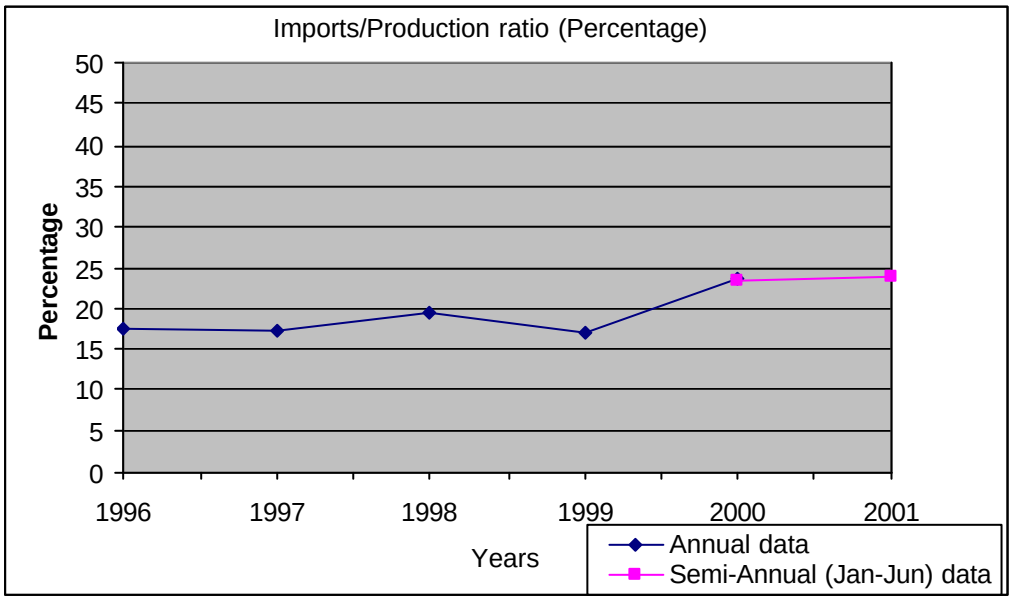
10.211 As regards increased imports of cold-finished bar, the USITC determined:

> "We find that the statutory criterion of increased imports is met.
> Imports of cold-finished bar increased from 206,272 tons in 1996 to 238,221 tons in 1997 and then to 272,972 tons in 1998. Imports then declined to 235,693 tons in 1999 but increased in 2000 to 314,958 tons. Imports were lower in interim 2001, at 134,971 tons, than in interim 2000, when they were 169,889 tons. Imports increased by 52.7 percent from 1996 to 2000 and by 33.6 percent from 1999 to 2000.[5080]
> As a ratio to US production, imports declined from 17.6 percent in 1996 to 17.3 percent in 1997, rose to 19.5 percent in 1998, declined to 17.0 percent in 1999, and then rose to 23.7 percent in 2000. The ratio was higher in interim 2001, at 23.9 percent, than in interim 2000, when it was 23.6 percent.[5081]
> Imports were higher, both in absolute terms and relative to US production, in 2000 than in any prior year of the period examined and showed a rapid and dramatic increase. Although import volumes declined in the interim period comparison, the ratio of imports to US production in interim 2001 was higher than in any full-year during the period examined.
> In view of the above, we find that imports are in increased quantities and that the first statutory criterion is satisfied."[5082]

[5079] USITC Report, Vol. I, p. 92.
[5080] (original footnote) CR and PR, Table LONG-6.
[5081] (original footnote) CR and PR, Table LONG-6.
[5082] USITC Report, Vol. I, pp. 101-102.

10.212 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5083]





(ii) Claims and arguments by the parties

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

[5083] The data represented in the following two graphs are contained in the USITC Report, in particular in Table LONG-6 at LONG-10. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.

(iii) Analysis by the Panel

Relative imports

10.214 The Panel believes that the USITC's determination on increased imports of cold-finished bar, relative to domestic production[5084], contains an adequate and reasoned explanation of how the facts support the determination. After an up-and-down movement between 1996 and 1999 (starting with 17.6% and ending with 17.0%) without any significant overall net trend, imports increased to 23.7% in 2000 and 23.9% in interim 2001. Comparing the two ratios, this represents 40.6% increase and is a development in the recent past. Given the overall neutral trends in the period until 1999, the Panel sees no development in the period preceding the very recent past that would cast doubt on its evaluation of the most recent trends.[5085]

10.215 Therefore, the Panel considers that the USITC's determination on increased imports of cold-finished bar, relative to domestic production[5086], contains an adequate and reasoned explanation of how the facts support the determination.

10.216 The Panel notes the doubts expressed by the European Communities as to whether the mere six per cent increase in the ratio between imports and domestic production could be seen as a sudden, sharp and significant surge in imports that is capable of causing injury to a domestic industry.[5087] The Panel also notes that 6% is the absolute difference between the two ratios, a variable that is not particularly meaningful. As to whether this proportionate increase by 40.6% is sudden and significant enough in order to cause serious injury, the Panel believes that the increase by 40.6% over the most recent 18 months evidences a certain degree of sharpness, significance, recentness and suddenness.

10.217 Whether the increase by 40.6% is sudden, sharp, recent and significant *enough as to cause serious injury* is a question that is appropriately to be addressed in the context of *causation of serious injury*, not in the context of the condition of the increase, where no well-founded judgment in this regard can be made. In this regard, the Panel's finding on increased imports must be read together with its subsequent findings on the other conditions of Article 2.1 of the Agreement on Safeguards.

10.218 Further, the Panel does not agree with the European Communities' argument that the *absolute* decrease in imports from 2000 to 2001 (interim period) detracts from the conclusion of the *relative* increase.[5088] The Agreement on Safeguards makes clear that the requirement is that of an increase, either in absolute or in relative terms. If there is an increase *both* in absolute *and* in relative terms, the condition of increased imports, of course, is also met. However, as a legal matter, a decrease in absolute terms does not invalidate the sufficiency of a relative increase. The Panel also believes that this legal framework is in line with the object and purpose of Article XIX:1(a) of GATT 1994 and the Agreement on Safeguards to allow for emergency action in specific circumstances: if absolute imports decrease, but imports, relative to domestic production, are on the increase, this means that the decrease of domestic production is stronger than that of imports (in absolute levels). Such a scenario may well warrant the imposition of a safeguard measure.

[5084] USITC Report, Vol. I, pp. 101-102.
[5085] European Communities' first written submission, para. 321.
[5086] USITC Report, Vol. I, pp. 101-102.
[5087] European Communities' first written submission, para. 321.
[5088] European Communities' first written submission, para. 321.

Absolute imports

10.219 Given the Panel's finding regarding relative imports, there is no need to make findings on absolute imports, since such findings could not change the overall result that the complainants' claims of violation of Article 2.1 of the Agreement on Safeguards on the lack of increased imports are to be rejected. Therefore, since the Panel has already disposed of the claims on the basis of relative imports, the Panel sees no need to examine the claims relating to absolute imports.

Conclusion

10.220 The Panel consequently finds that the USITC Report contained an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" of cold-finished bar with regard to relative imports. The USITC's determination that cold-finished bar was being imported in "increased quantities" is not inconsistent with the requirement of Article 2.1 of the Agreement on Safeguards that the product "is being imported in (such) increased quantities". Therefore, the Panel rejects violation claims made in this regard.

(e) Rebar

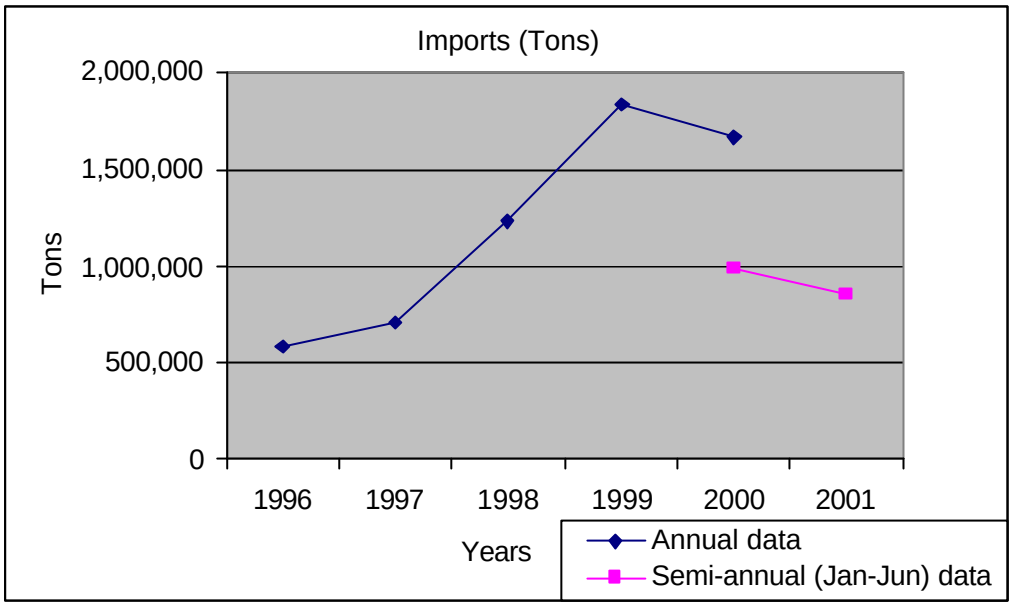
(i) The USITC's findings

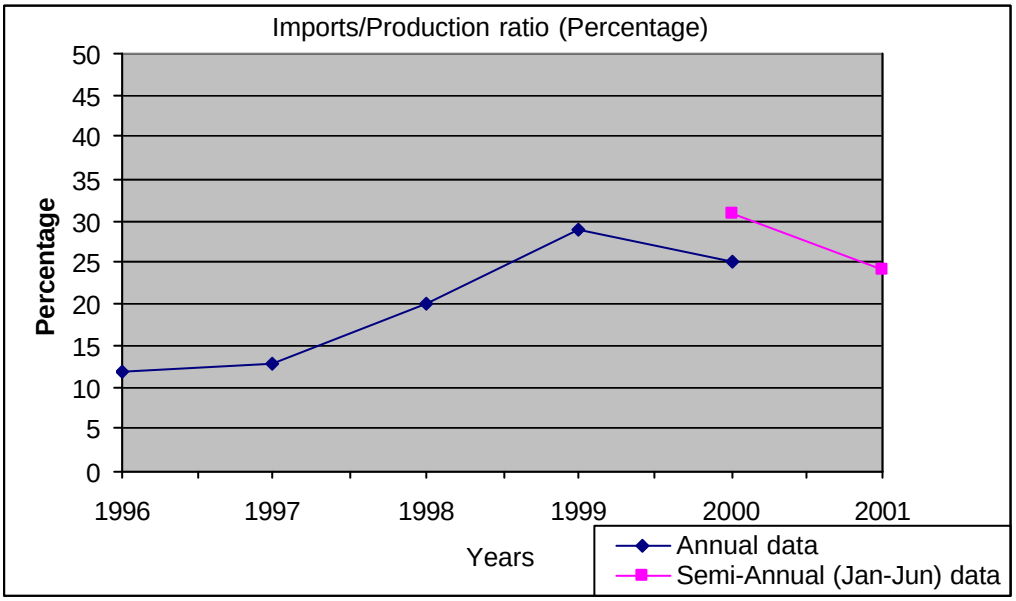
10.221 As regards increased imports of rebar, the USITC determined:

> "We find that the statutory criterion of increased imports is met.
> Imports of rebar increased from 581,731 tons in 1996 to 701,303 tons in 1997 and then to 1.2 million tons in 1998. Imports further increased to 1.8 million tons in 1999 and then declined to 1.7 million tons in 2000. Imports were lower in interim 2001, at 852,488 tons, than in interim 2000, when they were 985,991 tons.[5089]
> As a ratio to US production, imports rose from 11.7 percent in 1996 to 12.8 percent in 1997, 19.9 percent in 1998, and 29.1 percent in 1999. This ratio then declined to 25.2 percent in 2000. The ratio was lower in interim 2001, at 24.3 percent, than in interim 2000, when it was 30.9 percent.[5090]
> Notwithstanding the decline from 1999 levels, imports in 2000 were substantially higher than they were during earlier portions of the period examined, reflecting the rapid and dramatic increase in the prior two years. The quantity of imports in 2000 was 187.0 percent above the 1996 quantity and 35.8 percent over the 1998 quantity, and the ratio of imports to US production in 2000 was more than double the ratio in 1996. By the same token, import quantities for the first six months of 2001 were higher than the quantities for the full-years of either 1996 or 1997, and the ratio of imports to US production in interim 2001 was higher than that for any year from 1996 to 1998.
> In view of the above, we find that imports are in increased quantities and that the first statutory criterion is satisfied."[5091]

10.222 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5092]

[5089] (original footnote) CR and PR, Table LONG-7.
[5090] (original footnote) CR and PR, Table LONG-7.
[5091] USITC Report, Vol. I, p. 109.





(ii) Claims and arguments of the parties

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

[5092] The data represented in the following two graphs are contained in the USITC Report, in particular in Table LONG-7 at LONG-11. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.

(iii) Analysis by the Panel

Absolute imports

10.224 The Panel believes that the USITC's determination on increased imports of rebar in absolute terms[5093], contains an adequate and reasoned explanation of how the facts support the determination. In particular, the Panel considers that it amounts to such an adequate and reasoned explanation given that imports more than tripled from 1996 to 1999 (from 581,731 tons to 1.8 million tons) and then declined relatively insignificantly in 2000 (to 1.7 million tons, or by 5.6%) and in interim 2001 (by 13.5%).

10.225 These decreases in themselves might not be insignificant, but as the Panel has stated, the analysis of imports must take into account all features of the development of imports over the period examined, which is what the USITC did with regard to imports of rebar. In light of the tripling of imports, the decrease over the last 18 months is not significant enough in order to stand in the way of a conclusion that rebar "is being imported in such increased quantities". As the Panel has stated, there is no need for imports to "be increas*ing*". Instead, the product must (presently) be imported "in increas*ed* quantities". The Panel has no doubt that the increase until 1999 is recent enough and the subsequent decrease – in comparison – small enough in order to support such a conclusion. On the basis of the facts, the Panel, therefore, disagrees with the contention of the complainants. On the contrary, rebar is, as a matter of fact, being imported in recently and suddenly increased quantities.

10.226 As regards the question raised by the complainants whether the increase was sudden enough, sharp enough, recent enough and significant enough *to cause serious injury*, that is a question more appropriately addressed in the context of *causation of serious injury*, not in the context of the requirement of the increase, where no well-founded judgment in this regard can be made. The Panel's finding on increased imports must be read together with its subsequent findings on the other conditions of Article 2.1 of the Agreement on Safeguards. Therefore, the Panel considers that the USITC's determination on increased imports of rebar[5094] contains an adequate and reasoned explanation of how the facts support the determination.

Relative imports

10.227 Given the Panel's finding regarding absolute imports, there is no need to make findings on relative imports, since such findings could not change the overall result that the complainants' claims of violation of Article 2.1 of the Agreement on Safeguards on the lack of increased imports are to be rejected. Since the Panel has already disposed of the claims on the basis of absolute imports, the Panel sees no need to examine the claims relating to relative imports.

Conclusion

10.228 The Panel consequently finds that the USITC Report contained an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" of rebar with regard to absolute imports. The USITC's determination that rebar was being imported in "increased quantities" is not inconsistent with the requirement of Article 2.1 of the Agreement on Safeguards that the product "is being imported in (such) increased quantities". The Panel rejects the violation claims made in this regard.

[5093] USITC Report, Vol. I, p. 109.
[5094] USITC Report, Vol. I, p. 109.

(f) Welded pipe

(i) The USITC's findings

10.229 As regards increased imports of welded pipe, the USITC determined:

> "We find that the statutory criterion of increased imports is met. Imports of welded pipe other than OCTG increased steadily throughout most of the period examined in both absolute terms and relative to domestic production, with the largest increase occurring in 2000. Imports increased from 1.57 million short tons in 1996 to 1.86 million short tons in 1997 and 2.26 million short tons in 1998, declined slightly to 2.12 million short tons in 1999, and then surged to 2.63 million short tons in 2000. Imports increased by 24.2 percent in quantity between 1999 and 2000, which was the largest annual percentage increase of the period examined, and in 2000 were at their highest level of the period examined. Imports continued at a very high level in interim 2001, only slightly (1.7 percent) below the level of the same period of 2000. Imports were 1.41 million short tons in interim 2001, compared to 1.44 million short tons in the same period of 2000.[5095] Thus, imports of welded (non-OCTG) pipe have increased in absolute terms.[5096]
> Imports of welded (non-OCTG) pipe also increased relative to domestic production, with the largest increase in the ratio occurring at the end of the period examined, between 1999 and 2000, and into 2001.[5097] Thus, imports have increased relative to domestic production as well as in absolute terms."[5098]

10.230 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5099]

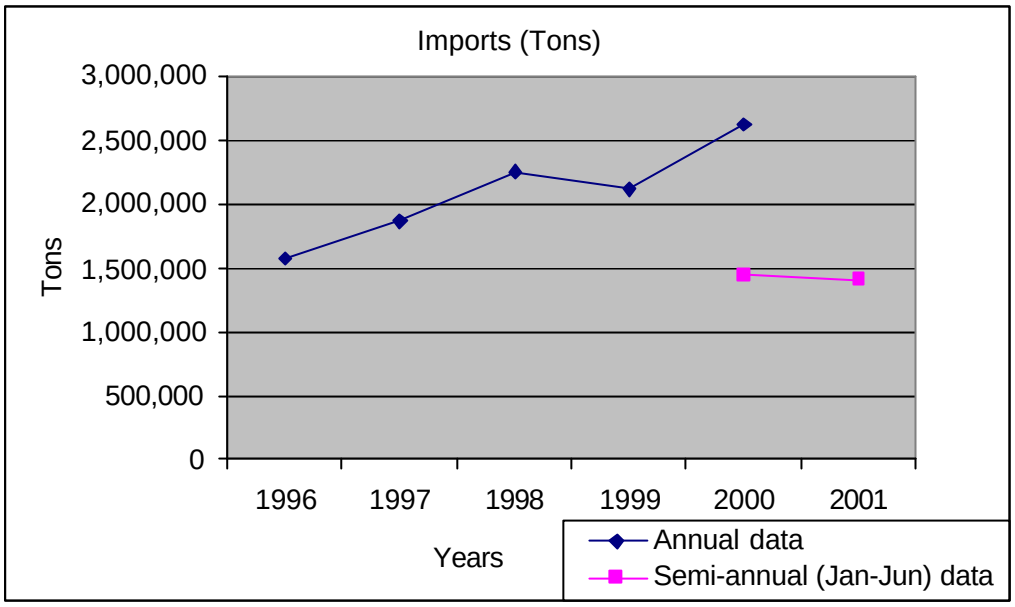
[5095] (original footnote) CR and PR at TUBULAR-C-4.

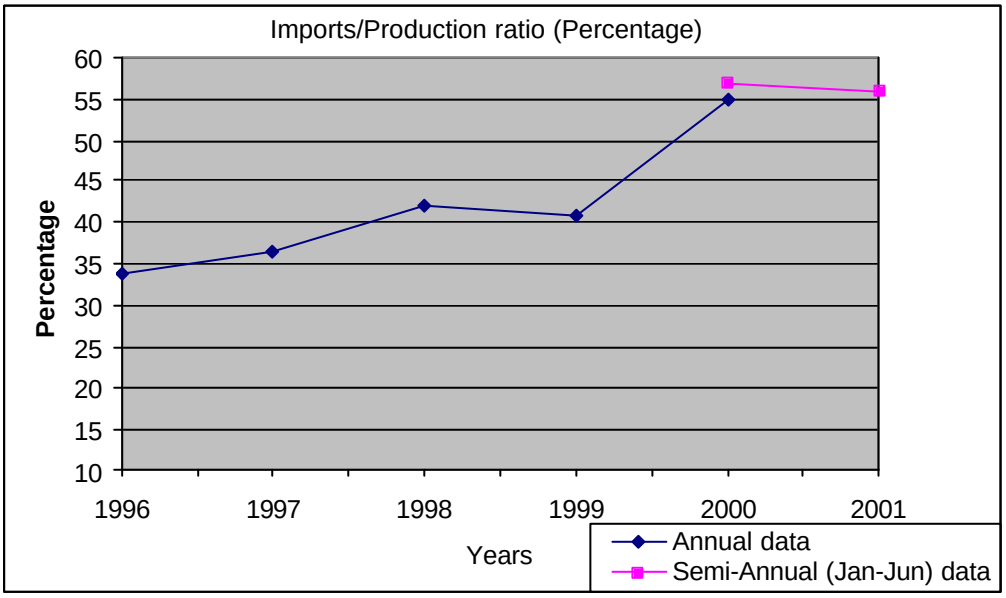
[5096] (original footnote) ESTA argues imports of welded line pipe decreased in the most recent period, based on data they have compiled for 2001. ESTA Posthearing Injury Brief at 8-9. ESTA provided extensive documentation regarding product entered as plate by Berg Steel Pipe Corporation into its foreign trade zone (FTZ) – but entered for customs purposes as imports for consumption of welded line pipe – for this limited period in a separate submission. *See* ESTA submission of October 9, 2001. We note that Berg only provided data for interim 2001, whereas Berg has conducted similar activities in prior years included in our period examined. *See, e.g., Certain Cut-to-Length Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, Invs. Nos. 701-TA-387-391 (Final) and 731-TA-816-821 (Final), USITC Pub. 3273 (Jan. 2000) at IV-5. Thus adjusting data for only one part of the period examined may be misleading. In any event, even if these quantities are excluded, the overall year-to-year trend in imports is not changed; nor is the fact that January-June 2001 imports are higher than imports during the immediately preceding six-month period (July-December 2000). Accordingly, these data do not alter our conclusion that imports increased, or (as described below) that increased imports are a substantial cause of the threat of serious injury.

[5097] (original footnote) In 1996, the ratio of imports to production was 33.8 percent. The ratio increased to 36.4 percent in 1997 and 41.9 percent in 1998, fell slightly to 40.8 percent in 1999, and then increased sharply to 55.0 percent in 2000. The ratio of imports to production was 55.9 percent in interim 2001, comparable to the 56.8 percent level in the same period of 2000. CR at TUBULAR-11; PR at TUBULAR-8.

[5098] USITC Report, Vol. I, pp. 157-158.

[5099] The data represented in the following two graphs are contained in the USITC Report, in particular in Table TUBULAR-6 at TUBULAR-8 and Table TUBULAR-C-4. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.





