1 ARTICLE 2

1.1 Text of Article 2

Article 2

Conditions

1. A Member[1] may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

> (*footnote original*)[1] A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

2. Safeguard measures shall be applied to a product being imported irrespective of its source.

1.2 General

1.2.1 The two basic inquiries

1. The Appellate Body in *US – Line Pipe* considered the existence of "a natural tension between, on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against 'fair trade' beyond what is necessary to provide extraordinary and temporary relief."[1] Moreover, it found this natural tension to be "inherent" in the "two basic inquiries" that are conducted in interpreting the Agreement on Safeguards.[2] The Appellate Body emphasized that these two inquiries are separate and distinct and should not be confused by the treaty interpreter:

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

2. In *US – Steel Safeguards*, the Panel applied the two basic inquiries test under the Agreement on Safeguards as articulated by the Appellate Body in *US – Line Pipe*:

> "Throughout its examination, this Panel has kept the two enquiries distinct. The Panel is of the view that, first, it must examine whether the United States had the *right* to take the safeguard measures. Second, should the Panel consider that the United States had the right to take such safeguard measures, the Panel would then assess whether the measures were applied (as regards the type of measure, their level and duration) only to the extent necessary to remedy or prevent serious injury and allow for readjustment.
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> In examining whether the United States had a right to impose the specific safeguard measures at issue, the Panel will concern itself with the application of Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994 (the latter being relevant in particular for the assessment of whether the United States was faced with unforeseen developments) in reviewing the report of the competent authority. In relation to the second enquiry, when assessing the appropriateness of such safeguards measures, the importing Member is obliged, when challenged by a WTO Member who has made a prima facie case of inconsistency with Article 5.1 of the Agreement on Safeguards, to justify before the Panel that the safeguard measures

[1] Appellate Body Report, *US – Line Pipe*, para. 83.
[2] Appellate Body Report, *US – Line Pipe*, para. 84.
[3] Appellate Body Report, *US – Line Pipe*, para. 84.

> were imposed only to the extent necessary to prevent or remedy injury and allow for readjustment. Reversals of this burden of proof may take place."[4]

1.2.2 Parallelism

3. In *Argentina – Footwear (EC)*, the Appellate Body examined "whether … there is an implied '*parallelism* between the scope of a safeguard *investigation* and the scope of the *application* of safeguard measures.'"[5] In this connection, the Appellate Body held:

> "Taken together, the provisions of Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* demonstrate that a Member of the WTO may only apply a safeguard measure after that Member has determined that a product is being imported *into its territory* in such increased quantities and under such conditions as to cause or threaten to cause serious injury to *its* domestic industry *within its territory*. According to Articles 2.1 and 4.1(c), therefore, all of the relevant aspects of a safeguard investigation must be conducted by the Member that ultimately applies the safeguard measure, on the basis of increased imports entering its territory and causing or threatening to cause serious injury to the domestic industry within its territory.
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> While Articles 2.1 and 4.1(c) set out the conditions for imposing a safeguard measure and the requirements for the scope of a safeguard *investigation*, these provisions do not resolve the matter of the scope of *application* of a safeguard measure. In that context, Article 2.2 of the *Agreement on Safeguards* provides:
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> > Safeguard measures shall be applied to a product being imported irrespective of its source.
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> As we have noted, in this case, Argentina applied the safeguard measures at issue after conducting an investigation of products being imported into Argentine territory and the effects of those imports on Argentina's domestic industry. In applying safeguard measures on the basis of this investigation in this case, Argentina was also required under Article 2.2 to apply those measures to imports from all sources, including from other MERCOSUR member States.
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> On the basis of this reasoning, and on the facts of this case, we find that Argentina's investigation, which evaluated whether serious injury or the threat thereof was caused by imports from *all* sources, could only lead to the imposition of safeguard measures on imports from *all* sources. Therefore, we conclude that Argentina's investigation, in this case, cannot serve as a basis for excluding imports from other MERCOSUR member States from the application of the safeguard measures."[6]

4. The Appellate Body in *Argentina – Footwear (EC)* also stressed that it was not ruling on "whether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of a safeguard measure".[7]

5. In *US – Wheat Gluten*, the Appellate Body upheld the finding by the Panel that the United States had acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* when, after including imports from all sources in their investigation of increased imports of wheat gluten effects of such imports on the domestic industry, the competent authorities excluded imports from Canada from the application of the safeguard measure. The exclusion was based on a separate inquiry by the competent authority as to whether Canada accounted for a substantial share of total imports and whether imports from Canada contributed "importantly" to the serious injury caused by imports. The Appellate Body reiterated its findings from *Argentina – Footwear (EC)* on the existence of parallelism between a safeguard investigation and the application of a safeguard measure:

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[4] Panel Reports, *US – Steel Safeguards*, paras. 10.15-10.16.
[5] Appellate Body Report, *Argentina – Footwear (EC*), para. 111.
[6] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 111-113.
[7] Appellate Body Report, *Argentina – Footwear (EC)*, para. 114.

> "[A]rticle 2.1 of the *Agreement on Safeguards* … provides that a safeguard measure may only be applied when 'such increased quantities' of a '*product* [are] *being imported* into its territory … under such conditions as to cause or threaten to cause serious injury to the domestic industry'. As we have said, this provision, as elaborated in Article 4 of the *Agreement on Safeguards*, sets forth the *conditions* for imposing a safeguard measure. Article 2.2 of the *Agreement on Safeguards*, which provides that a safeguard measure 'shall be applied to a *product being imported* irrespective of its source', sets forth the rules on the *application* of a safeguard measure.
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> The same phrase – 'product … being imported' – appears in *both* these paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in both Articles 2.1 and 2.2. To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase 'product being imported' a *different* meaning in Articles 2.1 and 2.2 of the *Agreement on Safeguards*. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted. In the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2.[8]"[9]

6. Furthermore, the Appellate Body rejected the United States' argument that its safeguard measure was nevertheless justified because its authorities had conducted an additional investigation focusing specifically on imports from Canada:

> "In the present case, the United States asserts that the exclusion of imports from Canada from the scope of the safeguard measure was justified because, following its investigation based on imports from *all* sources, the USITC conducted an additional inquiry specifically focused on imports from Canada. The United States claims, in effect, that the scope of its initial investigation, *together with its subsequent and additional inquiry* into imports from Canada, did correspond with the scope of application of its safeguard measure.
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> In our view, however, although the USITC examined the importance of imports from Canada separately, it did not make any explicit determination relating to increased imports, *excluding imports from Canada*. In other words, although the safeguard measure was applied to imports from all sources, *excluding* Canada, the USITC did not establish explicitly that imports from these *same* sources, excluding Canada, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*. Thus, we find that the separate examination of imports from Canada carried out by the USITC in this case was not a sufficient basis for the safeguard measure ultimately applied by the United States."[10]

7. The Appellate Body in *US – Line Pine* reiterated its ruling in *US – Wheat Gluten*[11] and further concluded that, by demonstrating a gap between the imports covered under the investigation performed by the competent authority and imports falling within the scope of the safeguard measure, the exporting Member established a *prima facie* case of the absence of "parallelism" with respect to the safeguard measure:

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[8] *(footnote original)* The United States relies on Article 9.1 of the *Agreement on Safeguards* in support of its argument that the scope of the serious injury investigation need not correspond exactly to the scope of application of a safeguard measure. Article 9.1 is an exception to the general rules set out in the *Agreement on Safeguards* that applies only to developing country Members. We do not consider that it is of relevance to this appeal.

[9] Appellate Body Report, *US – Wheat Gluten*, paras. 95-96.

[10] Appellate Body Report, *US – Wheat Gluten*, paras. 97-98.

[11] Appellate Body Report, *US – Line Pipe*, para. 181.

> "It is clear … that, in its investigation, the USITC considered imports from *all sources*, including imports from Canada and Mexico. Nevertheless, exports from Canada and Mexico were excluded from the safeguard measure at issue. Therefore, there is a gap between imports covered under the investigation performed by the USITC and imports falling within the scope of the measure.
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> In our view, Korea has demonstrated that the USITC considered imports from all sources in its investigation. Korea has also shown that exports from Canada and Mexico were excluded from the safeguard measure at issue. And, in our view, this *is* enough to have made a *prima facie* case of the absence of parallelism in the line pipe measure. Contrary to what the Panel stated, we do not consider that it was necessary for Korea to address the information set out in the USITC Report, or in particular, in footnote 168 in order to establish a *prima facie* case of violation of parallelism. Moreover, to require Korea to rebut the information in the USITC Report, and in particular, in footnote 168, would impose an impossible burden on Korea because, as the exporting country, Korea would not have had any of the relevant data to conduct its own analysis of the imports."[12]

8. The Panel in *US – Steel Safeguards*, in a finding upheld by the Appellate Body[13], recalled that the requirement of parallelism, as developed by panels and the Appellate Body, meant that the competent authorities must explicitly establish that imports covered by the safeguard measure satisfy the conditions for its application.[14] The Panel further added:

> "This implies that the competent authorities must provide a reasoned and adequate explanation of how the facts support their determination. As the Appellate Body has also clarified, 'to be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous.'
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> The Panel believes that the requirement of parallelism also exists in the interest of the other Members. The other Members who are facing the safeguard measure should be able to assess its legality on the basis of the determination and explanations provided by the competent authorities. This function would not be fulfilled if the other Members were left with statements such as those to the effect that the exclusion of subsets of all imports would not change the conclusions and, elsewhere in the report, that certain imports are very small.
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> Finally, the Panel notes the dispute between the parties as to whether competent authorities must consider imports from sources excluded by the measure as an 'other factor' in the sense of Article 4.2(b) of the Agreement on Safeguards, when they perform the exercise of establishing explicitly that imports from sources covered by the measure satisfy the requirements set out in Article 2.1 and elaborated in Article 4.2.
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> As clarified by the Appellate Body, if the scope of the measure does not match the scope of the determination, competent authorities must 'establish *explicitly* that increased imports from non-[FTA] sources alone'[15] caused serious injury or threat of serious injury. Increased imports from sources ultimately excluded from the application of the measure must hence be *excluded* from the analysis. The increase of these imports and their effect on the domestic industry cannot be used to support a conclusion that the product in question 'is being imported in such increased quantities

[12] Appellate Body Report, *US – Line Pipe*, paras. 186-187.
[13] Appellate Body Report, *US – Steel Safeguards*, para. 450.
[14] Panel Reports, *US – Steel Safeguards*, para. 10.595.
[15] *(footnote original)* In the view of the Panel, "alone", in this context means: "to the exclusion of increased imports from other sources (i.e. sources excluded from the measure)"; it does not mean: "to the exclusion of other factors, i.e. non-increased imports factors in the sense of Article 4.2(b), second sentence". The Appellate Body has clarified that increased imports precisely need not, by themselves, cause serious injury (Appellate Body Report, *US – Wheat Gluten*, paras. 70 and 79; Appellate Body Report, *US – Lamb*, para. 170). There is no reason why this latter aspect should be any different in the context of parallelism, where the same test of Articles 2 and 4 is applied, only to a narrower base of imports. *See also* Appellate Body Report, *US – Wheat Gluten*, para 98: "establish explicitly that imports from these *same* sources, excluding Canada, satisfied the conditions for the application of a safeguard measure".

> so as to cause serious injury'. This makes it necessary – whether imports excluded from the measure are an 'other factor' or not – to account for the fact that excluded imports may have some injurious impact on the domestic industry. As said, this impact must not be used as a basis supporting the establishment of the Article 2.1 criteria."[16]

9. In *US – Steel Safeguards*, the Appellate Body indicated that the requirement of "parallelism" is found in the "parallel" language used in the first and second paragraphs of Article 2 of the *Agreement on Safeguards*:

> "The word 'parallelism' is not in the text of the *Agreement on Safeguards*; rather, the requirement that is described as 'parallelism' is found in the 'parallel' language used in the first and second paragraphs of Article 2 of the *Agreement on Safeguards*."[17]

10. In *US – Steel Safeguards*, the Appellate Body concluded that the competent authority has an obligation to establish that imports from sources *other than* the excluded members satisfy, alone, and in and of themselves, the conditions for the application of a safeguard measure:

> "[It was] incumbent on the USITC, in fulfilling the obligations of the United States under Article 2 of the *Agreement on Safeguards*, to justify this gap by establishing explicitly, in its report, that imports from sources covered by the measures—that is, imports from sources *other than* the excluded countries of Canada, Israel, Jordan, and Mexico—satisfy, *alone*, and in and of themselves, the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*. Further, and as we have already explained, to provide such a justification, the USITC was obliged by the *Agreement on Safeguards* to provide a reasoned and adequate explanation of how the facts supported its determination that imports from sources *other than* Canada, Israel, Jordan, and Mexico satisfy, *alone*, and in and of themselves, the conditions for the application of a safeguard measure."[18]

11. In *US – Steel Safeguards*, the Appellate Body clarified that imports *excluded* from the application of the safeguard measure must be considered a factor "other than increased imports" within the meaning of Article 4.2(b):

> "Since the non-attribution requirement is part of the overall requirement, the competent authorities must explain how it ensured that it did not attribute the injurious effects of *factors other than included imports*—which subsume 'excluded imports'—to the imports included in the measure.
>
> As a result, the phrase 'increased imports' in Articles 4.2(a) and 4.2(b) must, in our view, be read as referring to the same set of imports envisaged in Article 2.1, that is, *to imports included in the safeguard measure*. Consequently, imports *excluded* from the application of the safeguard measure must be considered a factor 'other than increased imports' within the meaning of Article 4.2(b). The possible injurious effects that these excluded imports may have on the domestic industry must not be attributed to imports included in the safeguard measure pursuant to Article 4.2(b). The requirement articulated by the Panel 'to account for the fact that excluded imports may have some injurious impact on the domestic industry' is, therefore, not, as the United States argues, an 'extra analytical step' that the Panel added to the analysis of imports from all sources. To the contrary, this requirement necessarily follows from the obligation in Article 4.2(b) for the competent authority to ensure that the effects of factors other than increased imports—a set of factors that subsumes *imports excluded from the safeguard measure*—are not attributed to imports included in the measure, in establishing a causal link between imports included in the measure and serious injury or threat thereof.
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> The non-attribution requirement is part of the overall requirement, incumbent upon the competent authority, to demonstrate the existence of a 'causal link' between

[16] Panel Reports, *US – Steel Safeguards*, paras. 10.594-10.597.
[17] Appellate Body Report, *US – Steel Safeguards*, para. 439.
[18] Appellate Body Report, *US – Steel Safeguards*, para. 444.

> increased imports (covered by the measure) and serious injury, as provided in Article 4.2(b).Thus, as we found in *US – Line Pipe*, 'to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports'.
>
> In order to provide such a reasoned and adequate explanation, the competent authority must explain how it ensured that it did not attribute the injurious effects of *factors other than included imports*—which subsume 'excluded imports'—to the imports included in the measure. As we explained in *US – Line Pipe* in the context of Article 3.1 and 'unforeseen developments' in this Report , if the competent authority does not provide such an explanation, a panel is not in a position to find that the competent authority ensured compliance with the clear and express requirement of non-attribution under Article 4.2(b) of the *Agreement on Safeguards*."[19]

12. The Appellate Body in *US – Steel Safeguards* determined that a series of separate and partial determinations cannot satisfy the requirement to establish explicitly that imports from sources covered by a measure, alone, satisfy the conditions for the application of a safeguard measure:

> "The requirement of the *Agreement on Safeguards* to establish explicitly that imports from sources covered by a measure, *alone*, satisfy the conditions for the application of a safeguard measure cannot be fulfilled by conducting a *series of separate and partial* determinations.
>
> For example, where a WTO Member seeks to establish explicitly that imports from *sources other than A and B* satisfy the conditions for the application of a safeguard measure, if that Member conducts a separate investigation, and makes a separate determination, on whether imports from sources *other than A* satisfy the relevant conditions, and then, subsequently, conducts *another* separate and distinct investigation, and makes a separate determination, on whether imports from sources *other than B* satisfy the relevant conditions, then these *two separate* determinations, in our view, do not demonstrate that imports from sources other than *A and B together* satisfy the requirements for the imposition of a safeguard measure. By making these two separate determinations, that Member will, logically, for each of them, be basing its determination, in part, either on imports from A or on imports from B. If this were permitted, a determination on the application of a safeguard measure could be easily subjected to mathematical manipulation. This could not have been the intent of the Members of the WTO in drafting and agreeing on the *Agreement on Safeguards*.
>
> We are, therefore, of the view that the Panel raised a valid methodological concern when it stated that 'it would … be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan.'"[20]

13. The Appellate Body in *US – Steel Safeguards* added that even if the amount of imports that would be excluded is small, it still must be adequately explained by the competent authority:

> "As we explained in *US – Wheat Gluten* and *US – Line Pipe*, a competent authority must establish, unambiguously, with a reasoned and adequate explanation, and *in a way that leaves nothing merely implied or suggested*, that imports from sources covered by the measure, *alone*, satisfy the requirements for the application of a safeguard measure. We are *not* suggesting that very low imports volumes, either from some, or from all, of the excluded sources at issue, are irrelevant for a competent authority's findings or the reasoned and adequate explanation underpinning such findings. We recognize that, where import volumes from excluded sources are very small, it is quite possible that the explanation underpinning the competent authority's conclusion need not be as extensive as in circumstances where the excluded sources

[19] Appellate Body Report, *US – Steel Safeguards*, paras. 450-452.
[20] Appellate Body Report, *US – Steel Safeguards*, paras. 466-467.