(ii) Claims and arguments of the parties

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

(iii) Analysis by the Panel

Absolute imports

10.232 In the present context, the Panel does not address the contention of the European Communities, Korea and Switzerland that the USITC was supposed to make findings on each of the

specific products it grouped together as "certain tubular products".[5100] This is similar to the arguments made by the European Communities, Korea and Switzerland that the definitions of the "imported product" and the "domestic industry producing like … products" were erroneous. The Panel will, in its examination of the USITC's "increased imports" finding, assess the USITC's determination on the basis of the product identified by the USITC in this regard without prejudice to the question of the product/industry definition itself.[5101]

10.233 The Panel believes that the USITC's determination on increased imports of welded pipe in absolute terms[5102] contains an adequate and reasoned explanation of how the facts support the determination. The USITC took into account the import data for each of the years of the period of investigation and conducted a satisfactory analysis of the developments of imports. As the USITC noted, imports declined only from 1998 to 1999 (from 2.26 to 2.12 million short tons, i.e. by 6.2%) and from interim 2000 to 2001 (by 1.7%)[5103], whereas all other years showed increases. Each of these increases was more significant than the two mentioned decreases, so that the overall evaluation is that of a clearly discernible increase. Against the background of the total increase from 1996 to 2000 (from 1.57 million short tons to 2.63 million short tons, i.e. by 67.5%), the subsequent decrease in interim 2001 (by 1.7%) means that imports remained at increased levels even in the most recent past. These facts that were listed and evaluated in the USITC Report, in the view of the Panel, do support a conclusion that welded pipe "is being imported in (such) increased quantities".

10.234 The increase also shows a certain degree of suddenness, sharpness and significance. The Panel disagrees with Switzerland's contention that the increase of imports of welded pipe was "steady" and "gradual", hence "adjustable" and, therefore, not an increase satisfying the requirements of Article 2.1 of the Agreement on Safeguards. The Panel recognizes the possibility that, due to the gradual and steady pattern of an increase, the domestic industry manages to adjust and, therefore, suffers no injury. However, this is a question to be addressed within the context of whether there is serious injury and whether it has been caused by increased imports. An increase in absolute terms may even go hand in hand with an equally strong, or stronger increase of domestic production and a flourishing domestic industry. In such a case, there would be no relative increase, and there may not be *any causation of serious injury*. However, for the purposes of the first condition of Article 2.1 of the Agreement on Safeguards, an absolute increase (without a relative increase) is sufficient.

10.235 The Panel also sees no relevance in the point raised by Switzerland that the increase between 1996 and 1998 was stronger and did not result in the imposition of a safeguard measure. WTO Members do not forego their right to impose a safeguard measure because they refrained from taking such action in a past situation. There is also no justification for the additional argument that, because of an increase at a previous point in time, the more recent increase cannot be sudden and sharp enough so as to qualify as an increase in the sense of Article 2.1 of the Agreement on Safeguards. According to this argument, a Member would forego the right to take a safeguard measure, if in the most distant past, there was a very sharp and sudden increase, which is followed by a less significant increase causing additional serious injury to the relevant domestic industry. The Panel sees no basis in

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[5100] European Communities' first written submission, para. 236. European Communities' second written submission, paras. 140 and 283-285.

[5101] The Panel recalls that, for reasons of logic, it has to make this assumption in order to be able to review the USITC's determination with a view to assessing the claim of an inconsistency with the "increased imports" requirement itself. The Panel notes that previous panels and the Appellate Body have operated with similar assumptions, *see*, e.g., Appellate Body Report, *US – Lamb*, paras. 121, 172; and Panel Report, *US – Lamb*, para. 8.1.

[5102] USITC Report, Vol. I, p. 157.

[5103] Ibid.

Article XIX:1 of GATT 1994 or in the Agreement on Safeguards for the proposition that a WTO Member should be prohibited from applying a safeguard measure in such a scenario.

10.236 Whether the increase in the instant case was sudden enough, sharp enough, recent enough and significant enough *to cause serious injury* is a question that is appropriately addressed in the context of *causation of serious injury*, not in the context of the requirement of the increase, where no well-founded judgment in this regard can be made. In this regard, the Panel's finding on increased imports must be read together with its subsequent findings on the other conditions of Article 2.1 of the Agreement on Safeguards.

10.237 The Panel also rejects the European Communities' contention that the USITC failed to provide annual percentage increases and to evaluate *all* the trends by comparing their increases and decreases over the period of investigation.[5104] The requirement under the Agreement on Safeguards is not to present the data in all kinds of possible ways. Rather, the requirement is to provide an adequate and reasoned explanation of how the facts support the conclusion about increased imports. The Panel believes that the USITC has complied with this requirement in this case.

Relative imports

10.238 Given the Panel's finding regarding absolute imports, there is no need to make findings on relative imports, since such findings could not change the overall result that the complainants' claims of violation of Article 2.1 of the Agreement on Safeguards on the lack of increased imports are to be rejected. Since the Panel has already disposed of the claims on the basis of absolute imports, the Panel sees no need to examine the claims relating to relative increase.

Conclusion

10.239 The Panel consequently finds that the USITC Report contained an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" of welded pipe with regard to absolute imports. The USITC's determination that welded pipe was being imported in "increased quantities" is not inconsistent with the requirement of Article 2.1 of the Agreement on Safeguards that the product "is being imported in (such) increased quantities". Therefore, the Panel rejects the violation claims that have been made in this regard.

(g) FFTJ

(i) The USITC's findings

10.240 As regards increased imports of FFTJ, the USITC determined:

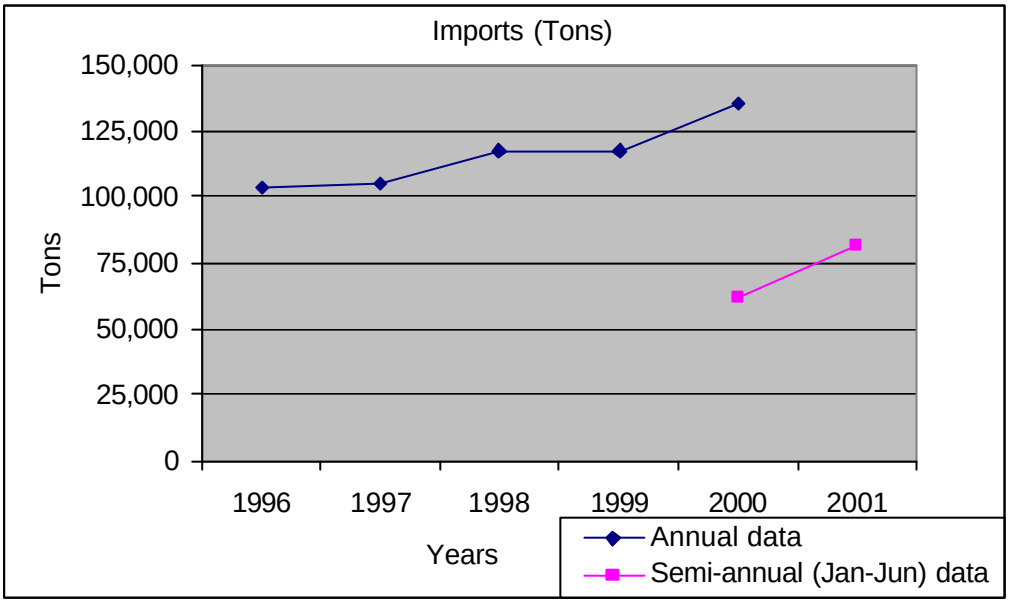
> "We find that the statutory criterion of increased imports is met. Imports of fittings and flanges steadily increased in both absolute terms and relative to domestic production during the period examined, with the largest increase occurring at the end of the period. Imports increased by 30.8 percent from 1996 to 2000, including 15.3 percent between 1999 and 2000. Imports were 32.1 percent higher in interim 2001 than in the same period of 2000.[5105]

[5104] European Communities' first written submission, para. 334.

[5105] (original footnote) Imports were at their highest level of the period examined in 2000 (135,399 short tons), and were significantly above the level of the second highest year, 1999 (117,461 short tons). Imports in interim 2001 were 81,380 short tons, well above the level of the same period in 2000 (61,588 short

> The ratio of imports to US production also increased significantly during the period examined, rising from 50.5 percent in 1996 to 69.7 percent in 2000, and was at its highest full-year level in 2000. The ratio in interim 2001 (88.8 percent) was substantially above the level of the same period of 2000 (59.4 percent).[5106] Thus, imports of fittings, flanges, and tool joints are entering the United States in increased quantities."[5107]

10.241 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5108]

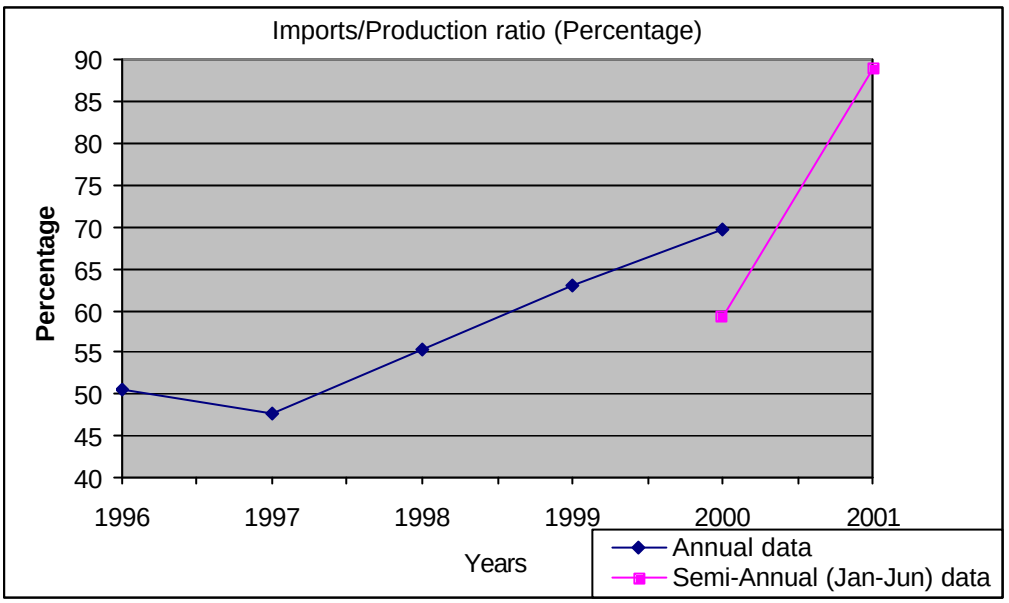


tons). The value of total imports also increased substantially during the period examined (45.9 percent), and between 1999 and 2000 (19.3 percent), and was at its highest full-year level in 2000 ($307.9 million). The value of imports was significantly higher in interim 2001 ($182.3 million) than in the same period of 2000 ($144.7 million). CR and PR at Table TUBULAR-C-6.

[5106] (original footnote) CR and PR at Table TUBULAR-8.

[5107] USITC Report, Vol. I, p. 171.

[5108] The data represented in the following two graphs are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10 and Table TUBULAR-C-6. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.



(ii) Claims and arguments of the parties

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

(iii) Analysis by the Panel

Relative imports

10.243 In the present context, the Panel does not address the contention of the European Communities that the USITC was supposed to make findings on each of the specific products it grouped together in its mix of heterogeneous products.[5109] This is the same argument advanced by the European Communities in the context of its claim of an erroneous definition of the "imported product" and the "domestic industry producing like … products". The Panel will, in its examination of the "increased imports" finding, assess the USITC's determination using as its basis the product category on which it was made. In this review, it is to be assumed that the product definition is correct, without prejudice to the question of the product/industry definition itself.[5110]

10.244 The Panel believes that the USITC's determination on increased imports of FFTJ in relative terms[5111] contains an adequate and reasoned explanation of how the facts support the determination. The USITC noted how much imports, relative to domestic production, had increased during the entire period of investigation and assessed the significance of that increase. The USITC also noted that the end of the period of examination showed the most significant increases (from 50.5% to 69.7% in 2000 and from 59.4% to 88.8% from interim 2000 to interim 2001. Also, in the light of the fact that only

[5109] European Communities' first written submission, para. 344.

[5110] The Panel recalls that, for reasons of logic, it has to make this assumption in order to be able to review the USITC's determination with a view to assessing the claim of an inconsistency with the "increase" requirement itself. The Panel notes that previous panels and the Appellate Body have operated with similar assumptions, *see*, e.g., Appellate Body Report, *US – Lamb*, paras. 121, 172; and Panel Report, *US – Lamb*, para. 8.1.

[5111] USITC Report, Vol. I, p. 171.

the period from 1996 to 1997 showed a decrease (from 50.5% to 47.7%) and that this decrease was less significant than each of the year-to-year increases in the period thereafter, the Panel considers that the increase found by the USITC is of a recent nature. The facts listed and evaluated in the USITC Report, in the view of the Panel, support a conclusion that FFTJ "is being imported in (such) increased quantities".

10.245 The increase also shows a certain degree of sharpness, suddenness and significance, particularly in the very recent past. The Panel disagrees with the European Communities' contention that the USITC failed to explain why the "steady increase" in imports of FFTJ was "sharp and significant enough so as to cause serious injury or a threat thereof".[5112]

10.246 Whether the increase in the instant case was sharp and significant enough *to cause serious injury or threat thereof* is a question that is appropriately addressed in the context of *causation of serious injury or threat thereof*, not in the context of the requirement of the increase, where no well-founded judgment in this regard can be made. In this regard, the Panel's finding on increased imports must be read together with its subsequent findings on the other conditions of Article 2.1 of the Agreement on Safeguards.

10.247 The USITC's determination that FFTJ was being imported in "increased quantities" is not inconsistent with the requirement of Article 2.1 Agreement on Safeguards that the product "is being imported in (such) increased quantities". The Panel rejects the violation claims made in this regard.

Absolute imports

10.248 Given the Panel's finding regarding relative imports, there is no need to make findings on absolute imports, since such findings could not change the overall result that the complainants' claims of violation of Article 2.1 of the Agreement on Safeguards on the lack of increased imports are to be rejected. Since the Panel has already disposed of the claims on the basis of relative imports, the Panel sees no need to examine the claims relating to absolute increase.

Conclusion

10.249 The Panel consequently finds that the USITC Report contained an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" of FFTJ with regard to relative imports. The USITC's determination that FFTJ was being imported in "increased quantities" is not inconsistent with the requirement of Article 2.1 of the Agreement on Safeguards that the product "is being imported in (such) increased quantities". Therefore, the Panel rejects the violation claims made in this regard.

(h) Stainless steel bar

(i) The USITC's findings

10.250 As regards increased imports of stainless steel bar, the USITC determined:

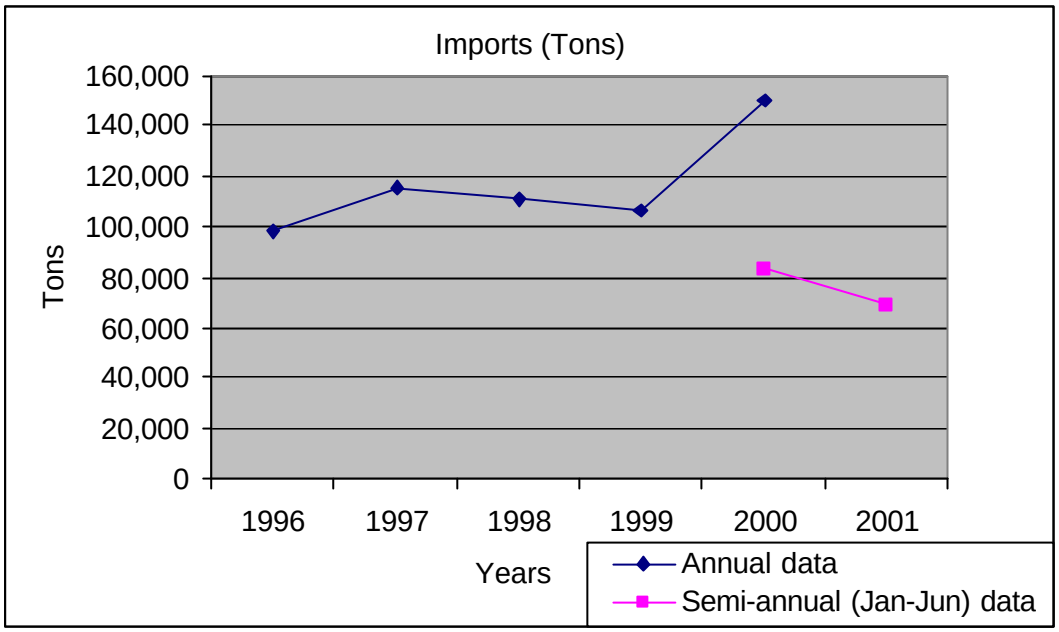
> "We find that the statutory criterion of increased imports is met.
>
> In terms of quantity, imports of stainless bar and light shapes increased by 53.8 percent during the five full-years of the period of investigation, growing from 97.9

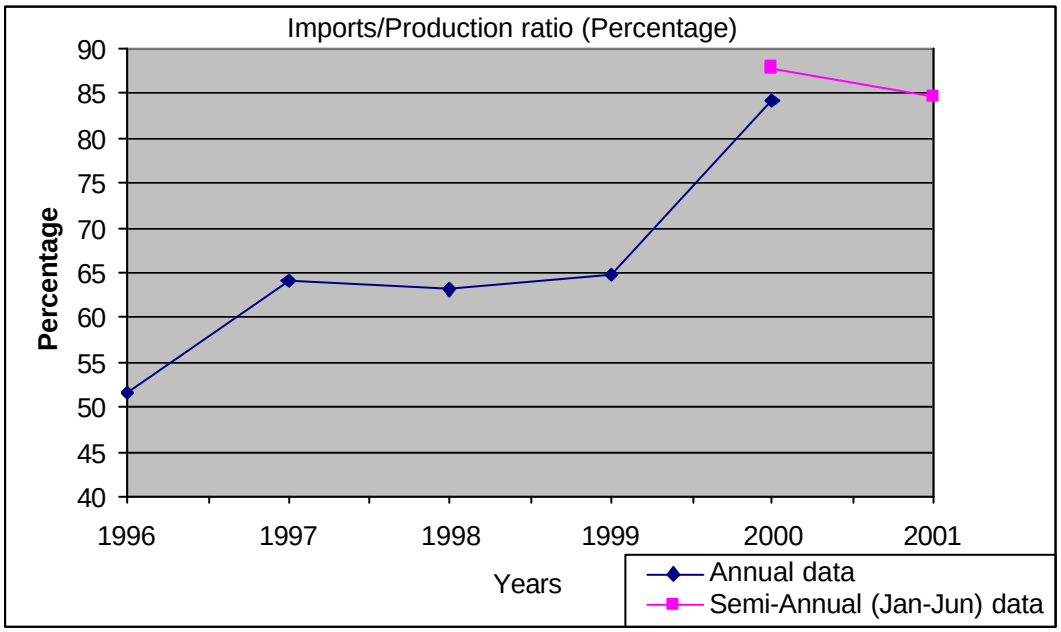
[5112] European Communities' first written submission, para. 344.

> thousand short tons in 1996 to 150.6 thousand short tons in 2000.[5113] Although the quantity of imports fluctuated somewhat (declining slightly in 1998 and 1999 from its level in 1997), a rapid and dramatic increase in import quantity occurred during the last full-year of the period of investigation, when imports of stainless bar grew by 44 thousand short tons.[5114] The quantity of imports declined between interim 2000 and interim 2001, dropping from 83.4 thousand short tons to 69.2 thousand short tons.[5115]
>
> The ratio of imports of stainless steel bar to domestic production also increased significantly during the period, growing from 51.8 percent in 1996 to 84.1 percent in 2000, with the largest single percentage increase in the ratio (19.3 percentage points) occurring in 2000.[5116] The ratio of imports to domestic production decreased from 87.9 percent in interim 2000 to 84.6 percent in interim 2001.[5117]
>
> In sum, imports of bar and light shapes increased significantly, both in quantity terms and as a ratio to domestic production, between 1996 and 2000, with the largest single increase in imports occurring during the last full-year of the period. Although there was a decline in imports in terms of quantity and as a ratio to domestic production between interim 2000 and interim 2001, we find that the first statutory criterion is satisfied."[5118]

10.251 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5119]

[5113] (original footnote) CR and PR at Tables STAINLESS-6 & STAINLESS-C-4.
[5114] (original footnote) CR and PR at Tables STAINLESS-6 & STAINLESS-C-4.
[5115] (original footnote) CR and PR at Tables STAINLESS-6 & STAINLESS-C-4.
[5116] (original footnote) CR and PR at Table STAINLESS-6.
[5117] (original footnote) CR and PR at Table STAINLESS-6.
[5118] USITC Report, Vol. I, pp. 205-206.
[5119] The data represented in the following two graphs are contained in the USITC Report, in particular in Table STAINLESS-6 at STAINLESS-11 and Table STAINLESS-C-4. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.





(ii) Claims and arguments of the parties

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

(iii) Analysis by the Panel

Relative imports

10.253 The Panel believes that the USITC's determination on increased imports of stainless steel bar, relative to domestic production[5120], contains an adequate and reasoned explanation of how the facts support the determination. The USITC found that the "ratio of imports of stainless steel bar to domestic production increased significantly during the period, growing from 51.8 percent in 1996 to 84.1 percent in 2000". The USITC also noted that "the largest single percentage increase in the ratio (19.3 percentage points)" occurred in 2000. According to the USITC, the slight decrease in the most recent past (from 87.9% in interim 2000 to 84.6% in interim 2001) was not an obstacle for finding that the requirement of increased imports was satisfied.[5121]

10.254 The Panel considers this to be a satisfactory explanation of how the facts support the determination. In particular, in the light of the significant increase from 1999 to 2000 (19.3 percentage points), the decline by 3.3 percentage points from interim 2000 to interim 2001 is, contrary to what the European Communities has stated[5122], insignificant. It simultaneously does not detract from a finding that imports, relative to domestic production, remain at high levels so that stainless steel bar "is being imported in (such) increased quantities".

10.255 The Panel is satisfied that the increase of relative imports of stainless steel bar, given the sharp increase from 1999 to 2000 shows a certain degree of recentness, sharpness, suddenness and significance. Whether the increase by 40.6% is sudden, sharp and significant *enough as to cause serious injury* is a question that is appropriately to be addressed in the context of *causation of serious injury*, not in the context of the condition of the increase, where no well-founded judgment in this regard can be made. In this regard, the Panel's finding on increased imports must be read together with its subsequent findings on the other conditions of Article 2.1 of the Agreement on Safeguards.

Absolute imports

10.256 Given the Panel's finding regarding relative imports, there is no need to make findings on absolute imports, since such findings could not change the overall result that the complainants' claims of violation of Article 2.1 of the Agreement on Safeguards on the lack of increased imports are to be rejected. Therefore, since the Panel has already disposed of the claims on the basis of relative imports, the Panel sees no need to examine the claims relating to absolute increase.

Conclusion

10.257 The Panel consequently finds that the USITC Report contained an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" of stainless steel bar with regard to relative imports. The USITC's determination that stainless steel bar was being imported in "increased quantities" is not inconsistent with the requirement of Article 2.1 of the Agreement on Safeguards that the product "is being imported in (such) increased quantities". Therefore, the Panel rejects the violation claims made in this regard.

[5120] USITC Report, Vol. I, pp. 101-102.
[5121] USITC Report, Vol. I, p. 206.
[5122] European Communities' first written submission, para. 350.

(i) Stainless steel wire

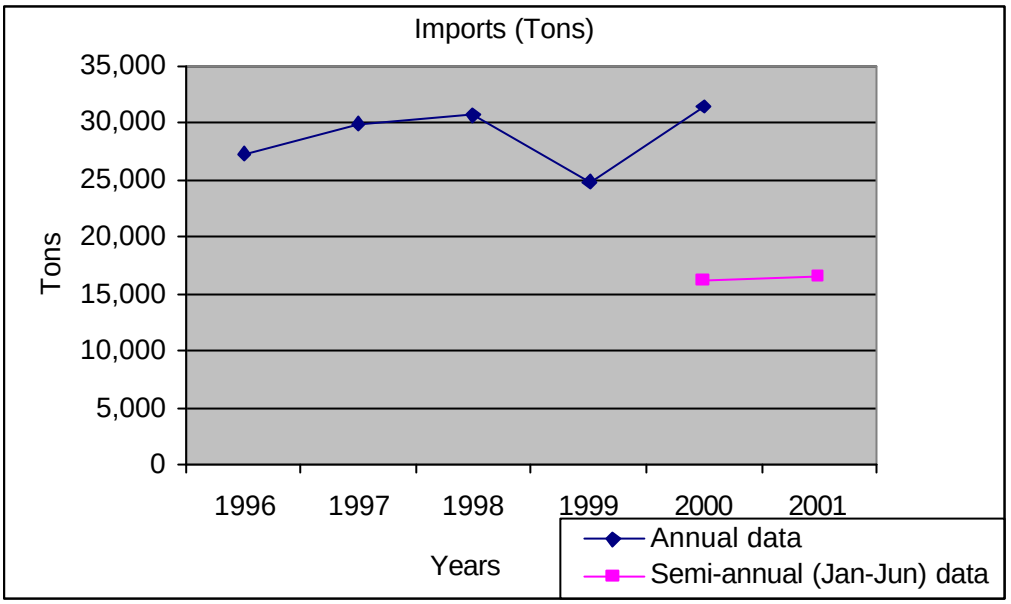
(i) The USITC's findings

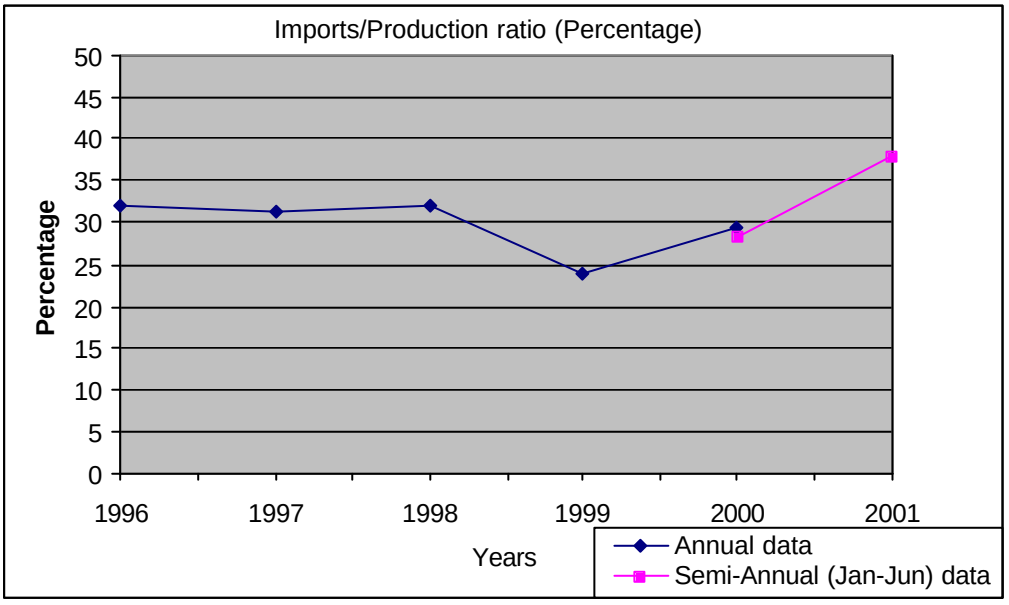
10.258 As regards increased imports of stainless steel wire, the USITC determined:

> "We find that the statutory criterion of increased imports is met.
>
> In quantity terms, imports of stainless wire increased from 27.3 thousand short tons in 1996 to 31.3 thousand short tons in 2000.[5123] The quantity of stainless wire imports fluctuated somewhat during the period, increasing from 27.3 thousand short tons in 1996 to 29.9 thousand short tons in 1997 and then to 30.7 thousand short tons in 1998.[5124] The quantity of imports then declined by 19.4 percent, to 24.7 thousand short tons, in 1999. However, the single largest increase in import quantity occurred between 1999 and 2000, when imports increased by 26.5 percent, from 24.8 thousand short tons to 31.3 thousand short tons.[5125] The quantity of stainless wire imports increased between interim 2000 and 2001, as import volumes grew from 16.0 thousand short tons to 16.5 thousand short tons.[5126]
>
> The ratio of stainless steel wire imports to domestic production exhibited a similar trend during the period of investigation. The ratio remained relatively stable (between 31 and 32 percent) during the first three years of the period but then declined to 23.9 percent in 1999.[5127] The ratio of stainless wire imports to domestic production then increased by 5.5 percentage points, to 29.4 percent, in 2000.[5128] The ratio of imports to domestic production increased to its highest level during the period, 38 percent, in interim 2001.[5129]
>
> In sum, the record indicates that imports of stainless wire increased in quantity terms and as a ratio to domestic production during the period of investigation. Accordingly, we find that the first statutory criterion is satisfied."[5130] [5131]

10.259 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5132]

[5123] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.
[5124] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.
[5125] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.
[5126] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.
[5127] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7
[5128] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.
[5129] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.
[5130] (original footnote) Chairman Koplan does not join the remainder of this section of the opinion.
[5131] USITC Report, Vol. I, pp. 234-235.
[5132] The data represented in the following two graphs are contained in the USITC Report, in particular in Table STAINLESS-9 at STAINLESS-14 and Table STAINLESS-C-7. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.





(ii) Claims and arguments of the parties

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

(iii) Analysis by the Panel

10.261 At the outset, the Panel notes that, in its defence, the United States relies not only on the increased imports findings reached by Commissioner Koplan, but also on those made by Commissioners Bragg and Devaney. The former made findings on stainless steel wire as a separate product whereas the latter two made affirmative findings with regard to a broader product category than stainless steel wire (stainless steel wire and rope). In this regard, the situation is equivalent to that encountered in the context of tin mill products, because the other Commissioners who defined

stainless steel wire as a separate product, did not reach an affirmative result. In the March Proclamation, the President did not select any of the various affirmative determinations as the basis of the decision to impose the safeguard measure on stainless steel wire. Rather, pursuant to domestic law, the President "decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to [tin mill products and stainless steel wire] to be the determination of the USITC".[5133] It, therefore, is apparent that the President based his determination on the findings of all three Commissioners (Bragg, Devaney and Koplan), although those three Commissioners did not perform their analysis on the basis of the same like product definition.

10.262 For the reasons set out above in relation to the USITC's determination(s) on tin mill[5134], the Panel believes that the Agreement on Safeguards does not permit the combination of findings as supporting a determination, if these findings were reached on the basis of differently defined products. If such findings cannot be reconciled one with another (as a matter of substance), they cannot simultaneously form the basis of a determination. The Panel therefore believes that there is a violation of the obligation under Articles 2.1 and 3.1 of the Agreement on Safeguards to provide a reasoned and adequate explanation of how the facts support the determination, if that explanation consists of alternative explanations departing from each other and which, given the different product basis, cannot be reconciled as a matter of substance.

10.263 Thus, the USITC Report did not contain a determination supported by a reasoned and adequate explanation of how the facts support the determination that imports of stainless steel wire have increased, contrary to Articles 2.1 and 3.1 of the Agreement on Safeguards.

(j) Stainless steel rod

(i) The USITC's findings

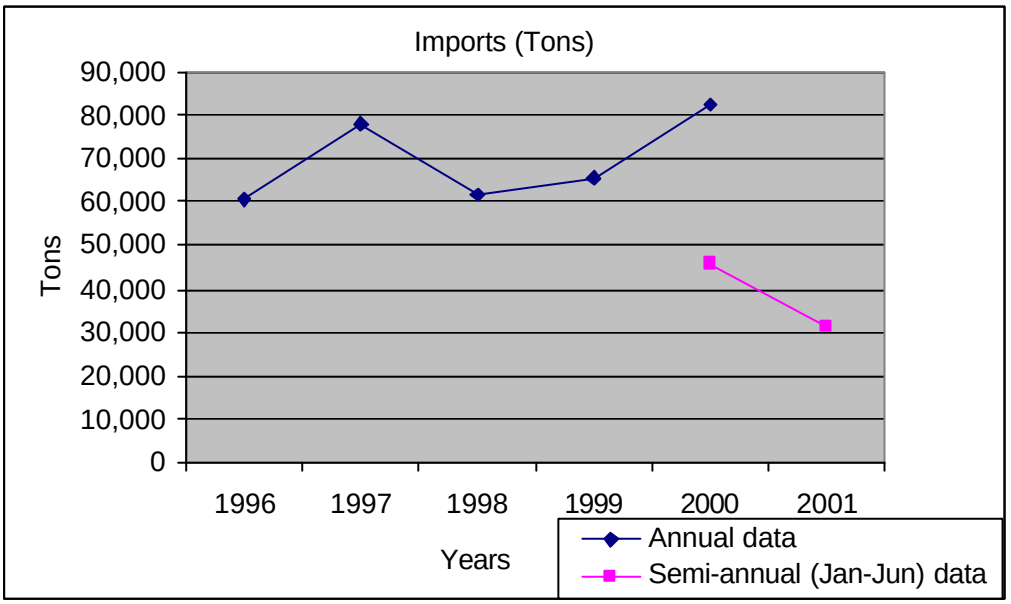
10.264 As regards increased imports of stainless steel rod, the USITC determined:

> "We find that the statutory criterion of increased imports is met.
>
> In quantity terms, imports of stainless rod increased by 36.1 percent during the period of investigation, growing from 60.5 thousand short tons in 1996 to 82.3 thousand short tons in 2000.[5135] Although the quantity of imports fluctuated somewhat during the period of investigation, the largest increase in terms of quantity occurred in 2000, the last full-year of the period of investigation, when import quantities increased by more than 25 percent, growing from 65.9 thousand short tons to 82.3 thousand short tons.[5136] The quantity of stainless rod imports declined by 31.3 percent between interim 2000 and 2001, falling from 45.6 thousand short tons to 31.4 thousand short tons.[5137] We note, however, that the market share of imports remained essentially stable in interim 2001, declining slightly from *** percent interim 2000 to *** percent in interim 2001.[5138]

[5133] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.
[5134] *See supra* paras. 10.191-10.200.
[5135] (original footnote) CR and PR at Table STAINLESS-7 & STAINLESS-C-5.
[5136] (original footnote) CR and PR at Table STAINLESS-7 & STAINLESS-C-5.
[5137] (original footnote) CR and PR at Table STAINLESS-7 & STAINLESS-C-5.
[5138] (original footnote) CR and PR at Table STAINLESS-7 & STAINLESS-C-5.

> The ratio of imports of stainless steel rod to domestic production also increased significantly during the period, increasing from *** percent in 1996 to *** percent in 2000. While the ratio fluctuated somewhat during the period of investigation, the largest single increase in the ratio (*** percentage points) occurred in 2000, the last full-year of the period of investigation.[5139] The ratio of imports to domestic production decreased from *** percent of domestic production in interim 2000 to *** percent in interim 2001.[5140]
>
> In sum, imports of stainless rod increased significantly, both in quantity terms and as a ratio of domestic production, between 1996 and 2000, with a rapid and dramatic increase in imports occurring during the last full-year of the period of investigation. Accordingly, we find that the first statutory criterion is satisfied."[5141]

10.265 The trends in imports, in absolute terms, are shown in the following graph illustrating the data relied upon by the USITC:[5142]



(ii) Claims and arguments of the parties

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

[5139] (original footnote) CR and PR at Table STAINLESS-7.
[5140] (original footnote) CR at Table STAINLESS-7.
[5141] USITC Report, Vol. I, pp. 214-215.
[5142] The data represented in the following graph are contained in the USITC Report, Table STAINLESS-7 at STAINLESS-12 and Table STAINLESS-C-5. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.

(iii) Analysis by the Panel

Absolute imports

10.267 The Panel believes that the USITC's determination on increased imports of stainless steel rod, as published in its Report[5143], does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC relied on the increase occurring between 1996 and 2000, with the largest increase from 1999 to 2000 (25%). The decline between interim 2000 and interim 2001 was acknowledged, but the USITC did not give an explanation why it nevertheless found that there was an increase of imports in absolute numbers. This failure is particularly serious since this decrease (by 31.3%) was sharper than the preceding increase, and, as a matter of proportion, offset the increase of the two preceding years.

10.268 The only additional aspect adduced by the USITC in response to the decrease in interim 2001 was the nearly stable market share of imports. The market share, however, is the relative notion of imports *vis-à-vis* domestic sales, and is not related to absolute import volumes. In light of the decrease in the most recent period and the overall developments between 1996 and interim 2001 which can be best described as a double up-and-down movement (returning to the low point at the end), the Panel does not believe that the facts support a finding that, at the moment of the determination, stainless steel rod "is being imported in (such) increased quantities".

10.269 It may well be that the increases occurring from 1996 to 1997, or from 1998 to 2000, taken by themselves, would qualify as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards. However, at the time of the determination, the trends of imports showed a significant recent decline, so that these past increases can no longer serve as the basis that stainless steel rod "is being imported in (such) increased quantities".

10.270 The Panel notes the argument made by the United States, that even if imports followed a pattern of successive surging and receding, this could cause serious injury to the domestic industry, such as to warrant a safeguard measure.[5144] In the eyes of the Panel, it is true that, despite a return of imports to a low level and, therefore, the absence of a product "being imported in … increased quantities", it is, nevertheless, conceivable that the intervening increases, or the shock-therapy of increases and decreases have caused serious injury to the domestic industry. In the Panel's view, the right to impose a safeguard exists only when, in addition to serious injury, and causation, there is also an increase in imports and this increase has to be recent. The legal framework contained in the Agreement on Safeguard requires, in addition to the causation of serious injury that the product "is being imported in … increased quantities".

Relative imports

10.271 The Panel also considers that the USITC's determination on increased imports of stainless steel rod relative to domestic production[5145] does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC performed an analysis which is similar to that rejected by the Panel in the context of absolute imports. What is more, the USITC did not provide any of the data on which it relied. All such numbers were replaced by asterisks. Therefore, there is no explanation of how the facts support a conclusion of increased imports because there are no facts supporting any conclusion.

[5143] USITC Report, Vol. I, pp. 214-215.
[5144] United States' first written submission, paras. 295-296 and 300.
[5145] USITC Report, Vol. I, p. 215.

10.272 The Panel agrees that a competent authority is not barred from relying on data provided by individual parties on a confidential basis in the course of the investigation. Article 3.2 of the Agreement on Safeguards contains an obligation to treat such data as confidential, i.e. not to disclose it (without permission). In this sense, the Panel, therefore, takes a position similar to that of the Appellate Body in *Thailand – H-Beams*.[5146] Competent authorities may rely on confidential data, even if these data are not disclosed to the public in their Reports.

10.273 However, Article 3.1 of the Agreement on Safeguards contains the obligation that competent authorities "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Article 4.2(c) adds the obligation that competent authorities "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". On the basis of these obligations and the obligation under Article 2.1, to make a determination, *inter alia*, that imports of the product in question have increased, competent authorities must provide a reasoned and adequate explanation of how the facts support the conclusion. In the view of the Panel, this requirement can, in an individual case, be limited by the obligation of Article 3.2 to protect confidential data.

10.274 However, we believe that Article 3.1 and 3.2 can be interpreted harmoniously.[5147] The obligation of Article 3.1 cannot be interpreted so as to imply a violation of Article 3.2. In other words, a competent authority is obliged to provide these explanations to fullest extent possible without disclosing confidential information. This implies that if there are ways of presenting data in a modified form (e.g. aggregation or indexing), which protects confidentiality, a competent authority is obliged to resort to these options. Conversely, the provision of no data at all, is permitted only when all these methods fail in a particular case.

10.275 The Panel believes that even if competent authorities are permitted not to disclose the data yet, nevertheless, rely on it, they are still required to provide through means other than full disclosure of that data, a reasoned and adequate explanation. This obligation could be complied with through the kind of explanation that the USITC has provided on page 215 of its report[5148], i.e. an explanation in words and without numbers. However, this obligation also includes an explanation by the competent authority of why there was no possibility of presenting *any* facts in a manner consistent with the obligation of protecting confidential information. That explanation was not provided in the instant case.

[5146] Appellate Body Report, *Thailand – H-Beams*, paras. 111, 112 and 119.

[5147] *See* Appellate Body Report, *Korea – Dairy*, para. 81: "In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.' " *See* also Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; Appellate Body Report, *US – Gasoline*, p. *23; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. *12; and Appellate Body Report, *India – Patents (US)*, para. 45.

[5148] For instance, at page 215 of the USITC's Report, Vol. I, one can read the following analysis protecting confidential information:

> "The ratio of imports of stainless steel rod to domestic production also increased significantly during the period, increasing from *** percent in 1996 to *** percent in 2000. While the ratio fluctuated somewhat during the period of investigation, the largest single increase in the ratio (*** percentage points) occurred in 2000, the last full year of the period of investigation. The ratio of imports to domestic production decreased from *** percent of domestic production in interim 2000 to *** percent in interim 2001." (Footnotes omitted).

10.276 The Panel also believes that, irrespective of the confidentialization of the numbers, the USITC's determination on increased imports of stainless steel rod relative to domestic production, as published in its Report[5149], does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC relied on a "significant" increase occurring between 1996 and 2000, with the largest increase from 1999 to 2000, the last full-year investigated. The decline between interim 2000 and interim 2001 was acknowledged, as was the fact that the ratio fluctuated over the period of investigation. Given these fluctuations and the most recent decline, the Panel does not believe that the USITC gave a reasoned and adequate explanation supporting that stainless steel rod, relative to domestic production "is being imported in increased quantities". This would at least have required some indication that relative imports, at the end of the period of investigation, remain at increased levels, for example, because the decline in the interim period was small in comparison with the increase until 2000. Such indication does not exist in the present case where the USITC, much as in the context of absolute imports, failed to place the existing, intervening increases in the context of previous and subsequent decreases. The only indication that remains is the stated increase from 1996 to 2000, but 2000 is not the end of the period investigated, so that the mentioned statement cannot provide a basis for the conclusion that stainless steel rod "is being imported" in increased quantities, relative to domestic production.

Conclusion

10.277 The Panel consequently finds that the USITC Report did not provide an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" and that the USITC's determination that stainless steel rod was being imported in "increased quantities" is inconsistent with the requirement of Article 2.1 of the Agreement on Safeguards that the product "is being imported in (such) increased quantities".

E. CLAIMS RELATING TO CAUSATION

10.278 As a preliminary point, the Panel notes that it has assumed for the purposes of its consideration of the issue of causation, that serious injury or threat thereof to all relevant domestic producers of the like or directly competitive products within the meaning of Article 4.2(a) of the Agreement on Safeguards, existed with respect to each of the safeguard measures at issue. The Panel has also assumed that the relevant domestic producers had been correctly defined, within the meaning of Article 4.1(c) of the Agreement on Safeguards. Of course, if there was no serious injury (or threat thereof) at all, serious injury could not have been caused by increased imports.

1. Claims and arguments of the parties

10.279 The arguments of the parties are set out in Section VII.H.1-3 *supra*. In summary, the complainants claim that: (i) the USITC determination(s) failed to establish the necessary causal link between increased imports and serious injury for each of the US measures; and (ii) the USITC failed to comply with the obligation that injury from other factors not be attributed to imports, contrary to the requirements of Article XIX of GATT 1994, and Articles 2.1 and 4.2(b) of the Agreement on Safeguards.

[5149] USITC Report, Vol. I, pp. 214-215.

2. Relevant WTO provisions[5150]

10.280 Article 2.1 of the Agreement on Safeguards provides that:

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

10.281 Article 4.2(a) provides that:

> "In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment."

10.282 In addition, Article 4.2(b) provides that:

> "The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports."

3. Standard of review

10.283 We recall that, as the Appellate Body has stated, the precise nature of the examination to be conducted by a panel in reviewing a claim under Article 4.2 of the Agreement on Safeguards stems in part from the panel's obligation to make an "objective assessment of the matter" under Article 11 of the DSU and, in part, from the obligations imposed by Article 4.2.[5151] Article 11 requires us to make an objective assessment of the facts and the applicability and conformity of the measures in question in this dispute with the Agreement on Safeguards.[5152]

[5150] The Panel is aware that Article XIX is relevant to the issue of causation but that Article 2.1 and, in particular, Article 4.2(b) of the Agreement on Safeguards address the issue of causation more specifically. The Panel is also aware that some complainants have raised causation claims pursuant to Article XIX of GATT as well as pursuant to the Agreement on Safeguards. However, the Panel considers that it need not to examine the relationship between Article XIX and the Agreement on Safeguards with regard to the causation to resolve the complainants' claims relating to causation. Therefore, the Panel has addressed the issue of causation by referring exclusively to the relevant provisions contained in the Agreement on Safeguards. We believe that this approach does not diminish the rights of the parties in this dispute.

[5151] Appellate Body Report, *US – Lamb*, para. 105.

[5152] Appellate Body Report, *Argentina – Footwear (EC)*, para. 120.

10.284 In addition, the Appellate Body has provided us with specific guidance with respect to the application of the standard of review in cases involving claims under Article 4 of the Agreement on Safeguards. In particular, in *Argentina – Footwear (EC)*, the Appellate Body stated that the Panel in that case was obliged by the terms of Article 4 to assess whether the competent authorities had examined all the relevant facts and had provided a reasoned explanation.[5153] In *US – Lamb*, the Appellate Body added that a panel can assess whether the competent authority's explanation for its determination is reasoned and adequate only if the panel critically examines that explanation in depth and in the light of the facts before the panel. The Appellate Body stated that, therefore, panels must review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[5154] Further, the Appellate Body in *US – Line Pipe* stated that a mere assertion that injury caused by other factors has not been attributed to increased imports does not establish explicitly with a reasoned and adequate explanation that injury caused by factors other than increased imports was not attributed to increased imports.[5155]

10.285 We have further guidance as to how to apply the standard of review in relation to the competent authorities' causation analysis. In particular, in *Argentina – Footwear (EC)*, the panel[5156] stated:

> "Applying our standard of review, we will consider whether Argentina's causation analysis meets these requirements on the basis of (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports."[5157]

4. Analysis by the Panel

10.286 The first sentence of Article 4.2(b) of the Agreement on Safeguards provides that, in determining whether increased imports have caused or are threatening to cause serious injury to a domestic industry under Article 4.2(a), a competent authority must demonstrate, "on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof."