> account for a large proportion of total imports. Nevertheless, even if an explanation need not necessarily be extensive, the requisite explicit finding *must still be provided*. That finding must be contained in the authority's report, must be supported by a reasoned and adequate explanation, and—as we stated above—must address imports from all covered sources, excluding *all* of the non-covered sources. Nowhere in the *Agreement on Safeguards* is there any indication that these important principles can be disregarded in circumstances where imports from some or all sources are at low levels."[21]

14. In *Dominican Republic – Safeguard Measures*, the issue of parallelism was raised in a different context. Unlike the previous cases where exporting countries were excluded from the scope of the measure because they were FTA or customs union partners with the importing country, in *Dominican Republic – Safeguard Measures*, the exclusion was based on Article 9.1 of the Agreement on Safeguards.[22] Faced with the question whether the principle of parallelism as developed in the case law applies to the exclusion of certain Members on the basis of Article 9.1 of the Agreement on Safeguards, the Panel noted:

> "In the case before us, Article 9.1 of the Agreement on Safeguards involves explicit departure from the obligation in Article 2.2 on the application of safeguard measures; this provision does not apply to or affect other provisions such as Articles 2.1, 3.1 or 4.2 of the Agreement concerning the analysis and the investigation to be conducted by the competent authorities."[23]

15. On this basis, the Panel in *Dominican Republic – Safeguard Measures* concluded:

> "Accordingly, in cases in which the exclusion is based on Article 9.1 of the Agreement, the Panel does not consider it necessary to undertake a new analysis of the increase in imports, the injury and causation. In this case, it would be enough for the competent authorities to show in their report that the excluded Members actually satisfied the requirements laid down in Article 9.1 itself of the Agreement on Safeguards. Moreover, the Panel agrees with the Dominican Republic that the fact that the Agreement on Safeguards itself, in Article 9.1, imposes the obligation to exclude products from specific origins from the application of the safeguard measure results in a departure from the usual application of the principle of parallelism with regard to such imports.
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> As to imports from Members that do not meet the requirements laid down in Article 9.1 of the Agreement on Safeguards, the safeguard measures have to be applied irrespective of the source of the imports, in conformity with Article 2.2 of the Agreement."[24]

16. The Panel in *Dominican Republic – Safeguard Measures* found sufficient the explanation provided in the investigating authority's determination that the reason for excluding certain developing countries from the scope of a safeguard measure was that the thresholds set forth in Article 9.1 of the Agreement on Safeguards were met. Consequently, the Panel found "that the complainants have not demonstrated that the Dominican Republic acted inconsistently with its obligations under Articles 2.1, 2.2, 3.1, 4.2, 6 and 9.1 of the Agreement on Safeguards as regards compliance with the principle of parallelism by failing to conduct a new analysis in order to determine the increase in imports, injury and causal link, excluding imports from Colombia, Indonesia, Mexico and Panama."[25]

1.2.3 Scope of application of a safeguard measure in the case of a regional trade agreement

17. The Appellate Body in *US – Line Pipe* avoided ruling on whether Article 2.2 of the Agreement on Safeguards permits a Member to exclude imports originating in member states of a

[21] Appellate Body Report, *US – Steel Safeguards*, para. 472.
[22] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.370.
[23] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.377.
[24] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.385-7.386.
[25] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.391.

free-trade area from the scope of a safeguard measure.[26] Regarding whether Article XXIV of the GATT 1994 permits excepting other members of an FTA from a safeguard measure, the Appellate Body stated that:

> "The question of whether Article XXIV of the GATT 1994 serves as an exception to Article 2.2 of the *Agreement on Safeguards* becomes relevant in only two possible circumstances. One is when, in the investigation by the competent authorities of a WTO Member, the imports that are exempted from the safeguard measure *are not considered* in the determination of serious injury. The other is when, in such an investigation, the imports that are exempted from the safeguard measure *are considered* in the determination of serious injury, *and* the competent authorities have *also* established explicitly, through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2."[27]

18. The Panel in *Argentina – Footwear (EC)* considered whether Argentina was permitted under the Agreement on Safeguards to take MERCOSUR imports into account in the analysis of injury factors and of a causal link between increased imports and the alleged (threat of) serious injury, and was at the same time permitted to exclude MERCOSUR countries from the application of the safeguard measure imposed. Relying on footnote 1 to Article 2.1 and Article XXIV:8 of the GATT 1994, the Panel concluded that "in the case of a customs union the imposition of a safeguard measure only on third country sources of supply cannot be justified on the basis of a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources of supply from within and outside a customs union."[28] Upon appeal, the Appellate Body reversed the legal reasoning and findings of the Panel relating to footnote 1 to Article 2.1 since it considered that footnote 1 to Article 2.1 did not apply to the safeguard measures imposed by Argentina in this case:

> "We question the Panel's implicit assumption that footnote 1 to Article 2.1 of the *Agreement on Safeguards* applies to the facts of this case. The ordinary meaning of the first sentence of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'.
>
> MERCOSUR did not apply these safeguard measures, either as a single unit or on behalf of Argentina. …
>
> It is Argentina that is a Member of the WTO for the purposes of Article 2 of the *Agreement on Safeguards*, and it is Argentina that applied the safeguard measures after conducting an investigation of products being imported into *its* territory and the effects of those imports on *its* domestic industry. For these reasons, we do not believe that footnote 1 to Article 2.1 applies to the safeguard measures imposed by Argentina in this case".[29]

19. The Appellate Body in *Argentina – Footwear (EC)* rejected the Panel's view that Article XXIV of the GATT 1994 was relevant to the issue before it. Recalling its findings in *Turkey – Textiles*, the Appellate Body reiterated that Article XXIV may serve as an "affirmative defence" and

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[26] The Panel in *US – Line Pipe* had interpreted the definition of a FTA in Article XXIV:8 "to mean that Members are authorised, under certain prescribed circumstances, to eliminate 'duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) ... on substantially all the trade' between them and their free-trade area partners." The Panel further found that such an authorisation existed "despite the fact that the formation of a free-trade area will necessarily result in more favourable treatment for free-trade area partners than for non-free-trade area partners"". The Panel concluded that the United States were entitled to rely on Article XXIV defense against Korea's claims of discrimination under Articles I, XIII and XIX. (Panel Report, *US – Line Pipe,* paras. 7.140 and 7.146) However, the Appellate Body declared these findings moot and as having no legal effect. (Appellate Body Report, *US – Line Pipe*, para. 199)

[27] Appellate Body Report, *US – Line Pipe*, para. 198.

[28] Panel Report, *Argentina – Footwear (EC*), para. 8.102.