10.287 In *US – Wheat Gluten*, the Appellate Body interpreted the reference to "the causal link" in Article 4.2(b) and concluded that it effectively requires a finding of a "genuine and substantial relationship of cause and effect" between increased imports and serious injury.[5158] Nevertheless,

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[5153] Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.
[5154] Appellate Body Report, *US – Lamb*, para. 106.
[5155] Appellate Body Report, *US – Line Pipe*, para. 220.
[5156] While the Appellate Body in *Argentina – Footwear (EC)* did not specifically comment on these causation findings, it did state that it saw "no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the *Agreement on Safeguards*": Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.
[5157] Panel Report, *Argentina – Footwear (EC)*, para. 8.229.
[5158] Appellate Body Report, *US – Wheat Gluten*, para. 69.

questions arise as to what is entailed in such a requirement. More particularly, how should the first and second sentences of Article 4.2(b) be operationalized to meet this requirement? The Panel considers that important issues to be addressed in this regard include the following. The first is the standard or threshold that should apply in determining whether or not a "genuine and substantial relationship of cause and effect" exists. The second is the issue of how (that is, using which analytical tools) a causal link can be established for the purposes of Article 4.2(b). The third is concerned with the non-attribution requirement provided for in the second sentence of Article 4.2(b) – how it is to be performed and its relationship with the overall demonstration of a causal link.

(a) Standard for assessment of the "causal link"

10.288 We commence with the first issue referred to above, namely the standard or threshold that should apply in determining whether or not a "genuine and substantial relationship of cause and effect" exists. At the outset, the Panel notes that the Appellate Body in *US – Wheat Gluten* found that

> "[T]he first sentence of Article 4.2(b) … provides that a determination 'shall not be made unless [the] investigation demonstrates … the existence of *the causal link* between increased imports … and serious injury or threat thereof.' (emphasis added) Thus, the requirement for a determination, under Article 4.2(a), is that 'the causal link' exists. The word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element.[5159] The word 'link' indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection'[5160] or 'nexus' between these two elements. Taking these words together, the term 'the causal link' denotes, in our view, a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury. Although that contribution must be sufficiently clear as to establish the existence of 'the causal link' required, the language in the first sentence of Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury, or that *'other* factors' causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that 'the causal link' between increased imports and serious injury may exist, even *though other factors are also contributing, 'at the same time', to the situation of the domestic industry.*"[5161]

10.289 In *US – Lamb*, the Appellate Body reiterated that the Agreement on Safeguards does not require that increased imports alone be capable of causing, or threatening to cause, serious injury.[5162] In addition, the Appellate Body in *US – Wheat Gluten* found that the causation requirement of Article 4.2(b) can be met where serious injury is caused by the interplay of increased imports and other factors.[5163]

10.290 It is clear to the Panel that, in order to meet the causation requirements in Article 4.2(b), it is not necessary for the competent authority to show that increased imports *alone* must be capable of

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[5159] (original footnote) *The New Shorter Oxford English Dictionary*, *supra*, footnote 43, Vol. I, pp. 355 and 356.
[5160] (original footnote) Ibid., p. 1598.
[5161] Appellate Body Report, *US – Wheat Gluten*, para. 67.
[5162] Appellate Body Report, *US – Lamb*, paras. 165-170.
[5163] Appellate Body Report, *US – Wheat Gluten*, paras. 67-68.

causing serious injury. [5164] Rather, if a number of factors have caused serious injury, a causal link may be demonstrated if the increased imports have, in some way, contributed to "bringing about", "producing" or "inducing" the serious injury. In this regard, the Appellate Body in *US – Wheat Gluten* concluded that the contribution must be sufficiently clear as to establish the existence of "the causal link" required[5165] but rejected the panel's conclusion that the serious injury must be caused by the increased imports alone and that the increased imports had to be sufficient to cause "serious" injury. [5166]

10.291 The Panel notes that the United States has argued that, on the basis of the standard dictionary definitions of the words "substantial" and "important", the words have essentially the same meaning when used to define the weight that must be given to a particular factor in a decision or an analysis.[5167] The United States further argues that, therefore, by requiring the USITC to find that increased imports are an "important" cause of injury and as important as any other cause, the United States' safeguards statute ensures that the USITC finds a "genuine and substantial" causal link between imports and serious injury before issuing an affirmative safeguards finding. [5168]

10.292 The Panel considers that the mere fact that the literal definitions of "important" and "substantial" may be considered by some to be "equivalent" is not necessarily relevant. In our view, what is important for this Panel is whether the test *applied* by the USITC for each of the safeguard measures at issue meets the standard or threshold prescribed by the requirement that there be a "genuine and substantial" relationship of cause and effect between the increased imports and the serious injury. We will discuss this further in the measure-by-measure analysis, which we undertake below.

10.293 Finally, the Panel recalls that serious injury within the meaning of Article 4.2(a) of the Agreement on Safeguards is to be determined with reference to the "overall impairment in the position of the domestic industry". Similarly, as further developed below, we believe that pursuant to Articles 2 and 4 of the Agreement on Safeguards, a competent authority must determine whether "overall", a genuine and substantial relationship of cause and effect exists between increased imports and serious injury suffered by the relevant domestic producers.

(b) Demonstration of a causal link

10.294 We proceed with the second issue referred to above, namely the question of how a causal link can be demonstrated for the purposes of Article 4.2(b) of the Agreement on Safeguards. The Panel notes first that Article 4.2(b) does not prescribe the use of any particular methods or analytical tools for demonstrating a causal link.[5169] The Panel is of the view that it is for the competent authority to decide the method it considers most appropriate in making a causal link determination. While the methods to determine causal link are not prescribed by Article 4.2(b), the competent authority should be encouraged to perform this analysis as thoroughly as the circumstances require. Whatever tool or method is used, it must be capable of determining whether or not a genuine and substantial relationship of cause and effect exists between the increased imports and the serious injury suffered by the relevant domestic producers.

[5164] Appellate Body Report, *US – Wheat Gluten*, para. 70.
[5165] Appellate Body Report, *US – Wheat Gluten*, paras. 66 and 69.
[5166] Appellate Body Report, *US – Wheat Gluten*, para. 61 ff and 79.
[5167] United States' first written submission, paras. 442 and 443.
[5168] United States' first written submission, paras. 442 and 443.
[5169] Panel Report, *Korea – Dairy*, para. 7.96.

10.295 This dispute raises the issue of the role that analyses of coincidence and conditions of competition must or may play in the demonstration of a causal link under Article 4.2(b). More particularly, the Panel considers that this dispute raises the issue of whether a competent authority *must* undertake a coincidence analysis when determining whether a causal link exists between increased imports and serious injury. We need to consider this issue because for some of the measures that are the subject of our review in this case, the USITC did not perform a coincidence analysis. Rather, the USITC limited itself to an analysis of the conditions of competition. We note in this regard that the USITC did not in its Report explicitly make a distinction between coincidence and conditions of competition analyses. Both types of analyses were undertaken by the USITC either individually or in conjunction in the section of the USITC Report containing its causation analysis.

10.296 Indeed, the characterization of the analyses undertaken by the USITC as coincidence and/or conditions of competition analyses is something that was done by the Panel for a number of reasons, which are further elaborated below. First, we note that the Agreement on Safeguards does not prescribe how causal link should be demonstrated. At the same time, WTO jurisprudence indicates that coincidence is central to a causation analysis. In this regard, a number of complainants have argued that the failure by the USITC to undertake a coincidence analysis in relation to some of the safeguard measures was fatal. Finally, the Panel is of the view that tools other than a coincidence analysis, such as a conditions of competition analysis, could also be used to establish a causal link under Article 4.2(b). We, therefore, developed an analytical framework to assess whether, in light of the circumstances of the causation determinations for each of the measures, the USITC demonstrated, through a reasoned and adequate explanation, that the facts supported its findings that causation existed. The Panel explains hereafter its understanding of what is entailed in coincidence and conditions of competition analyses. As a preliminary point, the Panel notes that in making this distinction between the types of analyses undertaken by the USITC, we have looked at the substance of the analyses undertaken rather than the labels used by the USITC in its Report.

(i) Coincidence

10.297 We first consider the role that a coincidence analysis plays in the context of the causal link analysis that is demanded by Article 4.2(b) of the Agreement on Safeguards. In this regard, the Panel recalls that the panel in *Argentina – Footwear (EC)* stated that Article 4.2(a) "requires" national authorities to analyse trends in both injury factors and imports. The panel considered that such an analysis was relevant in relation to a causation assessment:

> "In making our assessment of the causation analysis and finding, we note in the first instance that Article 4.2(a) requires the authority to consider the 'rate' (i.e., direction and speed) and 'amount' of the increase in imports and the share of the market taken by imports, as well as the 'changes' in the injury factors (sales, production, productivity, capacity utilization, profits and losses, and employment) in reaching a conclusion as to injury and causation. As noted above we consider that this language means that the *trends* – in both the injury factors and the imports – matter as much as their absolute levels. In the *particular context of a causation analysis, we also believe that this provision means that it is the relationship between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination."*[5170] (emphasis added)

10.298 The Appellate Body agreed with the panel and observed:

[5170] Panel Report, *Argentina – Footwear (EC)*, para. 8.237.

> "We see no reason to disagree with the Panel's interpretation that the words 'rate and amount' and 'changes' in Article 4.2(a) mean that 'the *trends* – in both the injury factors and the imports – matter as much as their absolute levels'. We also agree with the Panel that, in an analysis of causation, 'it is the relationship between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination.' "[5171] (emphasis added)

10.299 We understand from the foregoing, firstly, that the term "coincidence" refers to the relationship between the movements in imports and the movements in injury factors. The panel and Appellate Body made it clear that, in considering movements in imports, it is necessary to look at movements in import volumes and import market shares.[5172] In our view, the word "coincidence" in the current context refers to the *temporal* relationship between the movements in imports and the movements in injury factors. In other words, upward movements in imports should normally occur at the same time as downward movements in injury factors in order for coincidence to exist. We note that, below, we qualify these comments to take account of cases where a lag exists between the influx of imports and the manifestation of the effects of injury suffered by the domestic industry.

10.300 Secondly, the above indicates that the Appellate Body considers that "coincidence" between movements or trends in imports and movements or trends in the relevant injury factors plays a "central" role in determining whether or not a causal link exists. Indeed, both the panel and the Appellate Body in *Argentina – Footwear (EC)* stated that the relationship between the movements in imports and the movements in injury factors *must* be central to a causation analysis. We also note that the same panel, supported by the Appellate Body[5173] went on to state that "[I]n practical terms, we believe therefore that [Article 4.2(a)] means that if causation is present, an increase in imports *normally* should coincide with a decline in the relevant injury factors."[5174]

10.301 The Panel is of the view that since coincidence is "central" to a causation analysis, a competent authority should "normally" undertake a coincidence analysis when determining the existence of a causal link. We believe that in situations where the effects of injurious factors other than increased imports have not been attributed to increased imports[5175], overall clear coincidence between movements in imports and movements in injury factors will provide a competent authority with an adequate basis upon which to conclude that a genuine and substantial relationship of cause and effect between increased imports and serious injury exists.

10.302 As mentioned, the Panel is also of the view that *overall* coincidence is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the competent authority has considered. We refer in this regard to the panel's decision in *US – Wheat Gluten*, where it stated that:

> "[I]n light of the *overall* coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation, the existence of slight absences of coincidence in the movement of *individual* injury factors in relation to

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[5171] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[5172] Significantly, no mention was made by the panel and the Appellate Body in *Argentina – Footwear (EC)* to movements in import prices. We will discuss the relevance of this in the succeeding section of our findings dealing with "conditions of competition".

[5173] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[5174] Panel Report, *Argentina – Footwear (EC)*, para. 8.238.

[5175] That is, in compliance with the non-attribution requirements as discussed in paras. 10.325-10.334 *infra*.

> imports would not preclude a finding by the USITC of a causal link between increased imports and serious injury." [5176]

10.303 In the present dispute, the question arises as to how a causal link must be established for the purposes of Article 4.2(b) in cases where there is an *absence of coincidence*. By absence of coincidence we mean situations where coincidence does not exist or an analysis of coincidence has not been undertaken. In this regard, we agree with statements made by the panel and Appellate Body in *Argentina – Footwear (EC)* and the panel in *US – Wheat Gluten*, that coincidence in movements in imports and the movements in injury factors would ordinarily tend to support a finding of causation, while *the absence of such coincidence would ordinarily tend to detract from such a finding and would require a compelling explanation as to why a causal link is still present.*[5177]

10.304 We also recall that the panel in *Argentina – Footwear (EC)*, supported by the Appellate Body[5178], as well as the panel in *US – Wheat Gluten*[5179], noted that, in situations where a causal link exists, "an increase in imports *normally* should coincide with a decline in the relevant injury factors" and "coincidence… would *ordinarily* tend to support a finding of causation." In our view, even when coincidence does not exist or an analysis of coincidence has not been undertaken, a competent authority may still be able to demonstrate the existence of a causal link if it can offer a compelling explanation that such causal link exists.

10.305 The Panel emphasizes that the Appellate Body in *Argentina – Footwear (EC)* upheld the panel's statement that "coincidence by itself *cannot prove* causation" (emphasis added).[5180] The Panel considers that there are situations where a coincidence analysis may not suffice to prove causation or where the facts may not support a clear finding of coincidence and that, therefore, such situations may call for further demonstration of the existence of a causal link. Indeed, there may be situations where a competent authority, as part of its overall demonstration of the existence of a causal link, undertakes different analyses, with a view to proving that a genuine and substantial relationship of cause and effect exists between increased imports and serious injury.

10.306 In our view, there may be cases where: (i) a coincidence analysis has been undertaken and shows clear coincidence between movements in imports and movements in injury factors; (ii) as part of its overall demonstration of causal link, the competent authority has undertaken, *inter alia*, a coincidence analysis which, in and of itself, does not fully demonstrate the existence of a causal link and further analysis is undertaken; (iii) a coincidence analysis has been undertaken (with or without any other analysis) but it does not demonstrate any coincidence; and, finally, (iv) a coincidence analysis has not been undertaken but other analytical tools have been used with a view to proving a causal link.[5181]

10.307 We are of the view that in all cases, the competent authority must provide a reasoned and adequate explanation of its causal link findings. In the first case (i), assuming fulfilment of the non-attribution requirement, when clear coincidence exists, no further analysis is required of the

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[5176] Panel Report, *US – Wheat Gluten*, para. 8.101.

[5177] Panel Report, *US – Wheat Gluten*, para. 8.95; Panel Report, *Argentina – Footwear (EC)*, paras. 8.237-8.238; Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[5178] Panel Report, *Argentina – Footwear (EC)*, paras. 8.238; Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[5179] Panel Report, *US – Wheat Gluten*, para. 8.95.

[5180] Panel Report, *Argentina – Footwear (EC)*, paras. 8.237-8.238; Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[5181] These are situations that the Panel has encountered in this case. This is not to say that other situations may not exist.

competent authority and the Panel will confine its review to the coincidence analysis. In the second case (ii), the Panel will examine both the coincidence analysis and the other analysis undertaken by the competent authority with a view to assessing whether the competent authority has provided a reasoned and adequate explanation that, overall, a genuine and substantial relationship of cause and effects exists between increased imports and serious injury.

10.308 In cases (iii) and (iv), the competent authority should explain the absence of coincidence or why a coincidence analysis was not undertaken and provide, in particular, a compelling explanation as to why a causal link exists notwithstanding the absence of coincidence. Ultimately, it is for the competent authority to decide upon the analytical tool it considers most appropriate to perform this compelling analysis in demonstrating the existence of a causal link.

10.309 Another issue that has arisen in the present dispute is whether or not coincidence can be considered to exist in cases where there is a *temporal lag* between the influx of imports and the manifestation of the effects of such an influx on the domestic industry. More particularly, the United States has argued that a lag or delay in the manifestation of certain injury factors may be attributed to the delayed effect of increased imports on certain factors, such as employment and bankruptcy.[5182] A number of the complainants argue, on the other hand, that the nature of the markets involved in the present case is such that such a lag effect could not exist. They submit that the effect of the increased imports should be felt immediately and that a lag of two years, which they submit existed in the present case, is too long.[5183]

10.310 The Panel considers that the argument by the United States of a lag between the increased imports and the manifestation of the effects of such increased imports on the domestic industry may have merit in certain cases. More particularly, in our view, there may be instances in which injury may be suffered by an industry at the same point in time as the influx of increased imports. However, the injury that is caused at that point in time may not become apparent until some later point in time. In other words, there may be a lag between the influx of imports and the manifestation of the injurious effects on the domestic industry of such an influx.

10.311 We find support for this view from the panel's decision in *Egypt – Steel Rebar*. There, the panel rejected Turkey's contention that there must be a strict temporal connection between the dumped imports and any injury being suffered by the industry[5184], noting that this argument:

> "[R]est[ed] on the quite artificial assumption that the market instantly absorbs, and reacts to, imports the moment they enter the territory of the importing company. Such an assumption implicitly rests on the existence of so-called "perfect information" in the market (i.e., that all actors in the market are instantly aware of all market signals.)"[5185]

Nevertheless, we note that, in that case, the lag between the effects of imports on a market that the panel suggested was acceptable was, at most, a year in duration.

[5182] United States' first written submission, paras. 446, 448 and 449; United States' second written submission, paras. 119-122.

[5183] Japan's written reply to Panel question No. 86 at the first substantive meeting; Korea's second written submission, para. 141; Brazil's written reply to Panel question No. 86 at the first substantive meeting.

[5184] Panel Report, *Egypt – Steel Rebar*, paras. 7.127-7.132.

[5185] Panel Report, *Egypt – Steel Rebar*, para. 7.129.

10.312 The Panel considers that there are limits in temporal terms on the length of lags between increased imports and the manifestation of the effects that are acceptable for the purposes of a coincidence analysis under Article 4.2(b) of the Agreement on Safeguards. The limits that apply would, undoubtedly, vary from industry to industry and factor to factor. Generally speaking, the more rigid the market structure associated with a particular industry, the more likely a lag in effects would exist, at least in relation to some factors. Conversely, the more competitive the market structure, the less tenable it is that lagged effects could be expected. In addition, the Panel considers that while lags may be expected in relation to some factors (for example, employment), lags in the manifestation of effects are less likely to exist in relation to other injury factors such as production, inventories and capacity utilization, which, ordinarily, would react relatively quickly to changes taking place in the market, such as an influx of imports if increased imports are causing serious injury. If the competent authority does rely upon a lag as between the increased imports and the injury factors, we consider that such a lag must be fully explained by the competent authority on the basis of objective data.

(ii) Conditions of competition

10.313 The Panel recalls that while coincidence plays a central role in determining whether or not a causal link exists, other analytical tools may also come in to play.

10.314 As mentioned above, there may be cases, for instance, where a competent authority does not undertake a coincidence analysis or does so, but the facts do not support a finding of causal link on the basis of such an analysis. In such situations, reference could be made to the conditions of competition as between imports and domestic products with a view to providing a compelling explanation, in the absence of coincidence, as to why a causal link nevertheless exists. Indeed, in our view, consideration of the conditions of competition of the market in which the relevant imported and domestic products are being sold may generally prove insightful in respect of the issue of the causal relationship between increased imports and serious injury.

10.315 There may also be cases where a competent authority considers that it is necessary to *support* its coincidence analysis with another analysis because, for example, coincidence cannot be established with a sufficient degree of certainty. In such situations, the competent authority may rely upon analysis of the conditions of competition to reinforce its causal link demonstration. In such situations, a panel will review the conditions of competition analysis performed by the competent authority with a view to assessing whether it provided a reasoned and adequate explanation that, overall, a genuine and substantial relationship of cause and effects exists between increased imports and serious injury.

10.316 We believe that Articles 2.1 and 4.2(a) and (b) confirm the relevance of conditions of competition when determining causation. Article 2.1 calls for a determination that increased imports are occurring "*under such conditions* as to cause or threaten to cause serious injury." The Appellate Body in *US – Wheat Gluten* interpreted the meaning of "under such conditions" in Article 2.1 as follows:

> "[T]he phrase 'under such conditions' refers generally to the prevailing 'conditions', in the marketplace for the product concerned, when the increase in imports occurs. Interpreted in this way, the phrase 'under such conditions' is a shorthand reference to the remaining factors listed in Article 4.2(a), which relate to the overall state of the domestic industry and the domestic market, as well as to other factors 'having a bearing on the situation of [the] industry'. The phrase 'under such conditions', therefore, supports the view that, under Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards*, the competent authorities should determine whether the increase in

> imports, not alone, but in conjunction with the other relevant factors, cause serious injury."[5186]

10.317 We also note that the panels in *Argentina – Footwear (EC)* and *US – Wheat Gluten* considered the conditions of competition in the market between imported and domestic footwear in reviewing whether a causal link existed between increased imports and injury.[5187] The Appellate Body in *Argentina – Footwear (EC)* explicitly supported the panel's analysis, stating that: "[W]e agree with the Panel's conclusions that 'the conditions of competition between the imports and the domestic product were not analysed or adequately explained (in particular price)' ".[5188]

10.318 The Panel is of the view that the factors that should be considered in a conditions of competition analysis for the purposes of Article 4.2(b) are not pre-determined but include those mentioned in Article 4.2(a). This is so because Articles 4.2(a) and 4.2(b) of the Agreement on Safeguards must be given a mutually consistent interpretation.[5189] We refer in this regard to the following comments of the Appellate Body in *US – Wheat Gluten*:

> "[*B*]*oth* provisions [4.2(a) and 4.2(b)] lay down rules governing a *single* determination, made under Article 4.2(a). In our view, it would contradict the requirement in Article 4.2(a) to evaluate – and, thereby, include in the determination – the 'bearing' or effect *all* the relevant factors have on the domestic industry, if those *same* effects, caused by those *same* factors, were, with the exception of increased imports, to be excluded under Article 4.2(b), as the Panel suggested." (emphasis original)[5190]

10.319 Given then that the factors referred to in Article 4.2(a) are relevant in defining the conditions of competition for the purposes of the causation analysis under Article 4.2(b), in the Panel's view, volume of imports, imports' market share, changes in the level of sales and profit and losses are of particular interest. In addition, we note that the panel in *Argentina – Footwear (EC)* referred to physical characteristics, quality, service, delivery, technological developments, consumer tastes, and other supply and demand factors in the market as factors that could be taken into consideration in assessing the conditions of competition in a market for the purposes of a causation analysis.[5191]

10.320 A consideration of the various factors that have been mentioned provides context for the consideration of *price*, which, in the Panel's view, is an important, if not the most important, factor in analysing the conditions of competition in a particular market, although consideration of prices is not necessarily mandatory.[5192] The Panel agrees with the argument advanced by the European Communities insofar as it submits that price will often be relevant to explain how the increased volume of imports caused serious injury.[5193] Indeed, we consider that relative price trends as between

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[5186] Appellate Body Report, *US – Wheat Gluten*, para. 78.

[5187] Panel Report, *Argentina – Footwear (EC)*, para. 8.250; Panel Report, *US – Wheat Gluten*, para. 8.108.

[5188] Appellate Body Report, *Argentina – Footwear* (EC), para. 145.

[5189] Appellate Body Report, *US – Wheat Gluten*, para. 73.

[5190] Appellate Body Report, *US – Wheat Gluten*, para. 73.

[5191] Panel Report, *Argentina – Footwear (EC)*, para. 8.251.

[5192] The Panel agrees with the following comments made by the panel in *Korea – Dairy* at para. 7.51 in this regard: "Although the prices of the imported products will most often be a relevant factor indicating how the imports do, in fact, cause serious injury to the domestic industry, we note that there is no explicit requirement in Article 2, that the importing Member perform a price analysis of the imported products and the prices of the like or directly competitive products in the market of the importing country."

[5193] European Communities' written reply to Panel's question No. 29 at the second substantive meeting.

imports and domestic products will often be a good indicator of whether injury is being transmitted to the domestic industry (provided that the market context for such trends are borne in mind) given that price changes have an immediate effect on profitability, all other things being equal. In turn, profitability is a useful measure of the state of the domestic industry.

10.321 The relevance of price in the analysis of the conditions of competition appears to be supported by comments made by the panel in *Argentina – Footwear (EC)*.[5194] Further, the panel in *US – Wheat Gluten* was of the view that a price analysis is potentially relevant, although not necessarily mandatory:

> "'Price' is not expressly listed in Article 4.2(a) [of the Agreement on Safeguards ('SA')] as a 'relevant factor' having a bearing on the situation of the domestic industry. However, this is not to say that 'price' may not be a relevant factor in a given case. An imported product can compete with a domestic product in various ways in the market of the importing country. Clearly, the relative price of the imported product is one of these ways, but it is certainly not the only way, and it may be irrelevant or only marginally relevant in a given case.
>
> Therefore, in the context of safeguards measures, the relevance of 'price' will vary from case to case, in light of the particular circumstances and the nature of the particular product and domestic industry involved. Given that this is the nature of the 'price' factor under the Agreement on Safeguards, we consider that the phrase 'under such conditions' does not necessarily, in every case, require a price analysis."[5195]

10.322 With respect to the argument made by the European Communities that if imports are sold at a higher price than domestic products, it is unlikely that such imports are responsible for any serious injury[5196], the Panel considers that the existence or absence of underselling by imports cannot, on its own, lead to a definitive conclusion regarding the presence or otherwise of a causal link between the increased imports and the serious injury. In our view, pricing trends must always be considered in context. It is only after this contextual consideration that conclusions can be drawn regarding the existence or otherwise of the causal link.

10.323 As to *how detailed* an analysis of the conditions of competition must be, the Panel is of the view that the more complicated the factual situation, the more important it is for a number of factors to be taken into consideration.[5197] In this regard, the Panel agrees with the following statement by the panel in *Argentina – Footwear (EC)*, particularly in relation to CCFRS, which will be discussed further below:

> "We note in this regard that there would seem to be a relationship between the depth of detail and degree of specificity required in a causation analysis and the breadth and heterogeneity of the like or directly competitive product definition. Where as here a very broad product definition is used, within which there is considerable heterogeneity, the analysis of the conditions of competition must go considerably beyond mere statistical comparisons for imports and the industry as a whole, as given their breadth, the statistics for the industry and the imports as a whole will only show averages, and therefore will not be able to provide sufficiently specific information on

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[5194] Panel Report, *Argentina – Footwear (EC)*, para. 8.251.
[5195] Panel Report, *US – Wheat Gluten*, paras. 8.109-8.110.
[5196] European Communities' written reply to Panel's question No. 29 at the second substantive meeting.
[5197] Panel Report, *Argentina – Footwear (EC)*, para. 8.261, footnote 557.

> the locus of competition in the market. With regard to the present case, we do not disagree that a quite detailed investigation of the industry was conducted, in which a great deal of statistical and other information was amassed. What in our view was missing was a detailed analysis, on the basis of objective evidence, of the imports and of how in concrete terms those imports caused the injury found to exist in 1995. In this regard, we note that Act 338 contains a section entitled 'Conditions of competition between the domestic products and imports'. This section does not contain such a detailed analysis, however, but rather summarizes questionnaire responses from domestic producers about their strategies for 'fending off foreign competition', and from importers and domestic producers concerning 'the sales mix' of domestic products and imports, including their overall views about quality and other issues concerning domestic and imported footwear, with the importers stressing the benefits of imports. This summary of subjective statements by questionnaire respondents does not constitute an analysis of the 'conditions of competition' by the authority on the basis of objective evidence."[5198]

10.324 The Panel will consider in detail below in its measure-by-measure analysis the relevance of the conditions of competition for the purposes of determining whether the USITC provided a reasoned and adequate explanation that the facts supported a determination that a causal link existed in the context of a number of the safeguard measures at issue in this dispute.

(iii) Non-attribution

10.325 A third important issue arising in a causation analysis is the non-attribution requirement. The second sentence of Article 4.2(b) provides that:

> "When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports."

10.326 The above makes it clear that in cases where factors other than increased imports have caused injury to the domestic industry, a "non-attribution" exercise must be undertaken pursuant to the second sentence of Article 4.2(b). As noted by the Appellate Body[5199], it is precisely because there may be several factors, besides increased imports, contributing simultaneously to the situation of the domestic industry that the last sentence of Article 4.2(b) states that competent authorities "shall not … attribute" to increased imports injury caused by other factors.

10.327 The scope of the non-attribution requirement has been articulated by the Appellate Body on a number of occasions. In its discussion of the non-attribution requirement, the Appellate Body in *US – Wheat Gluten* stated that:

> "Article 4.2(b) presupposes, therefore, as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) by ensuring that any injury to the domestic industry that was *actually*

[5198] Panel Report, *Argentina – Footwear (EC)*, para. 8.261, footnote 557.
[5199] Appellate Body Report, *US – Wheat Gluten*, para. 68.

> caused by factors other than increased imports is not 'attributed' to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, 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, as required by the *Agreement on Safeguards*."[5200]

10.328 The Appellate Body in *US – Lamb* emphasized that the three steps mentioned in *US – Wheat Gluten* simply describe a logical process for complying with the obligations relating to causation set out in Article 4.2(b). It further stated that these steps are not legal "tests" mandated by the text of the Agreement on Safeguards, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities.[5201] Nevertheless, it concluded that the primary objective of the process described in *US – Wheat Gluten* is to determine whether there is "a genuine and substantial relationship of cause and effect" between increased imports and serious injury or threat thereof.[5202]

10.329 On the basis of its findings in *US – Wheat Gluten*[5203], *US – Lamb*[5204] and *US – Hot-Rolled Steel*[5205], the Appellate Body in *US – Line Pipe* stated that:

> "Article 4.2(b), last sentence, requires that, when factors other than increased imports are causing injury at the same time as increased imports, competent authorities must ensure that injury caused to the domestic industry by other factors is not attributed to the increased imports. We have previously ruled, and we reaffirm now, that, to fulfill this requirement, competent authorities must separate and distinguish the injurious effects of the increased imports from the injurious effects of the other factors. [5206] As we ruled in *US – Hot-Rolled Steel* with respect to the similar requirement in Article 3.5 of the *Anti-Dumping Agreement*, so, too, we are of the view that, with respect to Article 4.2(b), last sentence, competent authorities are required to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports."[5207]

10.330 The Appellate Body in *US – Line Pipe* further added that to fulfil the requirement contained in the second sentence of Article 4.2(b), the competent authority must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms.[5208]

[5200] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[5201] Appellate Body Report, *US – Lamb*, para. 178.
[5202] Appellate Body Report, *US – Lamb*, para. 179.
[5203] Appellate Body Report, *US – Wheat Gluten*, para. 70.
[5204] Appellate Body Report, *US – Lamb*, para. 179.
[5205] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 222, 223, 230 and 214.
[5206] (original footnote) Appellate Body Report, *US – Wheat Gluten*, , para. 70; Appellate Body Report, *US – Lamb*, para. 179. In the context of the *Anti-Dumping Agreement*, see, Appellate Body Report, *US – Hot-Rolled Steel*, para. 222.
[5207] Appellate Body Report, *US – Line Pipe*, para. 215.
[5208] Appellate Body Report, *US – Line Pipe*, para. 217.

10.331 Clearly, when factors other than increased imports are causing or are said to be causing injury to the industry, the competent authority *must* perform a non-attribution exercise to assess the effects of these other factors so that injury caused by those other factors is not attributed to increased imports with a view to determining whether a genuine and substantial relationship of cause and effects exist between increased imports and serious injury to the relevant domestic producers.

10.332 The Panel notes that purpose of the non-attribution exercise is to enable a competent authority to separate and distinguish the effects of increased imports from those caused by factors other than increased imports and, ultimately, to assess the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports. Therefore, the requirement to identify the nature and extent of the injurious effects of factors other than increased imports calls for an overall assessment of such "other factors". As we see it, Article 4.2(b) is not concerned with the relative importance of individual factors as between themselves or as compared with increased imports. Essentially, Articles 2 and 4 of the Agreement on Safeguards are concerned with the injurious effects of increased imports on the situation of the domestic industry as distinct from the injurious effects of all "other factors".

10.333 With regard to arguments made by complainants regarding the consistency of the "substantial cause" test *applied* by the USITC[5209] and the Agreement on Safeguards, the Panel notes that the Appellate Body in *US – Lamb* stated that:

> "[B]y examining the *relative* causal importance of the different causal factors, the USITC clearly engaged in some kind of process to separate out, and identify, the effects of the different factors, including increased imports. Although an examination of the *relative* causal importance of the different causal factors may satisfy the requirements of United States law, such an examination does not, for that reason, satisfy the requirements of the *Agreement on Safeguards*. On the record before the Panel in this case, a review of whether the United States complied with the non-attribution language in the second sentence of Article 4.2(b) can only be made in the light of the explanation given by the USITC for its conclusions on the relative causal importance of the increased imports, as distinguished from the injurious effects of the other causal factors."[5210]

10.334 In the Panel's view, there is nothing in the substantial cause test applied by the USITC, in itself, that would necessarily mean that the obligation to "separate and distinguish" the effects of other causes on the state of domestic industry cannot be fulfilled and was not fulfilled in the case of the safeguard measures that are the subject of our review in this case. Nor do we consider that it would necessarily preclude the consideration and evaluation of the nature and extent of the effects of those factors as required by the Agreement on Safeguards. The Panel does, however, believe that whether or not the approach that the USITC has adopted for each of the safeguard measures complies with the requirements of the Agreement on Safeguards will depend, in each case, on whether the USITC's analysis "established explicitly" on the basis of a "reasoned and adequate explanation" that the effect of the other factors on the situation of the domestic industry had not been attributed to the increased imports. We will consider this issue below in our measure-by-measure analysis.

[5209] The Panel recalls that the complainants have not challenged the United States' statute on safeguards *per se*, see at paras 10.6 – 10.8 above.

[5210] Appellate Body Report, *US – Lamb*, para. 184.

(iv) Quantification

10.335 In their argumentation on the legal standard for causation (as well as for the appropriate remedy), parties advanced detailed arguments on the question of whether quantification is required and on the use of econometric models.

10.336 We note, first, that the text of the Agreement on Safeguards does not require quantification. However, in the Panel's view both the Agreement on Safeguards and relevant jurisprudence anticipate that quantification *may* occur. In addition, the Panel considers that quantification may be particularly desirable in cases involving complicated factual situations where qualitative analyses may not suffice to more fully understand the dynamics of the relevant market.

10.337 In support, we note that Article 4.2(a) of the Agreement on Safeguards refers to "factors of [a] quantifiable nature." As explained in paragraph 10.318 above, we consider that Articles 4.2(a) and 4.2(b) must be read together and in a mutually consistent fashion. Therefore, the factors referred to in Article 4.2(a) must be taken into consideration in undertaking the non-attribution exercise (in addition to any other factors that may be relevant). In addition, the requirement in Article 4.2(a) that evaluated factors be of a "quantifiable nature" implies that at least some of the factors assessed in the non-attribution exercise will be quantifiable and, in those circumstances, should be quantified.

10.338 Further, the Panel recalls comments made by the Appellate Body in *US – Line Pipe* where it stated that compliance with Articles 3.1, 4.2(b) and 4.2(c) of the Agreement on Safeguards should have the incidental effect of providing sufficient justification for a measure and should also provide a benchmark against which the permissible extent of the measure should be determined. In particular, the Appellate Body stated that:

> "We observe here that the non-attribution language of the second sentence of Article 4.2(b) is an important part of the architecture of the *Agreement on Safeguards* and thus serves as necessary context in which Article 5.1, first sentence, must be interpreted. In our view, the non-attribution language of the second sentence of Article 4.2(b) has two objectives. First, it seeks, in situations where several factors cause injury at the same time, to prevent investigating authorities from inferring the required 'causal link' between increased imports and serious injury or threat thereof on the basis of the injurious effects caused by factors other than increased imports. Second, it is a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports. As we read the Agreement, this latter objective, in turn, informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1, first sentence. Indeed, as we see it, this is the only possible interpretation of the obligation set out in Article 4.2(b), last sentence, that ensures its consistency with Article 5.1, first sentence. It would be illogical to require an investigating authority to ensure that the 'causal link' between increased imports and serious injury not be based on the share of injury attributed to factors other than increased imports while, at the same time, permitting a Member to apply a safeguard measure addressing injury caused by all factors."[5211]

10.339 The Panel considers that quantification could help in identifying the share of the overall injury caused by increased imports, as distinct from the injury caused by other factors, which would in turn yield a "benchmark" for ensuring that the safeguard measure is imposed only to the extent necessary to prevent or remedy serious injury and allow for adjustments.

[5211] Appellate Body Report, *US – Line Pipe*, para. 252.

10.340 In addition, the Panel considers that quantification may, in certain cases, be entailed in the obligation on competent authorities to establish non-attribution "explicitly" on the basis of a reasoned and adequate explanation.[5212] In this regard, the Panel recalls that, as stated on several occasions by the Appellate Body, WTO Members are expected to interpret and apply their WTO obligations in good faith.[5213] Moreover, in light of the obligations imposed on competent authorities to consider all plausible alternative explanations submitted by the interested parties, we believe that a competent authority may find itself in situations where quantification and some form of economic analysis are necessary to rebut allegedly plausible alternative explanations that have been put forward. While the wording of the provisions of the Agreement on Safeguards does not require quantification in the causal link analysis *per se*, the circumstances of a specific dispute may call for quantification.

10.341 Having said that quantification may be desirable, useful and sometimes necessary depending on the circumstances of a case, the Panel recognizes that quantification may be difficult and is less than perfect. Therefore, the Panel is of the view that the results of such quantification may not necessarily be determinative. We consider that an overall qualitative assessment that takes into account all relevant information, must always be performed. Nevertheless, in the Panel's view, even the most simplistic of quantitative analyses may yield useful insights into the overall dynamics of a particular industry and, in particular, into the nature and extent of injury being caused by factors other than increased imports to a domestic industry.

10.342 Regarding argumentation by the parties as to the form which quantification should take, the Panel considers that this will depend again upon the complexity of the situation under consideration. The approach adopted should enable a competent authority to apportion, even roughly, the injury attributable to factors other than increased imports that may come into play in the context of a particular industry. The more complex the situation, the more necessary a sophisticated analysis becomes.[5214] Whatever approach or model is adopted, it should be applied in good faith and with due diligence.[5215] It seems to us that this is demanded by the good faith interpretation and application of Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards.

(v) Sequence of assessment

10.343 As for the sequence of assessment of the various elements that may be involved in establishing the existence of a causal link, the Panel is of the view that the Agreement on Safeguards does not prescribe any order. The Panel recalls the Appellate Body's comments in *US – Lamb*, where, in defining the steps that might be undertaken in the non-attribution analysis, it stated that "these steps are not legal 'tests' mandated by the text of the *Agreement on Safeguards*, nor is it imperative that

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[5212] The Appellate Body in *US – Line Pipe* stated that a mere assertion that injury caused by other factors has not been attributed to increased imports does not establish explicitly with a reasoned and adequate explanation that injury caused by factors other than increased imports was not attributed to increased imports.: Appellate Body Report, *US – Line Pipe*, para. 220.

[5213] See, for example, Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 297 *et seq*.

[5214] We note in this regard that the United States used econometric models in its demonstration of compliance with Article 5.1 before the Panel.

[5215] In support of our argument that the approach or model used for quantification should be one based on good faith and due diligence, we refer to the Appellate Body's decision in *US – Cotton Yarn*, which said the exercise of due diligence was required in relation to the obligations under the Agreement on Textiles and Clothing, being the equivalent to Article 3 of the Agreement on Safeguards (Appellate Body Report, para. 76). In addition, the Appellate Body in *US – Offset Act* acknowledged the relevance of the principle of good faith as a general rule of conduct in international relations that controls the exercise of rights by states. The Appellate Body stated that there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith. (Appellate Body Report, para. 297 *et seq*)

each step be the subject of a separate finding or a reasoned conclusion by the competent authorities."[5216]

10.344 Accordingly, the Panel does not consider that the non-attribution exercise need necessarily precede a consideration of coincidence between the increased imports and the injury factors and the conditions of competition or *vice versa*. The Panel is of the view that the wording of Articles 2.1 and 4.2 does not require that non-attribution be undertaken in advance of or following any other analysis that may be undertaken with a view to establishing the existence of a causal link. Provided that the various elements entailed in a causation analysis are considered and analysed in coming to a conclusion on the existence or otherwise of a "causal link", this should suffice. This much is clear from the Appellate Body's comments in *US – Wheat Gluten* and *US – Lamb*:

> "[L]ogically, the final identification of the injurious effects caused by increased imports must follow a prior separation of the injurious effects of the different causal factors. If the effects of the different factors are not separated and distinguished from the effects of increased imports, there can be no proper assessment of the injury caused by that single and decisive factor. As we also indicated, the final determination about the existence of 'the causal link' between increased imports and serious injury can only be made *after* the effects of increased imports have been properly assessed, and this assessment, in turn, follows the separation of the effects caused by all the different causal factors."[5217]

10.345 As for the significance of the fact that the USITC, in a number of instances, may have begun its text with a finding of a "causal link" before it undertook the non-attribution demonstration, in the Panel's view, this does not necessarily entail a violation of Article 4.2(b). In this regard, we emphasise the Appellate Body's comment that "the final determination about the existence of the 'causal link' between increased imports and serious injury can only be made *after* the effects of increased imports have been properly assessed, and this assessment in turn follows the separation of the effects caused by all the different factors". In our view, what matters is whether, ultimately, the USITC's report contains a reasoned and adequate explanation of the various elements that need to be established under Article 4.2(b).

10.346 As noted above, it is always incumbent upon a competent authority to determine, including through compliance with the non-attribution requirement, whether, overall, a genuine and substantial relationship of cause and effect exists between increased imports and serious injury. In this context, the Panel disagrees with the suggestion by Japan and Brazil that, in certain cases, once the effect of other factors has been separated and distinguished, the "connection between the imports and the serious injury is ascertained".[5218] The Panel is of the view that this assumption cannot be made automatically since the determination of whether a causal link exists always calls for an overall assessment.

[5216] Appellate Body Report, *US – Lamb*, para. 178.

[5217] Appellate Body Report, *US – Lamb*, para. 180; Appellate Body Report, *US – Wheat Gluten*, para. 69.

[5218] Brazil's written reply to Panel's question No. 87 at the first substantive meeting, Japan's written reply to Panel's question No. 87 at the first substantive meeting.

(vi) Imports from free-trade areas – "other factors"?

10.347 The complainants' claims raise the issue of whether imports from free-trade areas that were ultimately excluded from the application of the safeguard measures had to be treated as an "other factors" in the context of the non-attribution exercise that is required under Article 4.2(b).

10.348 The Panel will review, in the following measure-by-measure analysis, the USITC's causation findings for each specific safeguard measures at issue and contained in its 22 October 2001 determination published in December 2001. That determination treated imports from *all* sources together. Since the excluded imports (from Canada, Mexico, Jordan and Israel) were part of all imports for the purposes of the October causation analysis, they cannot be simultaneously treated as an "other factor" and part of "all imports" at the same time.

10.349 In the present case, there was indeed a "gap" between the imports covered by the determination (October 2001) and those covered by the safeguard measures (March 2002). In such a situation, pursuant to the principle of parallelism, the importing Member must establish explicitly that imports from sources covered by the measure satisfy the requirements of Articles 2 and 4 of the Agreement on Safeguards. The Panel's review of the demonstration of compliance with the principle is contained in the following section of our Reports dealing with parallelism. There, we will consider how the USITC treated the exclusion of imports from Canada, Mexico, Jordan and Israel in the context of the re-adjustments called for by the existence of a "gap" between the imports covered by the determination and those covered by safeguard measures.

5. Measure-by-measure analysis

10.350 We recall first our findings in paragraphs 10.306-10.308 above . There may be cases where: (i) a coincidence analysis has been undertaken and shows clear coincidence between movements in imports and movements in injury factors; (ii) as part of its overall demonstration of causal link, the competent authority has undertaken, *inter alia*, a coincidence analysis which, in and of itself, does not fully demonstrate the existence of a causal link and further analysis is undertaken; (iii) a coincidence analysis has been undertaken (with or without any other analysis) but it does not demonstrate any coincidence at all; and, finally, (iv) a coincidence analysis has not been undertaken but other analytical tools have been used with a view to proving causal link.

10.351 We also stated previously that, in all cases, in conducting its causal link analysis, the competent authority must provide a reasoned and adequate explanation of such analysis. In cases where there is an absence of coincidence (whether or not a coincidence analysis was undertaken), a compelling explanation of why causation exists is needed, since coincidence should normally be central to causation determinations. In light of our foregoing legal analysis, the Panel will review the various components of the USITC's findings on causation in the order they were dealt with by the USITC in its Report.

10.352 In cases where *the USITC undertook a coincidence analysis* and the causal link determination has been challenged by the complainants, we will examine whether the USITC provided a reasoned and adequate explanation that a causal link existed where it found coincidence between movements in imports and movements in injury factors.

10.353 As will be seen below, there is an instance where the Panel agreed with the USITC's conclusion that clear coincidence existed.[5219] In such cases, according to our analytical framework in

[5219] We refer, in particular, to the case of FFTJ.

paragraphs 10.306-10.308, there is generally no need for the competent authority to conduct a further analysis to support its coincidence analysis. Nor would it be necessary in these cases for the Panel to review any further analysis if it has been undertaken by the competent authority. However, in that particular instance, the USITC had not provided a reasoned and adequate explanation of the existence of coincidence, so the Panel proceeded to review the USITC's conditions of competition analysis.