[29] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 106-108.

emphasized that Argentina had not argued expressly that Article XXIV provided it with such an affirmative defence:

> "This issue, as the Panel itself observed, is whether Argentina, after including imports from all sources in its investigation of 'increased imports' of footwear products into its territory and the consequent effects of such imports on its domestic footwear industry, was justified in excluding other MERCOSUR member States from the application of the safeguard measures. In our Report in *Turkey – Restrictions on Imports of Textile and Clothing Products*, we stated that under certain conditions, 'Article XXIV may justify a measure which is inconsistent with certain other GATT provisions.' We indicated, however, that this defence is available only when it is demonstrated by the Member imposing the measure that 'the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV' and 'that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.'
>
> In this case, we note that Argentina did not argue before the Panel that Article XXIV of the GATT 1994 provided it with a defence to a finding of violation of a provision of the GATT 1994. As Argentina did not argue that Article XXIV provided it with a defence against a finding of violation of a provision of the GATT 1994, and as the Panel did not consider whether the safeguard measures at issue were introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV, we believe that the Panel erred in deciding that an examination of Article XXIV:8 of the GATT 1994 was relevant to its analysis of whether the safeguard measures at issue in this case were consistent with the provisions of Articles 2 and 4 of the *Agreement on Safeguards*."[30]

1.2.4 Relationship with Article 4 of the Agreement on Safeguards

20. The Panel Report in *Korea – Dairy* noted that a violation of Article 4.2 or 4.3 would constitute a violation of Article 2 of the Agreement on Safeguards.[31] In the specific circumstances of that dispute, however, the Panel declined to reach a conclusion on Article 2, since this claim had not been raised by the complaining party in its request for establishment of a panel:

> "Article 2.1 permits the application of a safeguard measure only if, inter alia, there has been a determination of serious injury pursuant to Article 4.2. Since we find that Korea's determination of serious injury does not meet the requirements of Article 4.2, the application of the safeguard measure at issue would necessarily also violate Article 2.1 of the *Agreement on Safeguards*. We note that in its request for establishment of a panel, the European Communities claims generally that Korea violated Articles 2.1, 4.2(a), 4.2(b), 5.1 and 12.1 to 12.3 of the *Agreement on Safeguards*. However, in its submissions, the European Communities did not argue specifically, nor did it submit any evidence, in support of its claim under Article 2.1, other than those relating to 'under such conditions' … Therefore, we do not reach any conclusion on the issue of whether Korea's determination of serious injury violates the provisions of Article 2.1 of the *Agreement on Safeguards*."[32]

21. The Panel in *Argentina – Footwear (EC)* considered Articles 2 and 4 largely in parallel:

> "[W]e conclude that Argentina's investigation did not demonstrate that there were increased imports within the meaning of Articles 2.1 and 4.2(a); that the investigation did not evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry within the meaning of Article 4.2(a); that the investigation did not demonstrate on the basis of objective evidence the existence of a causal link between increased imports and serious injury within the meaning of Article 2.1 and 4.2(b); that the investigation did not adequately take into account factors other than increased imports within the meaning of Article 4.2(b); and that the published report concerning the investigation did not set forth a complete

[30] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 109-110.
[31] Panel Report, *Korea – Dairy*, para. 7.53.
[32] Panel Report, *Korea – Dairy*, para. 7.86.

> analysis of the case under investigation as well as a demonstration of the relevance of the factors examined within the meaning of Article 4.2(c).
>
> Therefore, we find that Argentina's investigation and determinations of increased imports, serious injury and causation are inconsistent with Articles 2 and 4 of the *Safeguards Agreement*. As such, we find that Argentina's investigation provides no legal basis for the application of the definitive safeguard measure at issue, or any safeguard measure."[33]

22. The Panel in *US – Wheat Gluten* also linked violations of Article 4 to Article 2.1, finding:

> "In light of the findings made in section VIII above, we conclude that the definitive safeguard measure imposed by the United States on certain imports of wheat gluten based on the United States investigation and determination is inconsistent with Articles 2.1 and 4 of the *Agreement on Safeguards* in that:
>
> > (i) the causation analysis applied by the USITC did not ensure that injury caused by other factors was not attributed to imports; and
> >
> > (ii) imports from Canada (a NAFTA partner) were excluded from the application of the measure after imports from all sources were included in the investigation for the purposes of determining serious injury caused by increased imports (following a separate inquiry concerning whether imports from Canada accounted for a 'substantial share' of total imports and whether they 'contributed importantly' to the 'serious injury' caused by total imports)."[34]

23. The Appellate Body's findings in *US – Lamb* indicated that a violation of Articles 4.1(c) or 4.2(b) necessarily implies a violation of Article 2.[35]

1.3 Article 2.1

1.3.1 "that such product is being imported … in such increased quantities"

1.3.1.1 Nature and timing of the increase in imports

24. The Panel in *Argentina – Footwear (EC)* examined whether there is consistency with Articles 2.1 and 4.2(a) in a Member making a finding of increased imports on the basis of a comparison between the volume of imports at the starting-point of an investigation period and the volume of imports at the end of that period ("end-point-to-end-point-comparison"). The Panel, upheld in this respect by the Appellate Body, concluded that:

> "[I]n assessing whether an end-point-to-end-point increase in imports satisfies the increased imports requirement of Article 2.1, the sensitivity of the comparison to the specific years used as the end-points is important as it might confirm or reverse the apparent initial conclusion. If changing the starting-point and/or ending-point of the investigation period by just one year means that the comparison shows a decline in imports rather than an increase, this necessarily signifies an intervening decrease in imports at least equal to the initial increase, thus calling into question the conclusion that there are increased imports.
>
> In other words, if an increase in imports in fact is present, this should be evident both in an end-point-to-end-point comparison and in an analysis of intervening trends over the period. That is, the two analyses should be mutually reinforcing. Where as here

[33] Panel Report, *Argentina – Footwear (EC)*, paras. 8.279-8.280. See also Panel Reports, *US – Wheat Gluten*, paras. 9.1-9.2; and *US – Lamb*, para. 8.1.
[34] Panel Report, *US – Wheat Gluten*, para. 9.2.
[35] Appellate Body Report, *US – Lamb*, paras. 96 and 188.