10.354 There are also a number of instances where the Panel considered that the relevant facts did not support a finding of coincidence by the USITC at all. In these cases, the Panel proceeded to consider whether the USITC, nevertheless, provided a compelling explanation that a causal link existed. The Panel proceeded in this fashion even in cases where the complainants did not specifically challenge the compelling explanation provided by the USITC. We consider that we are entitled to adopt such an approach, provided that the complainants challenged the causal link determination.

10.355 Finally, there are a number of instances where the Panel was unsure whether the facts supported a finding of coincidence or where overall coincidence was not clear. In these cases, the Panel considered whether the USITC undertook a *further* analysis to demonstrate that a causal link existed. Where it did so, the Panel examined the further analysis performed by the USITC to assess whether, overall, a causal link existed. We consider that we are entitled to adopt such an approach, provided that the complainants challenged the causal link determination.

10.356 In cases where *the USITC did not undertake a coincidence analysis*, we assessed whether the USITC provided a reasoned and adequate explanation as to why it did not do so and whether it provided a compelling explanation as to why a causal link nevertheless existed. In so doing, we considered whether, on the basis of the analysis used by the USITC in such cases, the facts supported the conclusions drawn by the USITC. Again, the Panel proceeded in this fashion even in cases where the complainants did not specifically challenge the compelling explanation. We consider that we are entitled to adopt such an approach, provided the complainants challenged the causal link determination.

10.357 With respect to non-attribution, the Panel will consider whether relevant factors other than imports were considered by the USITC. Further, we will consider whether the USITC established explicitly, on the basis of a reasoned and adequate explanation, that injury caused by those other factors was not attributed to imports.

10.358 Finally, in the case of CCFRS, the Panel will examine the difficulties encountered in reviewing the USITC's causation analysis for this product. We note that such difficulties are associated with the fact that CCFRS is comprised of five constituent items, namely, slab, plate, hot-rolled steel, cold-rolled steel and coated steel.

10.359 As a preliminary point, we note that all data that has been relied upon by the Panel in this section was obtained directly from the USITC Report or from the various tables and annexes to which that Report refers. In addition, we note that, for each part of our discussion on the USITC's causation analysis for the various safeguard measures at issue, we have set out what we consider to be the relevant parts of the USITC Report. Finally, as a more specific point, the Panel notes that, on a number of occasions, we have reviewed pricing analyses undertaken by the USITC as part of its causal link analysis. We note that in conducting such a review, the Panel has treated unit values as a proxy for prices. We consider that this is acceptable given that this is apparently what the USITC itself did.[5220] Further, we understand that price trends mirror unit value trends. As a related point, we

[5220] See, for example, the USITC's analysis for CCFRs at pp 55 – 63 of the USITC Report, Vol I.

do not consider that any distinction exists between "unit values" on the one hand and "average unit values" on the other hand. More particularly, in the context of this case, we consider that unit values for a particular year are implicitly averages.

(a) CCFRS

10.360 The Panel notes at the outset that it has focused in this section on the arguments made by the complainants which, for us, raised the most problematic aspects of the USITC's determinations on causation – that is, those aspects that more obviously entailed violations of the Agreement on Safeguards. Since we will dispose of the complainants' claims in our review below, the Panel sees no need to deal with the other arguments.

(i) Coincidence and conditions of competition

USITC findings

10.361 The USITC findings read as follows:

> "We find that the increased imports of certain carbon flat-rolled steel are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry.[5221] In making this finding, we have considered carefully evidence in the record relating to the enumerated statutory factors, as well as evidence relating to domestic production, capacity, capacity utilization, shipments, market share, profit and loss data, plant closings, wages and other employment-related data, productivity, capital expenditures, and research and development expenditures. Accordingly, we find that increased imports are a substantial cause of serious injury to the domestic industry producing certain carbon flat-rolled steel.
>
> a. Conditions of Competition
>
> We take into account a number of factors that affect the competitiveness of domestic and imported certain carbon flat-rolled steel in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, and market conditions. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestic or imported articles.
>
> Producers generally agree that there are few or no substitutes for certain carbon flat-rolled steel.[5222] Certain carbon flat-rolled steel may represent a relatively high share of the cost of downstream certain carbon flat-rolled steel, but typically represents a relatively small share of the value of finished products.[5223]

[5221] (original footnote) Commissioner Devaney joins in the analysis of the majority, related to causation, as presented here. He further notes that when the analysis is performed over the entire industry as he has defined it, the result is the same, *i.e.* imports are a substantial cause of serious injury.

[5222] (original footnote) CR at FLAT-67 and PR at FLAT-53. There are few or no substitute products for each of the product categories included in our certain carbon flat-rolled products class. CR at FLAT-67-68 and PR at FLAT-53-FLAT-54.

[5223] (original footnote) CR at FLAT-68 and PR at FLAT-54.

Demand for certain carbon flat-rolled steel depends upon the demand for a variety of end-use applications.[5224] A significant percentage of certain carbon flat-rolled steel is consumed in the production of other downstream certain carbon flat-rolled steel.[5225] All slabs are consumed in the production of downstream steel, and steelmakers themselves are the only purchasers of slab. Slab is not a rolled product and requires additional processing before it may be incorporated into a finished product. As expected for feedstock products, the majority of domestically-produced hot-rolled and cold-rolled steel are consumed in the production of further processed steel, although a merchant market exists for both hot-rolled and cold-rolled steel.[5226] On the other hand, a majority of domestically-produced plate and coated steel, which are further processed steel, is sold on the merchant market, with relatively small shares of these steels being devoted to the production of downstream products.[5227] Construction and automotive applications are significant end-uses for plate, hot-rolled, cold-rolled, and coated steel.[5228]

By any measure, the period of investigation saw significant growth in US demand for certain carbon flat-rolled steel.[5229] Apparent domestic consumption of certain carbon flat-rolled steel, including internally consumed production, climbed steadily during the period, from 203.2 million short tons in 1996 to 219.0 million short tons in 2000, an increase of 7.8 percent.[5230] Apparent domestic consumption of certain carbon flat-rolled steel, including internally consumed production, declined 14.9 percent from interim 2000 to interim 2001.[5231] Net sales of certain carbon flat-rolled steel increased from 58.8 million short tons in 1996 to 65.2 million short tons in 2000, an increase of 10.9 percent.[5232] Net sales of certain carbon flat-rolled steel declined 11.7 percent between interim 2000 and interim 2001.[5233] A decline in demand, however, can be seen at the end of the period examined, as apparent domestic consumption of certain carbon flat-rolled steel was 14.9 percent lower in interim 2001 than in interim 2000.

Similar, though not identical, increases occurred in the consumption of each type of flat-rolled steel. Apparent domestic consumption of slabs rose from 71.4 million short tons in 1996 to 74.4 million short tons in 2000; apparent domestic

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[5224] (original footnote) CR at FLAT-66 and PR at FLAT-51.
[5225] (original footnote) CR and PR at OVERVIEW-10 and Table OVERVIEW-2.
[5226] (original footnote) CR and PR at Tables FLAT-14 and FLAT-15.
[5227] (original footnote) CR and PR at Tables FLAT-13 and FLAT-16.
[5228] (original footnote) CR and PR at Table OVERVIEW-2.
[5229] (original footnote) We are cognizant of the difficulty of measuring consumption, production, capacity, and import penetration in a product for which a significant portion of production is consumed in the production of other, downstream materials also included in the like product. Adding figures for each of the product categories would tend to overstate domestic capacity and production and understate the true impact of imports, while concentrating solely on commercial shipments would be inconsistent with available capacity data. *See* CR at FLAT-18 n.11, FLAT-34 n.13, and FLAT-60 n.14, PR at FLAT-15 n.11, FLAT-30 n.13, and FLAT-44 n.14. We have considered the arguments of both domestic producers and respondents regarding the appropriate method for determining these indicators, and we have considered a variety of different measurements in reaching our determination. In general, however, we found that the same conclusions were warranted regardless of which measurement was used.
[5230] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5231] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5232] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5233] (original footnote) INV-Y-209 at Table FLAT-ALT7.

consumption of slabs in 2000 was the highest level registered in the POI.[5234] Apparent domestic consumption of slabs declined 15.6 percent between interim 2000 and interim 2001.[5235] Apparent domestic consumption of hot-rolled steel increased from 68.5 million short tons in 1996 to 75.1 million short tons in 2000; apparent domestic consumption of hot-rolled steel in 2000 was the highest level registered in the POI.[5236] Apparent domestic consumption of hot-rolled steel declined 17.1 percent between interim 2000 and interim 2001.[5237] Apparent domestic consumption of cold-rolled steel actually peaked in 1999 at 40.6 million short tons. Nonetheless, apparent domestic consumption of cold-rolled steel in 2000, at 40.0 million short tons, was 9.8 percent higher than the 1996 level of 36.4 million short tons.[5238] Apparent domestic consumption of cold-rolled steel declined 12.3 percent between interim 2000 and interim 2001.[5239] Similarly, apparent domestic consumption of coated steel peaked in 1999 at 22.8 million tons, but apparent domestic consumption in 2000, at 22.3 million short tons, was 16.9 percent higher than the 1996 level of 19.1 million short tons.[5240] Apparent domestic consumption of coated steel was 13.0 percent lower in interim 2001 than in interim 2000.[5241] Only plate consumption exhibited a significantly different trend, with apparent consumption in 2000, at 7.1 million short tons, below the 1996 level of 7.8 million short tons.[5242] Apparent domestic consumption of plate was 3.6 percent lower in interim 2001 than in interim 2000.[5243]

With regard to supply of certain carbon flat-rolled steel, as discussed above, domestic capacity increased steadily from 1996 to 2000. Foreign production capacity also increased from 1996 to 2000.[5244] As measured by production capacity for plate and hot-rolled steel only, foreign production capacity rose from 290.9 million short tons in 1996 to 335.2 million short tons in 2000, an increase of 15.2 percent.[5245] Foreign production capacity for each of the product categories increased during the POI. Foreign production capacity for slabs rose 8.0 percent between 1996 and 2000, while production capacity for plate rose 9.5 percent.[5246] Foreign production capacity for further processed flat-rolled steel rose much more significantly between 1996 and 2000, with production capacity for hot-rolled steel rising by 16.3 percent, for cold-rolled steel by 13.9 percent, and for coated steel by 29.4 percent.[5247]

[5234] (original footnote) CR and PR at Table FLAT-C-2.
[5235] (original footnote) CR and PR at Table FLAT-C-2.
[5236] (original footnote) CR and PR at Table FLAT-C-4.
[5237] (original footnote) CR and PR at Table FLAT-C-4.
[5238] (original footnote) CR and PR at Table FLAT-C-5.
[5239] (original footnote) CR and PR at Table FLAT-C-5.
[5240] (original footnote) CR and PR at Table FLAT-C-7.
[5241] (original footnote) CR and PR at Table FLAT-C-7.
[5242] (original footnote) CR and PR at Table FLAT-C-3.
[5243] (original footnote) CR and PR at Table FLAT-C-3.
[5244] (original footnote) We note that domestic producers criticized the quality of data from our questionnaires regarding foreign capacity. Prehearing Brief of Bethlehem Steel Corporation, LTV Steel Company, Inc., National Steel Corporation and United States Steel LLC at 70 n.217 and Appendix A. We have followed our long-standing practice of relying on questionnaire data in reaching our determination, although we have considered the alternative data provided by domestic producers and other parties.
[5245] (original footnote) INV-Y-215 at Table VII-ALT1.
[5246] (original footnote) CR and PR at Tables FLAT-30 and FLAT-33.
[5247] (original footnote) CR and PR at Tables FLAT-36, FLAT-39, and FLAT-43.

These significant production capacity increases occurred during a period of disruption in world steel markets. The depreciation of several Asian currencies in late 1997 and early 1998 significantly curtailed steel consumption in those countries and created a pool of steel seeking alternative markets.[5248] The dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries.[5249]

There is a moderate to high degree of substitutability between domestically-produced and imported certain carbon flat-rolled steel.[5250] Purchasers typically ranked "quality" as the most important factor in their purchasing decision.[5251] A significant majority of purchasers found domestically-produced and imported certain carbon flat-rolled steel comparable in product quality, product range, and consistency.[5252] Only in delivery time did purchasers note a clear difference between domestically-produced and imported certain carbon flat-rolled steel.[5253] Furthermore, while more purchasers ranked quality as the most important factor in the purchasing decision, a significant number ranked price first, and most purchasers included price as one of the top three factors.[5254] A significant number of purchasers reported they "always" or "usually" purchase the lowest priced flat-rolled steel offered.[5255]

Imports of various certain carbon flat-rolled steel products are affected by a number of existing antidumping and countervailing duty orders and suspension and other trade restricting agreements.[5256] Some of these measures pre-dated the POI and did not prevent the import surge observed in this investigation. However, other measures were imposed during the POI.

b. Analysis

…

The dramatic increase in the volume of imports in 1998 – at the midpoint of the period examined – coincided with sharp declines in the domestic industry's performance and condition which occurred despite growing US demand. Total imports were 18.4 million short tons in 1996 and 19.3 million short tons in 1997, an increase that only modestly exceeded the increase in total apparent domestic

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[5248] (original footnote) CR and PR at OVERVIEW -17.

[5249] (original footnote) CR and PR at OVERVIEW -18.

[5250] (original footnote) CR at FLAT-68, PR at FLAT-54.

[5251] (original footnote) CR and PR at Table FLAT-64. Purchasers made similar responses for each of the types of certain carbon flat-rolled steel. INV-Y-212 at Flat Products, pp.20-22.

[5252] (original footnote) CR at Table FLAT-65, PR at Table FLAT-65. Purchasers made similar responses for each of the types of certain carbon flat-rolled steel. INV-Y-212 at Flat Products, pp.15-19.

[5253] (original footnote) CR at Table FLAT-65, PR at Table FLAT-65. Purchasers made similar responses for each of the types of certain carbon flat-rolled steel. INV-Y-212 at Flat Products, pp.15-19.

[5254] (original footnote) CR at Table FLAT-64, PR at Table FLAT-64. Purchasers made similar responses for each of the types of certain carbon flat-rolled steel. INV-Y-212 at Flat Products, pp.20-22.

[5255] (original footnote) CR at FLAT-71, PR at FLAT-57.

[5256] (original footnote) CR and PR at Table OVERVIEW-1; *see also Certain Cold-Rolled Steel Products from Argentina, Brazil, Japan, Russia, South Africa, and Thailand*, Inv. Nos. 701-TA-393 (Final) and 731-TA-829-830, 833-834, 836, and 838 (Final), USITC Pub. 3283 (March 2000) at 20 (comprehensive agreement with Russia); *Certain Hot-Rolled Steel from Brazil and Japan*, 701-TA-384 (Final) and 731-TA-806 and 808 (Final), USITC Pub. 3223 (Aug. 1999) at 3 n.7 (suspension agreements with Brazil and Russia).

consumption.[5257] Imports in 1998 jumped more than 30 percent over the previous year's level, to a total of 25.3 million short tons.[5258] This increase occurred in a year when total apparent domestic consumption, including all captive consumption, increased 3.2 percent and net domestic sales rose a scant 0.5 percent.[5259] After this steep increase, import volume lessened in 1999 and 2000 but remained above 1996 and 1997 levels.[5260]

This import surge occurred in most types of certain carbon flat-rolled steel. Imports of plate increased by 53.4 percent between 1997 and 1998; imports of hot-rolled steel increased by 76.4 percent; and imports of cold-rolled steel increased 13.0 percent, after already increasing 38.2 percent between 1996 and 1997.[5261] For coated steel, the surge came a year later, as imports increased by 15.8 percent between 1998 and 1999.[5262] After these primary surges, imports of hot-rolled steel increased by another 14.4 percent between 1999 and 2000, and cold-rolled steel imports by 11.2 percent between interim 2000 and interim 2001, despite a sharp decrease in demand.[5263]

The impact of the 1998 surge in imports on the domestic industry is undeniable. In 1996 and 1997, before the rapid escalation in import volume, the domestic industry performed moderately well. In 1997, with net merchant sales of 61.1 million short tons, the domestic industry had an operating income of 6.1 percent of sales and a net income of 4.5 percent.[5264] In 1998, despite an increase in net sales to 61.3 million short tons and a modest decrease in unit costs, the industry's operating margin declined to 4.0 percent. In 1999, net sales increased to 63.5 million short tons and cost of goods sold were the lowest during the POI, but the industry experienced operating losses of 0.7 percent of sales. In 2000, net sales again increased to 65.2 million short tons and the total cost of goods sold increased a modest one percent, yet operating losses fell further, to 1.4 percent of sales. The industry experienced net operating losses in both 1999 and 2000.[5265] The industry's operating margin continued to slide in the first half of 2001, to a loss of 11.5 percent of sales.

After the initial import surges in 1998, as noted, the volume of imports slackened somewhat but remained above the levels seen in 1996-1997. One way in which the impact of the massive import volume continued to reverberate beyond 1998 was through increased inventories. End-of-period inventories held by importers increased substantially in 1998, as did inventories held by service centers.[5266]

The imports that entered the US market between 1998 and 2000 were generally significantly lower-priced than in the earlier years of the POI. These price

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[5257] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5258] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5259] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5260] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5261] (original footnote) CR and PR at Tables FLAT-C-3-FLAT-C-5.
[5262] (original footnote) CR and PR at Table FLAT-C-7.
[5263] (original footnote) CR and PR at Tables FLAT-C-4 and FLAT-C-5.
[5264] (original footnote) INV-Y-212 at STL201FT.WK4.
[5265] (original footnote) INV-Y-212 at STL201FT.WK4.
[5266] (original footnote) CR and PR at Table FLAT-49; Dewey/Skadden Prehearing Brief at Exhs. 55 and 56 (we note that the data in the latter exhibits do not distinguish between domestic and imported product).

decreases were sharp and generally unrelated to overall demand in the US market, which steadily increased even as prices fell.

Import Average Unit Values[5267]

	1996	1997	1998	1999	2000	Interim 2000	Interim 2001
Certain Carbon Flat-Rolled	370	376	344	298	331	323	310
Slabs	253	251	231	177	221	222	180
Plate	400	424	466	400	398	418	409
Hot-Rolled	331	325	288	269	303	299	276
Cold-Rolled	505	485	447	402	466	463	399
Coated	608	609	596	537	558	556	519

The import surge in 1998 altered the competitive strategy of domestic producers. After the initial wave of imports in 1998, which captured substantial market share from domestic producers, domestic producers sought to protect market share against further import penetration by competing aggressively against imports on price.[5268] Repeated price cuts by the industry, while stemming somewhat the tide of imports and increasing domestic shipments, did nothing to improve the industry's condition. Moreover, the price declines occurred despite the fact that demand for certain carbon flat-rolled steel increased in both 1999 and 2000.

Average Unit Values of Commercial Shipments for Domestically Produced Steel[5269]

	1996	1997	1998	1999	2000	Interim 2000	Interim 2001
Certain Carbon Flat-Rolled	470	474	459	415	418	428	373
Slabs[5270]	248	251	250	215	214	224	205
Plate	482	473	470	402	401	400	379
Hot-Rolled	348	356	335	294	312	329	257
Cold-Rolled	492	496	472	440	445	452	409
Coated	616	621	597	557	544	553	508

A review of product specific data supports the claims of the domestic producers that imports were priced below domestically produced steel, and that imports led to the decline in prices. For example, for hot-rolled product 3A, *** led

[5267] (original footnote) CR and PR at Tables FLAT-C-1-FLAT-C-5 and FLAT-C-7. We are mindful not to place undue weight on average unit values, as these may be affected by issues of product mix.

[5268] (original footnote) Dewey/Skadden Posthearing Brief on Flat-Rolled at 27.

[5269] (original footnote) CR and PR at Tables FLAT-12 to FLAT-15, and FLAT-17.

[5270] (original footnote) Between 1996 and 2000, commercial shipments of slabs accounted for only 0.9 percent of total shipments of domestically produced slab. CR and PR at Table FLAT-12.

to ***, reductions in shipments of the domestic product, and sharp subsequent reductions in domestic prices.[5271] Similar pricing and volume patterns, with significant dips in import prices garnering historically large sales volumes, followed by sharp cuts in domestic prices, occurred for cold-rolled products 4A and 4B.[5272]

As noted above, purchasers generally consider price an important factor in the purchasing decision, and the lowest price frequently wins the sale. In addition, although purchasers rank quality as the most important purchasing factor, purchasers generally consider imported certain carbon flat-rolled steel comparable in quality to domestically produced certain carbon flat-rolled steel. In such a market, the increased volume of imports, at prices that undercut and depressed and suppressed domestic prices, had an injurious impact on the domestic industry, particularly when the domestic industry aggressively cut prices to meet the continued influx of import volumes.

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 benefitted from the decline in import prices during the POI.[5273] Despite these possible isolated individual benefits[5274], the record indicates that the domestic industry as a whole suffered serious injury from increased imports.

Respondents have argued that, since imports generally peaked in 1998, any injury resulting from increased imports has long since passed, or been repaired by the imposition of subsequent Title VII duties. Between the surge in 1998 and the last full-year of the POI, 2000, domestic producers filed Title VII complaints on carbon steel plate, hot-rolled steel, and cold-rolled steel.[5275] Additionally, outstanding orders on coated steel were reviewed and retained during this same time period.[5276] Existing orders on cold-rolled steel were revoked only late in 2000.[5277] We find it reasonable to conclude that the filing of these Title VII actions to some extent staunched the flow of imports after 1998; indeed, respondents admit that the filing of a Title VII action temporarily repressed cold-rolled imports.[5278] We note, however, that import levels remained high through 1999 and 2000, and that the corrosive effects of low-priced

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[5271] (original footnote) INV-Y-212 at Table FLAT-ALT69. *See also* Product 3B (historically high import volume in 1998, and falling domestic prices from second quarter 1998 to second quarter 1999).

[5272] (original footnote) INV-Y-212 at Tables FLAT-ALT70 and FLAT-ALT71.

[5273] (original footnote) The *** US firms that rely exclusively on imported slab–***–showed generally more positive financial results than the industry as a whole. However, the unit raw material costs of these *** firms were ***. INV-Y-212 at STL201P2.WK4 (results on plate for ***), STL201H3.WK4 (results on hot-rolled for ***), STL201C4.WK4 (results on cold-rolled for ***), and ST201R6.WK4 (results on coated steel for ***).

[5274] (original footnote) For example, slab imports represent approximately ten percent of the slab consumed in the United States. CR and PR at Table FLAT-C-2.

[5275] (original footnote) CR and PR at Table OVERVIEW-1.

[5276] (original footnote) *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, Inv. Nos. AA1921-197, 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350 (Review), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review), USITC Pub. 3364 (November 2000) at 3.

[5277] (original footnote) USITC Pub. 3364 at 3.

[5278] (original footnote) Joint Respondents' Prehearing Brief on Cold-Rolled Steel at 11-12.

imports continued to injure the domestic industry even as the absolute volume of imports slackened somewhat. Although the volume of imports was lower in 1999 and 2000, prices of those imports continued to decline.

In sum, the causal link between increased imports and the injury to the domestic industry is clear. In 1997, at an operating margin of 6.1 percent, the industry was performing modestly well and thus was well poised to increase its profitability in 1998 as demand strengthened. However, the surge in imports in 1998, at prices below domestic prices, led to a decline in the industry's financial and other indicators. The industry then cut prices to hold on to market share but the price cuts prevented the industry from restoring profitability. The industry's operating margins declined steadily from 6.1 percent in 1997 to 4.0 percent in 1998 to negative 0.7 percent in 1999 and to negative 1.4 percent in 2000. Finally, in interim 2001, although import levels declined somewhat, prices remained low. The domestic industry entered a period of falling demand already in a weakened condition and deteriorated even further to an operating margin of negative 11.5 percent."[5279]

Claims and arguments of the parties

10.362 The arguments of the parties are set out in Section VII.H.2(a)(i) and (ii) *supra.*

Analysis by the Panel

10.363 At the outset, the Panel notes that the USITC undertook a coincidence analysis for CCFRS and concluded that coincidence existed. Accordingly, we will consider whether these findings provide a reasoned and adequate explanation of how the facts support this conclusion.

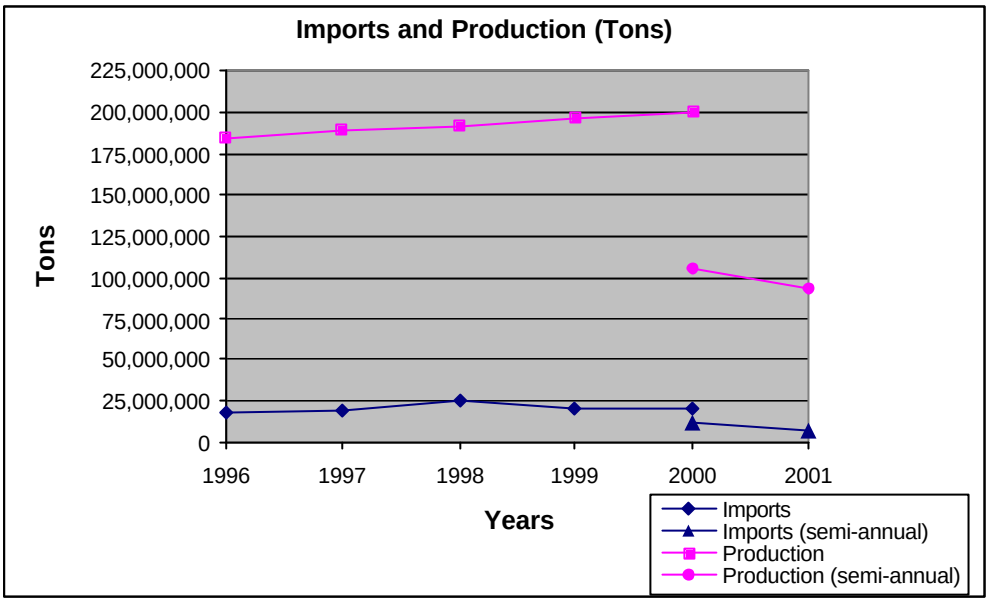
10.364 The Panel recalls that, when examined by a competent authority, coincidence must be demonstrated between the movements in imports and the movements in injury factors. The injury factors are listed in Article 4.2(a) of the Agreement on Safeguards. Specifically, they are: the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

10.365 The Panel has considered coincidence between a number of the injury factors mentioned in Article 4.2(a), including those referred to by the USITC, and imports. More specifically, we make reference to the following graphs of imports versus injury factors, which have been generated using USITC data, with a view to determining whether the USITC provided a reasoned and adequate explanation of how the facts support its determination that coincidence between increased imports and serious injury factors existed for CCFRS. Since CCFRS was treated by the USITC as a single product, aggregated data for each of the constituent items of CCFRS have been relied upon by the Panel.

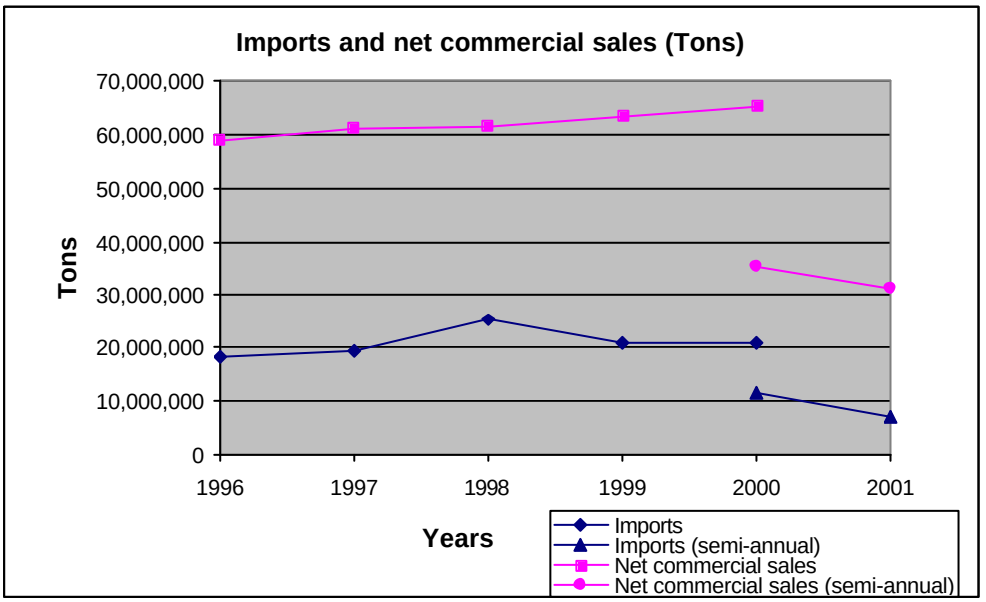
10.366 The Panel has first considered the relationship between imports and production. In the Panel's view, there does not appear to be any coincidence between import trends and production trends. In fact, production seems to have increased (albeit gradually) throughout most of the period of

[5279] USITC Report, Vol. I, pp. 55-63.

investigation, despite an increase in imports in 1998. Further, at the very end of the period of investigation, production decreased even though imports also decreased during that time.[5280]



10.367 Similarly, despite an increase in imports in 1998, net commercial sales increased (again, albeit gradually) throughout most of the period of investigation and do not appear to have been affected by the level of imports. Further, at the very end of the period of investigation, net commercial sales decreased even though imports also decreased during that time.[5281]

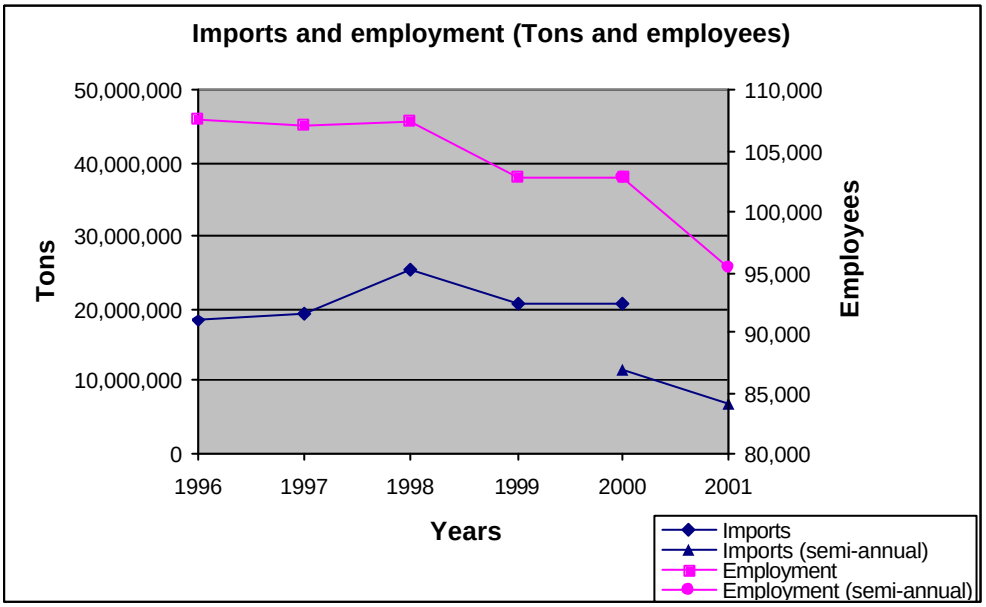


[5280] The data represented in the graph below are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7.

[5281] The data represented in the graph below are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7.

10.368 Assuming that a lag in the manifestation of effects can be expected in relation to employment, it would appear that, indeed, there is some coincidence between import levels in 1998 and employment levels in 1999. In particular, the surge in imports in 1998 appears to have been followed by a drop in employment levels in the following year. Similarly, a drop in import levels between 1998 and 1999 seems to correspond to a slight gain in employment levels in the succeding year, namely 1999 to 2000. In our view, the fact that employment decreased at the very end of the period of investigation even though imports also decreased during that time does not detract from our conclusion that, overall, coincidence appears to exist between import trends and employment trends, assuming a lag in the manifestation of the effects.

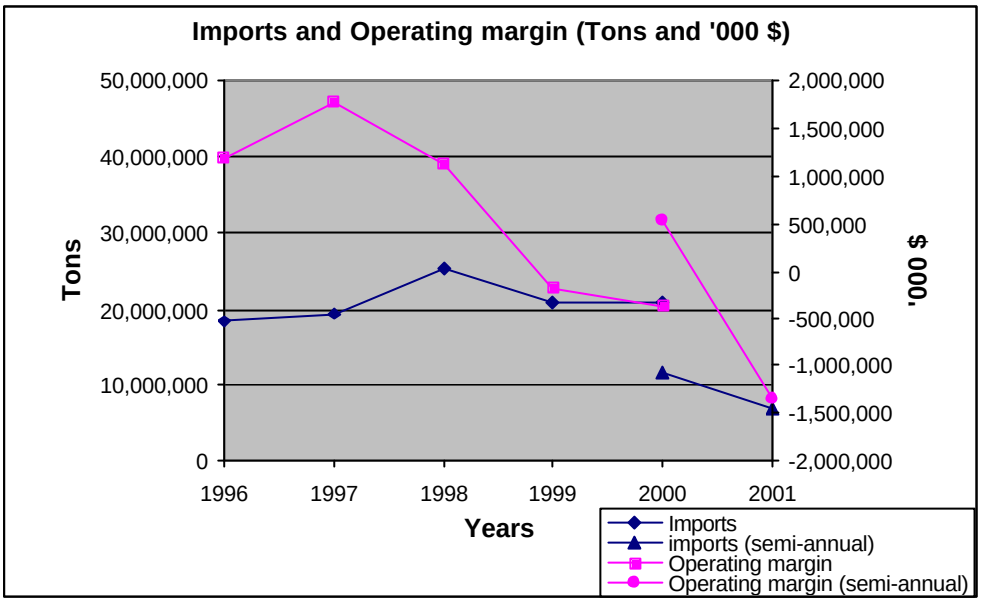
10.369 In our view, it is not inconceivable that a lag could be expected with respect to employment. We tend to agree with the argument made by the United States that companies may, in the face of adverse market conditions, defer taking employment decisions in the hope that the market situation will improve. A one-year lag between the influx of imports and declines in employment would, in the Panel's view, be reasonable. However, despite the fact that a lag is conceivable in relation to employment, we note that the USITC made no reference in its Report to this lag effect and the United States cannot rely on this argument before the Panel.[5282]



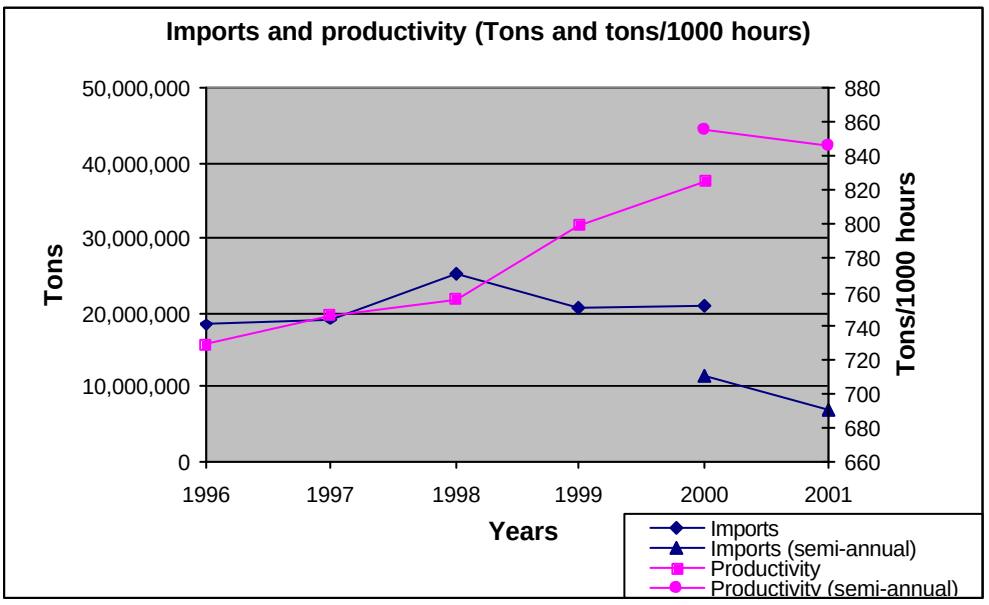
10.370 With respect to operating margin, which was apparently used by the USITC as a proxy for profit and losses and is, consequently, used for the same purpose here by the Panel, there appears to be some coincidence between a rise in imports from 1997 until 1998 and a sharp decline in the level of operating margin during the same period. However, from 1998 to 1999 when the level of imports fell and then subsequently stabilized from 1999 to 2000, the operating marging continued to decline quite dramatically. The continuing decline in operating margin in the latter part of the period of

[5282] The data represented in the graph below are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7.

investigation despite the decline in the level of imports suggests that something other than increased imports was also causing injury.[5283]



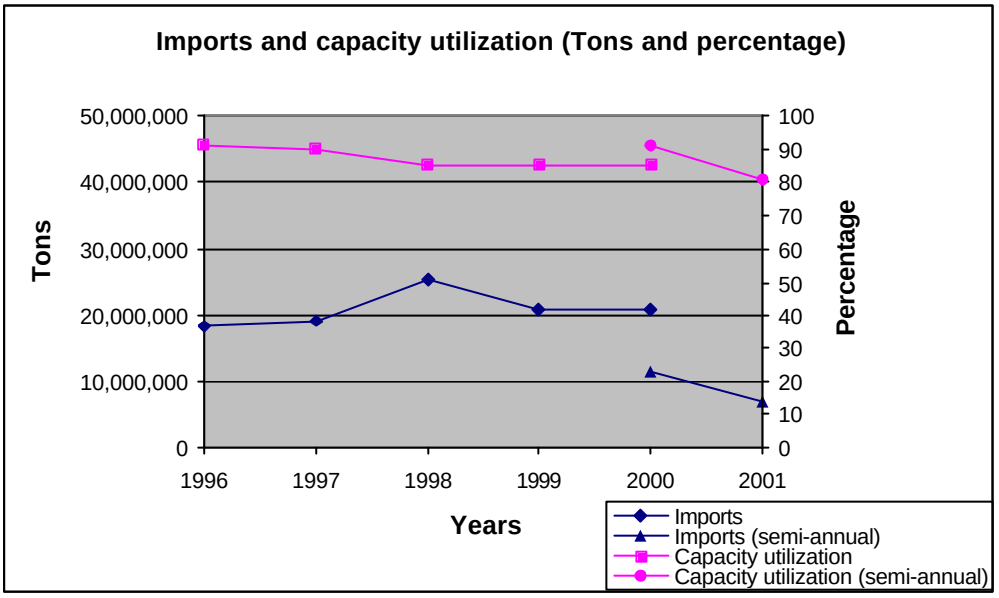
10.371 There does not appear to be coincidence between the import trends and trends in productivity. Indeed, even following the alleged surge in imports in 1998, productivity levels increased from 1998 onwards. Further, at the very end of the period of investigation, productivity decreased even though imports also decreased during that time.[5284]



[5283] The data represented in the graph below are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7.

[5284] The data represented in the graph below are contained in the USITC Report, in particular inINV-Y-209 at Table FLAT-ALT 7.

10.372 In the Panel's view, there appears to be an absence of coincidence between trends in imports and capacity utilization trends. In particular, capacity utilization appears to be fairly stable throughout the period of investigation, even following the increase in imports in 1998. Further, at the very end of the period of investigation, capacity utilization decreased even though imports also decreased during that time.[5285]



10.373 With respect to importers' inventories, the Panel notes that the USITC stated in its Report that: "One way in which the impact of the massive import volume continued to reverberate beyond 1998 was through increased inventories." Reference is made by the USITC in its report to Table-FLAT 49, which does, as the USITC finds, indicate that importers' inventories climbed significantly during the period of investigation. We agree that a build-up in importers' inventories may provide such importers with the ability to flood the domestic market. However, unless there is evidence of a subsequent increased volume of sales of imported products, we do not consider that a build-up of importers' inventories is necessarily relevant. While there was a peak in imports in 1998, this was followed by a return in the level of imports to that which existed towards the beginning of the period of investigation. Therefore, we do not consider that the build-up in importers' inventories is necessarily indicative of anything in this case, particularly since the USITC did not provide any explanation of the relationship between the building up of importers' inventories and the serious injury suffered by the producers of domestic CCFRS.

10.374 As stated by the Panel above, it is the *overall* coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation that must be considered. The Panel has assessed whether the USITC provided a reasoned and adequate explanation of how the facts support the determination that coincidence existed for CCFRS. In so doing, we have found that there was no coincidence between, on the one hand, imports trends and the situation of the domestic industry of CCFRS, as reflected in data for production, net commercial sales, productivity and capacity utilization of the domestic CCFRS. We have also found that there was a lack of coincidence between imports trends and declines in domestic operating margin, particularly

[5285] The data represented in the graph below are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7.

towards the end of the period of investigation. We did discern coincidence, albeit lagged, between increased imports, on the one hand, and employment, on the other hand. However, we note that the USITC made no reference in its Report to a lagged effect between increased imports and employment and the United States cannot now rely on this argument before the Panel. Finally, we did not consider that the build-up of importers' inventories during the course of the period of investigation was relevant given that there was no evidence to indicate that such a build-up subsequently entered into the market through sale (except for in 1998).

10.375 Having taken into consideration all of the foregoing, in the Panel's view, overall, coincidence did not exist between import trends for CCFRS and the serious injury suffered by the domestic industry. The Panel is particularly compelled by the fact that the indicators that would ordinarily be assumed to react shortly after an increase in imports did not display coincidence with the increased imports – namely, production, net commercial sales, productivity, capacity utilization and, most importantly, operating margin. The Panel notes in this regard that the USITC relied primarily on trends in net commercial sales and operating margin in its determination that coincidence existed, two factors for which we believe the facts do not support a conclusion that coincidence existed.

10.376 Given the lack of coincidence between imports trends and the injury factors, it was for the USITC to provide a compelling explanation as to why a causal link was considered, nevertheless, to exist. We proceed now to the USITC's analysis of the conditions of competition for CCFRS.

10.377 At the outset, the Panel would like to make some observations about the pricing data upon which the USITC relied in making its analysis of the conditions of competition in the CCFRS market for the purposes of determining whether or not a causal link existed between the increased imports and the serious injury. First, as mentioned above, the premise for the USITC's investigation regarding CCFRS is that CCFRS is a single product. Reference is made in the USITC's price analysis to average unit values ($/ton) for imported and domestically produced CCFRS. The Panel notes that the USITC itself admits that there may be difficulties associated with aggregated data upon which it relied, presumably including average unit values for CCFRS as a single product. In particular, the USITC stated in its Report that:

> "Throughout our analysis, we generally rely on combined data for five types of certain carbon flat-rolled steel. However, we also recognize that some combined data – for production and capacity for example – may involve double-counting, and we therefore cite data for the separate types of certain carbon flat-rolled steel where appropriate. Separate data also show trends similar to those for the industry as a whole in most cases."[5286]

In light of the foregoing, the Panel considers that it was incumbent upon the USITC to explain, where appropriate, why aggregate data could not be relied upon and justify the use of data for the items constituting CCFRS.

10.378 Further, as a related point, on the basis of the Panel's comments in *Argentina – Footwear (EC)*, the Panel notes that the use of a very broad product definition in this case that covered a number of separately identifiable items, means that "the statistics for the industry and the imports as a whole will only show averages, and therefore will not be able to provide sufficiently specific information on the locus of competition in the market."[5287] Given the similarities in terms of product breadth between the products at issue in *Argentina – Footwear (EC)* and CCFRS, we consider that serious doubt would

[5286] USITC Report Vol I, p. 51, note 193.
[5287] Panel Report, *Argentina – Footwear (EC)*, para. 8. 261, footnote 557.

be cast on the validity of the price analysis for CCFRS on the basis of the foregoing. More particularly, in cases where a causal link determination is made using a conditions of competition analysis, the product upon which the safeguard measure was imposed, namely, CCFRS, should be amenable to a proper analysis of the conditions prevailing in the market. We do not consider that the grouping of the various products that constituted CCFRS renders it amenable to such an analysis because it becomes difficult, if not impossible, for the competent authority to identify the proper locus of competition while undertaking a conditions of competition analysis for the purposes of establishing a causal link for CCFRS.

10.379 In any event, and this leads us to our second point, we note that, in concluding that there was import underselling for CCFRS as a single product, the USITC appears to have primarily relied upon data for constituent items of CCFRS rather than for CCFRS as a whole. This much is evident from the following statement made by the USITC: "A review of product specific data supports the claims of the domestic producers that imports were priced below domestically produced steel, and that imports led to the decline in prices". Putting aside the difficulties we have with the USITC's reliance on such data that have already been mentioned, a comparison of the imported and domestic prices for the constituent items of the CCFRS product indicates that while some of the domestically produced constituent items were undersold by the import counterparts at particular points during the period of investigation, this was not necessarily the case for the entire period of investigation. Nor was it the case for all the constituent items that made up CCFRS. Indeed, the USITC was, in our view, conveniently selective in the data to which it referred in its pricing analysis. In particular, it only referred to prices for hot-rolled products and cold-rolled products:

> "For example, for hot-rolled product 3A, *** led to ***, reductions in shipments of the domestic product, and sharp subsequent reductions in domestic prices.[5288] Similar pricing and volume patterns, with significant dips in import prices garnering historically large sales volumes, followed by sharp cuts in domestic prices, occurred for cold-rolled products 4A and 4B.[5289]"

Further, it provided no explanation as to why pricing data for the other three items that constituted CCFRS were not specifically considered and why the pricing data that it did refer to was respresentative of CCFRS.

10.380 For the reasons expressed above, we consider that whether the USITC relied upon average unit values for CCFRS as a single product or values for constituent items making up CCFRS, the USITC's analysis could certainly not justify the conclusion that:

> "In such a market, the increased volume of imports, at prices that undercut and depressed and suppressed domestic prices, had an injurious impact on the domestic industry, particularly when the domestic industry aggressively cut prices to meet the continued influx of import volumes.
>
> …
>
> However, the surge in imports in 1998, at prices below domestic prices, led to a decline in the industry's financial and other indicators."