> their results diverge, this at least raises doubts as to whether imports have increased in the sense of Article 2.1."[36]

25. In *Argentina – Footwear (EC)*, the Panel, in a finding confirmed by the Appellate Body, considered that an analysis of intervening trends of imports was indispensable:

> "[T]he question of whether any decline in imports is 'temporary' is relevant in assessing whether the 'increased imports' requirement of Article 2.1 has been met. In this context, we recall Article 4.2(a)'s requirement that 'the rate and amount of the increase in imports' be evaluated.[37] In our view this constitutes a requirement that the intervening *trends* of imports over the period of investigation be analysed. We note that the term 'rate' connotes both speed and direction, and thus intervening trends (up or down) must be fully taken into consideration. Where these trends are mixed over a period of investigation, this may be decisive in determining whether an increase in imports in the sense of Article 2.1 has occurred. In practical terms, we consider that the best way to assess the significance of any such mixed trends in imports is by evaluating whether any downturn in imports is simply temporary, or instead reflects a longer-term change."[38]

26. The Panel in *Argentina – Footwear (EC)* found that in the case before it the decline in the volume of imports could not be characterized as a temporary reversal of an increase in the volume of imports.[39] It then stated that:

> "[T]he Agreement requires not just an increase (i.e., any increase) in imports, but an increase in 'such…quantities' as to cause or threaten to cause serious injury. The Agreement provides no numerical guidance as to how this is to be judged, nor in our view could it do so. But this does not mean that this requirement is meaningless. To the contrary, we believe that it means that …the increase in imports must be judged in its full context, in particular with regard to its 'rate and amount' as required by Article 4.2(a). Thus, considering the changes in import levels over the entire period of investigation, as discussed above, seems unavoidable when making a determination of whether there has been an increase in imports 'in such quantities' in the sense of Article 2.1.
>
> …
>
> Where … the volume of imports has declined continuously and significantly during each of the most recent years of the period, more than a 'temporary' reversal of an increase has taken place (as reflected as well in the sensitivity of the outcome of the comparison to a one-year shift of its start or end year)."[40]

27. In *Argentina – Footwear (EC),* the Panel further found, in interpreting the phrase "is being imported … in such quantities", that an investigation period of five years "can be quite useful" to the national authorities. The Panel also rejected the argument that the *Agreement on Safeguards* requires a "sharply increasing" trend in imports at the end of the investigation period. The Appellate Body reversed both of these interpretative findings. First, the Appellate Body did not find a five-year investigative period reasonable in the light of the phrase "is being imported" and emphasized the need to focus the investigation on the "recent past":

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[36] Panel Report, *Argentina – Footwear (EC),* paras. 8.156-8.157. See Appellate Body Report, *Argentina – Footwear (EC)*, para. 129, confirming the Panel's finding.

[37] *(footnote original)* We recognise that Article 4.2(a) makes this reference in the specific context of the causation analysis, which in our view is inseparable from the requirement of imports in "*such* increased quantities" (emphasis added). Thus, we consider that in the context of both the requirement that imports have increased, and the analysis to determine whether these imports have caused or threaten to cause serious injury, the Agreement requires consideration not just of data for the end-points of an investigation period, but for the entirety of that period.

[38] Panel Report, *Argentina – Footwear (EC)*, para. 8.159. See Appellate Body Report in *Argentina – Footwear (EC)*, para. 129, confirming the Panel's finding.

[39] Panel Report, *Argentina – Footwear (EC)*, para. 8.160.

[40] Panel Report, *Argentina – Footwear (EC)*, paras. 8.161-8.162.

> "[T]he actual requirement, and we emphasize that this requirement is found in *both* Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, is that 'such product *is being imported* … in such increased quantities' 'and under such conditions as to cause or threaten to cause serious injury to the domestic industry'. Although we agree with the Panel that the 'increased quantities' of imports cannot be just *any* increase, we do not agree with the Panel that it is reasonable to examine the trend in imports over a five-year historical period. In our view, the use of the present tense of the verb phrase 'is being imported' in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years – or, for that matter, during any other period of several years.[41] In our view, the phrase 'is being imported' implies that the increase in imports must have been sudden and recent."[42]

28. With regard to the nature of the increase in imports, the Appellate Body in *Argentina – Footwear (EC)*, in contrast to the Panel, held that the increase in imports must have been recent, sudden, sharp and significant enough to cause or threaten to cause serious injury:

> "[T]he determination of whether the requirement of imports 'in such increased quantities' is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be '*such* increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'."[43]

29. The Panel in *India – Iron and Steel Products* reiterated the need to conduct both a quantitative and qualitative analysis of import trends based on objective data. The Panel found that, in the investigation at issue, India had failed to conduct such an analysis as it had utilized data that was partly annualized and hence not reflective of overall trends:

> "As we have discussed above, Article 2.1 of the Agreement on Safeguards and Article XIX:1 of the GATT 1994 require a competent authority to determine not just any increase in imports, but an increase in 'such … quantities' as to cause or threaten to cause serious injury to the domestic industry. This implies both a quantitative and a qualitative consideration of the increase in imports. The increase in imports must be considered 'in its full context', including in particular its 'rate and amount' as required by Article 4.2(a). It follows that the enquiry with regard to the increase in imports requires the evaluation of the trends in imports or changes in import levels over the entire POI. While the Agreement on Safeguards does not provide any guidance with regard to the selection of the POI and a competent authority has certain discretion in this regard, the POI should be long enough to provide an adequate basis for comparison of import trends. In *US – Line Pipe*, the panel noted that the POI should allow a competent authority to focus on recent imports, while being sufficiently long so that the authority can draw conclusions regarding the existence of increased imports.
>
> In our view, the POI of two years and three months did not allow the Indian competent authority to make a quantitative and qualitative objective analysis. India based its evaluation of the increase in imports on the import data pertaining to two

[41] *(footnote original)* The Panel … recognizes that the present tense is being used, which it states "would seem to indicate that, whatever the starting-point of an investigation period, it has to *end* no later than the very recent past." (emphasis added) Here, we disagree with the Panel. We believe that the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past.

[42] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.