[5288] (original footnote) INV-Y-212 at Table FLAT-ALT69. *See also* Product 3B (historically high import volume in 1998, and falling domestic prices from second quarter 1998 to second quarter 1999).

[5289] (original footnote) INV-Y-212 at Tables FLAT-ALT70 and FLAT-ALT71.

10.381 In conclusion, we are of the view that in conducting a conditions of competition analysis for CCFRS, the USITC did not provide a compelling explanation that demonstrates the existence of a causal link between increased imports and serious injury suffered by domestic producers of CCFRS. In particular, it is our view that the flaws in the data referred to by the USITC coupled with selective reliance upon data undermines the validity of the USITC's analysis.

(ii) Non-attribution

USITC findings

10.382 The USITC's findings read as follows:

> "Respondents have suggested several alternate sources of injury to the domestic industry, including declining domestic demand, intra-industry competition, domestic capacity increases, buyer consolidation, excess leverage of domestic producers, and legacy costs. We consider each of these in turn.
>
> Respondents argue that the domestic industry has been injured by declining US demand. But all evidence suggests that the decline occurred very late in the POI, as late as the fourth quarter of 2000. Demand for certain carbon flat-rolled steel was lower in the first six months of 2001 than in the first six months of 2000.[5290] Apparent domestic demand in 2000 was higher than in 1996 for slabs, hot-rolled, cold-rolled, and coated steel, and apparent domestic demand for all certain carbon flat-rolled steel was higher in 2000 than in 1999.[5291] The domestic industry showed the signs of injury described above well before the latter portion of 2000, when demand began to drop off. The domestic industry first saw its operating income decline in 1998, at a time when demand was increasing and would continue to increase for another two years.[5292] The period of increasing demand was also when imports surged. We thus find that the domestic industry was already injured by increased imports when demand began to decline, and declining demand, while not the cause of the injury found here, contributed to the industry's continued deterioration at the end of the period. Indeed, the losses experienced by the industry in 1999 and 2000 as a result of imports left the industry in a much weakened position to face the slowdown in demand.
>
> Respondents argue that the domestic industry has been injured by increases in domestic capacity well in excess of the increase in domestic demand. As noted above, domestic capacity for certain carbon flat-rolled steel in total and each certain carbon flat-rolled steel category increased between 1996 and 2000. These capacity increases occurred at a time when domestic demand rose consistently. Thus, increases in domestic capacity in general were justified in light of market conditions.
>
> It is true, as alleged by respondents, that capacity increases did exceed the increases in domestic consumption. From 1996 to 2000, apparent consumption of certain carbon flat-rolled steel increased by 7.8 percent for both internal transfers and commercial shipments, and increased by 10.9 percent for commercial shipments

[5290] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5291] (original footnote) INV-Y-209 at Table FLAT-ALT7 and CR and PR at Tables FLAT-C-2, FLAT-C4-FLAT-C-5, and FLAT-C-7.
[5292] (original footnote) INV-Y-209 at Table FLAT-ALT7.

alone.[5293] By contrast, domestic capacity increased by the following amounts from 1996 to 2000: 15.9 percent, for certain carbon flat-rolled steel; 12.2 percent for initial-stage steel-making capacity (slabs); 16.9 percent for combined hot-rolled steel and plate. Because domestic production did not increase by an amount as great as the increase in capacity but did increase commensurate with increased consumption, the increase in capacity appears to explain, in significant part, the decline in the rate of domestic capacity utilization that occurred over the period examined.

Respondents have argued that the presence of this new capacity, combined with the failure of the industry to retire older, less efficient capacity, put tremendous pressure on the domestic industry to cut costs in order to generate sales to fill the new capacity. It is true that there is a significant incentive to maximize the use of steelmaking assets, which can affect producers' pricing behavior. As we noted above, however, product-specific data, as well as AUV data, indicate that imports, rather than domestically produced steel, led prices downward during the POI. Indeed, capacity of foreign producers, already substantial exporters, increased steadily over the POI.[5294] Additionally, imports supplied a higher share of apparent domestic consumption in 2000 than in 1996. If increased domestic capacity were in fact the source of injury to the domestic industry, we would have expected to see the domestic industry lead prices downward, and wrest market share from imports. Therefore, we find that increased production capacity, while likely playing a role in the price declines that helped cause injury, was not an important cause of serious injury to the domestic industry equal to or greater than the injury caused by increased imports.

Respondents have also claimed that poor management decisions, such as capital investment decisions that increased companies' debt load, are responsible for bankruptcies and poor financial performance by the domestic industry.[5295] We do not find these arguments persuasive. We noted above that the financial position of the industry weakened after imports first surged in 1998. The most serious injury to the domestic industry occurred in years of record overall demand. High levels of low-priced imports prevented the domestic industry from achieving profitability despite increased demand and increased shipments by the domestic industry. We find that the poor financial position of the domestic industry, including the high degree of debt leverage, is a result of the injury from increased imports suffered by the domestic industry, including poor equity performance, rather than a cause of that injury.[5296] Moreover, increased debt load and other allegedly poor management decisions cannot explain the price declines experienced by this industry.[5297]

Respondents argue that legacy costs, in the form of pension and non-pension benefits, have increased costs substantially, and those increased costs are more responsible for

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[5293] (original footnote) INV-Y-209 at Table FLAT-ALT7, CR and PR at Tables FLAT-12 to FLAT-15, FLAT-17, FLAT-C-2 to FLAT-C-5 and FLAT-C-7.

[5294] (original footnote) INV-Y-215 at Table VII-ALT1.

[5295] (original footnote) Joint Respondents' Prehearing Framework Brief at 63-83.

[5296] (original footnote) Injury Tr. at 988-89 (Dr. Kothari).

[5297] (original footnote) We have examined respondents' allegations of poor strategies followed by individual domestic companies. In an industry as large and diverse as the industry producing certain carbon flat-rolled steel, it is always possible to question the business strategies of individual firms. However, such examples, even if true, could not explain the substantial decline in the performance of the domestic industry as a whole. We do not find such a pattern of poor decision-making.

the wave of bankruptcy filings than are increased imports.[5298] The funding of legacy costs is a vexing problem for the domestic industry, and evidence on the record indicates that legacy costs have prevented needed consolidation within the domestic industry from taking place. However, the burden of legacy costs varies tremendously among domestic producers.[5299] The issue of legacy costs is not a new one to this industry. The difficulties in meeting these obligations were recognized before the POI, and the domestic industry was able to earn a reasonable rate of return in 1996 and 1997 despite these costs. Respondents have offered no reason why the industry's longstanding problem would cause no injury in 1996 or 1997 but then begin to depress prices and strangle revenue in 1998-2000. Legacy costs may have left certain members of the domestic industry less able to compete with low-priced imports, but are not responsible for the low prices that have injured the industry. We therefore find that legacy costs are not a source of injury to the domestic industry equal to or greater than increased imports.

Respondents argue that intra-industry competition, spurred by the increased presence of efficient minimills, has caused injury to the domestic industry. Minimills did typically enjoy cost advantages over integrated producers, based in part on differing product mixes and raw material costs. However, these cost advantages existed throughout the POI, and integrated producers as well as minimills enjoyed declining costs throughout the POI.[5300] The addition of a greater volume of lower-cost capacity would be expected to have an effect on prices, and we find that it did. However, as noted above, imports, rather than minimills, typically led prices downward. Hot-rolled steel is the primary commercial product for minimills. Prices for hot-rolled steel produced by minimills typically *** prices of hot-rolled steel produced by integrated producers ***.[5301] In 1998 and again in 2000, imports *** hot-rolled steel produced by both integrated producers and minimills by ***, resulting in lowered sales for domestically produced hot-rolled steel and subsequent price cuts by both integrated producers and minimills.[5302] Thus, while in general, minimills may have been in a somewhat better position to withstand low-priced import competition than other domestic producers, we find that minimills were not primarily responsible for the declines in domestic prices or an important cause of serious injury to the domestic industry, which is equal to or greater than the injury caused by increased imports.

Respondents have also argued that buyer consolidation, especially among automobile manufacturers, reduced the bargaining power and the profit margins of domestic producers. The record does contain evidence that automobile manufacturers in particular have either consolidated or attempted to consolidate their buying operations. Automotive manufacturers are important purchasers of certain carbon flat-rolled steel.[5303] There is some consolidation in other steel-purchasing sectors as

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[5298] (original footnote) Joint Respondents' Posthearing Brief on Flat-Rolled Steel, Vol. 2 at Exh. B, Answers to Vice Chairman Okun's Questions at 17.

[5299] (original footnote) CR and PR at OVERVIEW-31-35. Producers Birmingham, CSI, Commercial Metals, Nucor, and SDI have defined contribution plans, while other steel producers provide defined benefit plans. CR and PR at OVERVIEW-32 nn.37 and 38.

[5300] (original footnote) INV-Y-215 at STL20P2I.WK4, STL20P2M.WK4, STL20H3I.WK4, STL20H3M.WK4, STL20C4I.WK4, STL40C4M.WK4, STL20R6I.WK4, and STL20R6M.WK4.

[5301] (original footnote) INV-Y-215 at Pricing Tables for products 3A and 3B.

[5302] (original footnote) INV-Y-215 at Pricing Tables for products 3A and 3B.

[5303] (original footnote) CR and PR at Table OVERVIEW-2.

well.[5304] A smaller number of purchasers would tend to give the purchasers greater bargaining power which would be expected to impact price. However, purchaser consolidation has been an ongoing process that did not suddenly occur beginning in 1998. We do not find that purchaser consolidation can explain the substantial decline in domestic prices or that consolidation is an important cause of serious injury to the domestic industry, which is equal to or greater than the injury caused by increased imports.

In view of the above, we find that increased imports are a substantial cause, and a cause no less important than any other cause, of serious injury to the domestic certain carbon flat-rolled steel industry. Our finding is based on the increase in imports and subsequent increase in the share of the domestic market held by imports, the lower prices of the imports, and the corresponding declines in domestic market share, prices, and capacity utilization, negative profitability, evidence of unemployment, and the decline in capital expenditures. Accordingly, we make an affirmative determination."[5305]

Factors considered by the USITC

Declining domestic demand

Claims and arguments of the parties

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

Analysis by the Panel

10.384 The Panel notes the USITC statement that: "We thus find that the domestic industry was already injured by increased imports when demand began to decline, and declining demand, while not the cause of the injury found here, contributed to the industry's continued deterioration at the end of the period." We take the statement that declining demand "contributed to the industry's continued deterioration at the end of the period" to amount to an acknowledgement by the USITC that declining demand did, in fact, play a role in causing the injury suffered by the industry, albeit at the end of the period of investigation.

10.385 We note that the USITC discussed demand trends during the period of investigation. That discussion confirms the USITC's statement that demand declined towards the end of the period of investigation. In particular, in the section of the report dealing with conditions of competition for CCFRS, the USITC stated that:

"By any measure, the period of investigation saw significant growth in US demand for certain carbon flat-rolled steel.[5306] Apparent domestic consumption of certain

[5304] (original footnote) CR and PR at OVERVIEW -53-54.
[5305] USITC Report, Vol. I, pp. 63-65.
[5306] We are cognizant of the difficulty of measuring consumption, production, capacity, and import penetration in a product for which a significant portion of production is consumed in the production of other, downstream materials also included in the like product. Adding figures for each of the product categories would tend to overstate domestic capacity and production and understate the true impact of imports, while concentrating solely on commercial shipments would be inconsistent with available capacity data. *See* CR at FLAT-18 n.11, FLAT-34 n.13, and FLAT-60 n.14, PR at FLAT-15 n.11, FLAT-30 n.13, and FLAT-44 n.14. We have considered the arguments of both domestic producers and respondents regarding the appropriate

carbon flat-rolled steel, including internally consumed production, climbed steadily during the period, from 203.2 million short tons in 1996 to 219.0 million short tons in 2000, an increase of 7.8 percent.[5307] Apparent domestic consumption of certain carbon flat-rolled steel, including internally consumed production, declined 14.9 percent from interim 2000 to interim 2001.[5308] Net sales of certain carbon flat-rolled steel increased from 58.8 million short tons in 1996 to 65.2 million short tons in 2000, an increase of 10.9 percent.[5309] Net sales of certain carbon flat-rolled steel declined 11.7 percent between interim 2000 and interim 2001.[5310] A decline in demand, however, can be seen at the end of the period examined, as apparent domestic consumption of certain carbon flat-rolled steel was 14.9 percent lower in interim 2001 than in interim 2000.

Similar, though not identical, increases occurred in the consumption of each type of flat-rolled steel. Apparent domestic consumption of slabs rose from 71.4 million short tons in 1996 to 74.4 million short tons in 2000; apparent domestic consumption of slabs in 2000 was the highest level registered in the POI.[5311] Apparent domestic consumption of slabs declined 15.6 percent between interim 2000 and interim 2001.[5312] Apparent domestic consumption of hot-rolled steel increased from 68.5 million short tons in 1996 to 75.1 million short tons in 2000; apparent domestic consumption of hot-rolled steel in 2000 was the highest level registered in the POI.[5313] Apparent domestic consumption of hot-rolled steel declined 17.1 percent between interim 2000 and interim 2001.[5314] Apparent domestic consumption of cold-rolled steel actually peaked in 1999 at 40.6 million short tons. Nonetheless, apparent domestic consumption of cold-rolled steel in 2000, at 40.0 million short tons, was 9.8 percent higher than the 1996 level of 36.4 million short tons.[5315] Apparent domestic consumption of cold-rolled steel declined 12.3 percent between interim 2000 and interim 2001.[5316] Similarly, apparent domestic consumption of coated steel peaked in 1999 at 22.8 million tons, but apparent domestic consumption in 2000, at 22.3 million short tons, was 16.9 percent higher than the 1996 level of 19.1 million short tons.[5317] Apparent domestic consumption of coated steel was 13.0 percent lower in interim 2001 than in interim 2000.[5318] Only plate consumption exhibited a significantly different trend, with apparent consumption in 2000, at 7.1 million short tons, below

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method for determining these indicators, and we have considered a variety of different measurements in reaching our determination. In general, however, we found that the same conclusions were warranted regardless of which measurement was used.

[5307] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5308] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5309] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5310] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5311] (original footnote) CR and PR at Table FLAT-C-2.
[5312] (original footnote) CR and PR at Table FLAT-C-2.
[5313] (original footnote) CR and PR at Table FLAT-C-4.
[5314] (original footnote) CR and PR at Table FLAT-C-4.
[5315] (original footnote) CR and PR at Table FLAT-C-5.
[5316] (original footnote) CR and PR at Table FLAT-C-5.
[5317] (original footnote) CR and PR at Table FLAT-C-7.
[5318] (original footnote) CR and PR at Table FLAT-C-7.

> the 1996 level of 7.8 million short tons.[5319] Apparent domestic consumption of plate was 3.6 percent lower in interim 2001 than in interim 2000.[5320],[5321]

10.386 In addition, in its non-attribution analysis, the USITC stated that:

> "But all evidence suggests that the decline occurred very late in the POI, as late as the fourth quarter of 2000. Demand for certain carbon flat-rolled steel was lower in the first six months of 2001 than in the first six months of 2000.[5322] Apparent domestic demand in 2000 was higher than in 1996 for slabs, hot-rolled, cold-rolled, and coated steel, and apparent domestic demand for all certain carbon flat-rolled steel was higher in 2000 than in 1999.[5323] The domestic industry showed the signs of injury described above well before the latter portion of 2000, when demand began to drop off. The domestic industry first saw its operating income decline in 1998, at a time when demand was increasing and would continue to increase for another two years.[5324],[5325]

10.387 We note that the USITC dismissed this factor in its non-attribution analysis because: "The domestic industry showed the signs of injury … well before the latter portion of 2000, when demand began to drop off". The Panel notes in this regard that the fact that the contribution of a factor to the injury suffered may have only occurred late in the period of investigation or for only a relatively short period within that time-span does not relieve a competent authority of its obligation to ensure that the injury caused by that factor is not attributed to the increased imports. It may be the case that such a factor may inflict considerable damage on the industry, even though its effects appeared late in the period and/or for a relatively short duration. However, the USITC did not consider this possibility in its analysis.

10.388 Accordingly, in our view, the USITC unjustifiably dismissed this factor in its non-attribution analysis despite the fact that it explicitly acknowledged that declines in demand played a role in the injury suffered by the industry, albeit at the end of the period of investigation. The USITC dismissed this factor on the basis that the industry was already injured when demand began to decline. Despite the apparent role played by this factor in causing injury to the industry, we find nothing in the USITC Report to indicate whether and how the injury caused by this factor was not attributed to increased imports.

10.389 In failing to adequately analyse this factor, the Panel finds that the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by this factor, together with other factors, was not attributed to increased imports.

Domestic capacity increases

Claims and arguments of the parties

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

[5319] (original footnote) CR and PR at Table FLAT-C-3.
[5320] (original footnote) CR and PR at Table FLAT-C-3.
[5321] USITC Report, Vol. I, pp. 56-57.
[5322] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5323] (original footnote) INV-Y-209 at Table FLAT-ALT7 and CR and PR at Tables FLAT-C-2, FLAT-C4-FLAT-C-5, and FLAT-C-7.
[5324] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5325] USITC Report, Vol. I, p. 63.

Analysis by the Panel

10.391 The Panel considers that the USITC explicitly acknowledged that domestic capacity increases were causing injury to the industry. In particular, the USITC stated:

> "Because domestic production did not increase by an amount as great as the increase in capacity but did increase commensurate with increased consumption, the increase in capacity appears to explain, in significant part, the decline in the rate of domestic capacity utilization that occurred over the period examined.
>
> …
>
> Therefore, we find that increased production capacity, while likely playing a role in the price declines that helped cause injury, was not an important cause of serious injury to the domestic industry equal to or greater than the injury caused by increased imports."[5326]

10.392 We note that, in the first cited paragraph, the USITC links capacity increases to declines in domestic capacity utilization, the latter being an injury factor referred to in Article 4.2(a) of the Agreement on Safeguards. In addition, the second cited paragraph states explicitly that domestic capacity increases likely played a role in causing injury to the industry.

10.393 We note that the USITC identified increases in the level of domestic capacity during the period of investigation. In particular, in the section of the USITC's Report dealing with injury, the USITC stated that:

> "We recognize that the industry's production and capacity both increased from 1996 to 2000 … The sum of all productive capacity for slab, plate, hot-rolled, cold-rolled, and coated steel increased by 15.9 percent between 1996 and 2000.[5327] The sum of all productive capacity for slab, plate, hot-rolled, cold-rolled, and coated steel fell by 0.8 percent between interim 2000 and interim 2001.[5328],[5329]

10.394 Nevertheless, the USITC dismissed domestic capacity increases in its non-attribution analysis on the basis of the assertion that: "If increased domestic capacity were in fact the source of injury to the domestic industry, we would have expected to see the domestic industry lead prices downward,

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[5326] USITC Report, Vol. I, pp. 63-67.

[5327] (original footnote) INV-Y-209 at Table FLAT-ALT7.

[5328] (original footnote) INV-Y-209 at Table FLAT-ALT7. Slab-making capacity increased by 12.2 percent between 1996 and 2000, rising from 66.9 million short tons in 1996 to 75.1 million short tons in 2000. CR and PR at Table FLAT-C-2. Slab-making capacity declined by 2.4 percent between interim 2000 and interim 2001. CR and PR at Table FLAT-C-2. Combined domestic production capacity for hot-rolled and plate increased by 16.9 percent, rising from 76.6 million short tons in 1996 to 89.5 million short tons in 2000. CR and PR at Tables FLAT-C-3 and FLAT-C-4. Some domestic producers suggested that aggregating hot-rolled and plate capacity is an appropriate measure of domestic capacity. Dewey/Skadden Posthearing Brief at 18. Combined domestic production capacity for hot-rolled and plate increased by 1.6 percent between interim 2000 and interim 2001, rising from 44.5 million short tons to 45.2 million short tons. CR and PR at Tables FLAT-C-3 and FLAT-C-4. Capacity for cold-rolled steel production rose by 14.4 percent between 1996 and 2000, but declined 4.3 percent between interim 2000 and interim 2001. CR and PR at Table FLAT-C-5. Domestic capacity for coated steel production rose by 28.1 percent between 1996 and 2000 and rose by 1.8 percent between interim 2000 and interim 2001. CR and PR at Table FLAT-C-7.

[5329] USITC Report, Vol. I, p. 52.

and wrest market share from imports".[5330] In the Panel's opinion, this analysis is simplistic and fails to address the complexities associated with this factor, which the USITC itself acknowledged. In particular, it stated that: "Because domestic production did not increase by an amount as great as the increase in capacity but did increase commensurate with increased consumption, the increase in capacity appears to explain, in significant part, the decline in the rate of domestic capacity utilization that occurred over the period examined".[5331]

10.395 This statement indicates to us that, in its consideration of domestic capacity increases, the USITC recognized the interrelatedness between capacity on the one hand and domestic production and capacity utilization on the other hand, the latter two being injury factors referred to in Article 4.2(a). In addition, the USITC referred on a number of occasions in its injury analysis for CCFRS to "a significant idling of the domestic industry's productive facilities." It would not be implausible to conclude that such idling may have been caused by increased capacity, which the USITC also acknowledged exceeded increases in domestic consumption. Despite these clear inter-linkages between domestic capacity increases and other factors or effects that were observed in the market, the USITC dismissed it in its non-attribution analysis.

10.396 In failing to adequately analyse this factor, the Panel considers that the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by this factor, together with other factors, was not attributed to increased imports.

Intra-industry competition

Claims and arguments of the parties

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

Analysis by the Panel

10.398 The Panel considers that the USITC explicitly acknowledged that intra-industry competition played a role in causing the injury suffered by the domestic industry. This acknowledgement is contained in the following statement: "[W]e find that minimills were not primarily responsible for the declines in domestic prices or an important cause of serious injury to the domestic industry, which is equal to or greater than the injury caused by increased imports".[5332] We read this statement to mean that while the USITC did not consider that intra-industry competition was "primarily" responsible for the serious injury suffered by the industry, it, nevertheless, considered that this factor played a role in causing such injury. The USITC also explicitly acknowledged that low-cost capacity created by domestic minimill producers had an effect (implicitly, a negative one) on prices. In particular, the USITC stated that: "The addition of a greater volume of lower-cost capacity would be expected to have an effect on prices, and we find that it did".[5333]

10.399 In our view, the USITC did not adequately assess the role played by this factor. It is true that it referred to cost advantages enjoyed by minimills over integrated producers. It is also true that the USITC engaged in a price comparison for products produced both by minimills and integrated producers. However, in our view, this analysis does not provide sufficient insights into the effects that intra-industry competition had on the market.

[5330] See para. 10.382.
[5331] See para. 10.382.
[5332] See para. 10.382.
[5333] See para. 10.382.