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

> years and three months, which in effect provides two points of comparison of the volume of imports in 2013-2014 and in 2014-2015. With regard to the third point of comparison, 2015-2016, as we have found above, the Indian competent authority did not have objective data for the full financial year. The import data for 2015-2016 was based on imports for the first quarter of this year, which undermines the trend analysis of changes in imports in 2015-2016 compared to the previous two years. Furthermore, the data for the last year of POI is of particular importance, since it reflects the most recent trends in imports. Considering the above, we conclude that India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1 of the GATT 1994, by failing to objectively examine trends in imports and to provide a reasoned explanation with regard to the conclusion in the Final Findings that there was "a sudden, sharp and significant surge in imports 'during the POI'."[44]

30. The Panel in *India – Iron and Steel Products* emphasized that India had failed to provide an adequate explanation of its methodology:

> "Since data were annualized in order to make them comparable with those of previous years, this required a compelling explanation from the Indian competent authority as to why such methodology was reliable and why the figures corresponding to the first quarter of 2015-2016 could be extrapolated for the entire financial year."[45]

31. The Panel in *Ukraine – Passenger Cars* rejected Ukraine's argument that the Ukrainian authorities' analysis of the suddenness, sharpness and significance of the increase in imports was confidential, noting that Ukraine had not explained "why an analysis of the 'suddenness', 'sharpness' and 'significance' of the relative increase in imports (as opposed to the actual import volumes) should be confidential."[46] The Panel therefore concluded that Ukraine had acted inconsistently with Article 2.1:

> "Without additional information or relevant explanations in the Notice of 14 March 2013, we are therefore unable to accept that a reference to a 37.9% relative increase in imports alone is sufficient to demonstrate that the increase was 'significant'. The *ex post* explanations provided by Ukraine in the context of the present proceedings cannot cure this defect. …
>
> Based on the foregoing considerations, we find that Ukraine has acted inconsistently with Article 2.1 by failing to demonstrate in its published report, through reasoned explanations, that there was an increase in imports during the period of investigation 2008-2010 that was sudden enough, sharp enough, and significant enough."[47]

32. In *US – Line Pipe*, the Panel found that the word "recent" implies a "retrospective analysis", but does not imply an analysis of the conditions immediately preceding the authority's decision nor does it imply that the analysis must focus exclusively on conditions at the very end of the period of investigation:

> "The word 'recent' – which was used by the Appellate Body in interpreting the phrase 'is being imported' – is defined as 'not long past; that happened, appeared, began to exist, or existed lately'. In other words, the word 'recent' implies some form of retrospective analysis. It does not imply an analysis of the conditions immediately preceding the authority's decision. Nor does it imply that the analysis must focus exclusively on conditions at the very end of the period of investigation. We consider that an analysis that compares the first semester of 1998 with the first semester of 1999 is not inconsistent with the requirement that the increase in imports be 'recent'."[48]

[44] Panel Report, *India – Iron and Steel Products*, paras. 7.149-7.150.
[45] Panel Report, *India – Iron and Steel Products*, para. 7.218.
[46] Panel Report, *Ukraine – Passenger Cars*, para. 7.145.
[47] Panel Report, *Ukraine – Passenger Cars*, paras. 7.147-7.148.
[48] Panel Report, *US – Line Pipe*, para. 7.204.

33. In *US – Line Pipe*, the Panel also found that "there is no need for a determination that imports are presently still increasing. Rather, imports could have 'increased' in the recent past, but not necessarily be increasing up to the end of the period of investigation or immediately preceding the determination":

> "[T]he fact that the increase in imports must be 'recent' does not mean that it must continue up to the period immediately preceding the investigating authority's determination, nor up to the very end of the period of investigation. We find support for our view in Article 2.1, which provides 'that such product is being imported … in such increased quantities'. The Agreement uses the adjective 'increas**ed**', as opposed to 'increas**ing**'. The use of the word 'increas**ed**' indicates to us that there is no need for a determination that imports are presently still increas**ing.** Rather, imports could have 'increas**ed**' in the recent past, but not necessarily be increasing up to the end of the period of investigation or immediately preceding the determination. Provided the investigated product 'is being imported' at such increas**ed** quantities at the end of the period of investigation, the requirements of Article 2.1 are met.[49]"[50]

34. In light of Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994[51], the Panel in *US – Line Pipe* reasoned that it was within its standard of review to examine the appropriateness of the methodology in evaluating the increase in the imports:

> "[I]n determining whether the US methodology for the analysis of the existence of increased imports complied with its obligations under the Agreement on Safeguards and the GATT 1994, our review will consist of an objective assessment, pursuant to Article 11 of the DSU, of whether the methodology selected is unbiased and objective, such that its application permits an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports."[52]

35. In *US – Line Pipe*, Korea argued that the period of investigation of five years chosen by the United States authorities was in conflict with the requirements of Article 2.1 and Article XIX:1(a). The Panel ruled that it is up to the discretion of the investigating authority of the importing Member to decide the "length of the period of investigation" and its "breakdown":

> "We note that the Agreement contains no requirements as to how long the period of investigation in a safeguards investigation should be, nor how the period should be broken down for purposes of analysis. Thus, the period of investigation and its breakdown is left to the discretion of the investigating authorities.
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> …
>
> In the case before us the period selected by the ITC was five years and six months, which is a period similar in length to the one used by the Argentine investigating authority in *Argentina – Footwear Safeguards*. However, we note that the Appellate Body, in the findings relied upon by Korea to argue the question of the length of the period of investigation, emphasized not the <u>length</u> of the period *per se,* but that there should be a focus on recent imports and not simply trends over the period examined. In the case of the line pipe investigation the ITC did not merely compare end points, or look at the overall trend over the period of investigation, (as Argentina had done in the investigation at issue in *Argentina - Footwear Safeguard*). It analysed the data regarding imports on a year-to-year basis for the 5 complete years, and also considered whether there was an increase in interim 1999 as compared with interim 1998.
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> …

[49] (*footnote original*) We observe that an increase in imports before the date of a determination, but not sustained <u>at</u> the date of the determination, could still cause actual serious injury at the time of the determination.

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

[51] Panel Report, *US – Line Pipe*, para. 7.193.

[52] Panel Report, *US – Line Pipe*, para. 7.194.

> We are of the view that by choosing a period of investigation that extends over 5 years and six months, the ITC did not act inconsistently with Article 2.1 and Article XIX. This conclusion is based on the following considerations: first, the Agreement contains no specific rules as to the length of the period of investigation; second, the period selected by the ITC allows it to focus on the recent imports; and third, the period selected by the ITC is sufficiently long to allow conclusions to be drawn regarding the existence of increased imports."[53]

36. In *US – Line Pipe*, the Panel also examined whether the United States' competent authority was entitled to compare interim 1998 data with interim 1999 data in performing the analysis or whether it was, in addition, required to compare "the second half of 1998" with interim 1999 data.[54] The Panel found that the Agreement on Safeguards does not prescribe such practice by the importing Member:

> "We recall that there are no provisions in the Safeguards Agreement which give any guidance on how the period of investigation should be broken down for purpose of analysis by the investigating authorities. In the case before us the period selected by the ITC would have allowed it to find that there was a decrease in the imports if the facts in the case supported such a finding. We do not believe that the methodology chosen by the ITC for the purposes of analysing whether or not there was an increase in imports was inherently biased or would have precluded it from performing a reasonable evaluation of the facts in the investigation. The United States asserts that the ITC acted according to its past practice, and that this shows that the methodology was objective and unbiased. We agree with the United States. The United States responds that a comparison of matching interim periods, in this case January-June, of different years, is the standard ITC practice.[55] According to the United States this standard practice helps eliminate the possible effect of any seasonal or cyclical distortions which may affect the comparison. Although the ITC concedes that line pipe is not a seasonal product, we are of the view that the methodology applied in the comparison was not chosen in order to manipulate the data and show a particular result. Nor is there any evidence of manipulation or bias resulting from an alleged inconsistency with the ITC's serious injury analysis. Although the ITC did make some observations that include or make reference to the second half of 1998 in its determination on serious injury or threat of serious injury, we do not consider that the ITC was comparing the situation in the first half of 1999 to that in the second half of 1998. The ITC was simply describing factual circumstances that existed in the second half of 1998 and the first half of 1999. The ITC was not drawing conclusions based on a comparison of those periods."[56]

37. The Panel in *Argentina – Preserved Peaches* concurred with the Panel in *US – Line Pipe* that the word "recent" does not imply that the analysis must focus exclusively on conditions at the end of the period of analysis.[57] The Panel believed that a recent and sharp increase in imports is a necessary, but not a sufficient, condition to satisfy Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994:

> "The increase is not merely the product of a quantitative analysis, it must also be qualitative. This was the approach of the Appellate Body in the passage quoted above from *Argentina – Footwear (EC),* where it found that an increase in imports as required by Article 2.1 and Article XIX:1(a) must be recent, sudden, sharp and significant *enough*, both quantitatively and qualitatively. It is therefore not sufficient to find that an increase in imports is only recent, sudden, sharp and significant mathematically.

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[53] Panel Report, *US – Line Pipe*, paras. 7.196, 7.199 and 7.201.

[54] Panel Report, *US – Line Pipe*, para. 7.192.

[55] (*footnote original*) The fact that the ITC conformed to its previous practice does not necessarily mean that the methodology used, or that such past practice, is in conformity with the Agreement. Nevertheless, it has not been established that the usual ITC practice regarding the period of investigation was not appropriate for the line pipe investigation.

[56] Panel Report, *US – Line Pipe*, para. 7.203.

[57] Panel Report, *Argentina – Preserved Peaches*, para. 7.53.

> The qualitative analysis required was illustrated by the Appellate Body in *Argentina – Footwear (EC)* when it interpreted the requirement in Article 4.2(a) that the competent authorities evaluate the 'rate and amount' of the increase in imports. They found that it meant that the competent authorities in that case should have considered the trends in imports over the period of investigation, rather than just comparing the end points, and to consider the sensitivity of their analysis to the particular end points of the investigation period used.[58]"[59]

38. In *Argentina – Preserved Peaches*, the Panel also concluded that there is no absolute formula to determine whether increased imports justify the application of a safeguard measure:

> "[T]he point is that there is no fixed period of five years or any other length of time over which figures can simply be subtracted to yield an increase in imports in the sense of Article 2.1 and Article XIX:1(a). Accordingly, neither the mathematical increase in imports of preserved peaches in the last two years, nor the mathematical decrease over the whole five year period of analysis, is determinative."[60]

39. Regarding the date that the recentness of the increase in imports has to be measured against, the Panel in *Ukraine – Passenger Cars* held that both the date of the competent authorities' determination and the date of the decision to apply a safeguard measure are relevant to this determination:

> "[A]n increase in imports must in our view not only be recent in relation to the date of the determination, but also in relation to the date of the decision to apply a safeguard measure. This minimizes the potential of 'emergency action' being taken outside emergency situations by ensuring that any time gap between the determination and the application of a safeguard measure remains appropriately limited."[61]

40. The Panel in *Ukraine – Passenger Cars* found that, in the circumstances of the investigation before it, the 16-month time gap between the end of the investigation period and the date of the competent authorities' determination did not call into question the recentness of the increase in imports[62], but that the two-year gap between the end of the period of investigation and the decision to apply the safeguard measure did:

> "In our assessment, the time gap between the competent authorities' determination and the decision to apply the safeguard measure was such that, on 14 March 2013, the competent authorities could no longer maintain, based on data from 2008 to 2010 alone, that passenger cars were 'being imported' in increased quantities within the meaning of Article 2.1 and that the determination of, *inter alia*, increased imports that they made on 28 April 2012 continued to rest on a sufficient factual basis. We also note that Article 2.1 admits of no exception with regard to the requirement to ensure that a safeguard measure be applied only if a product 'is being imported … in such increased quantities'. Thus, even ongoing, good faith consultations would not justify a departure from the requirements of Article 2.1.
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> …
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> For these reasons, we consider that in the particular circumstances of this case the time gap of more than two years following the end of the period of investigation removed the date of the decision to apply the safeguard measure at issue too far from the underlying facts for the competent authorities to be justified in concluding that there was a 'recent' increase in imports as of that date. We therefore find that the relative increase in imports, which the competent authorities determined to have existed in this case on the basis of data covering the period 2008-2010, was not

[58] *(footnote original)* Appellate Body Report in *Argentina – Footwear (EC)*, paragraph 129.
[59] Panel Report, *Argentina – Preserved Peaches*, paras. 7.54-7.55.
[60] Panel Report, *Argentina – Preserved Peaches*, para. 7.52.
[61] Panel Report, *Ukraine – Passenger Cars*, para. 7.172.
[62] Panel Report, *Ukraine – Passenger Cars*, para. 7.177.

> recent enough in relation to the date of the decision to apply a safeguard measure, 14 March 2013."[63]

41. In *US – Steel Safeguards*, the Panel, in a finding upheld by the Appellate Body, concluded that "a finding that imports have increased pursuant to Article 2.1 can be made when an increase evidences a certain degree of recentness, suddenness, sharpness and significance."[64] In stating this, the Panel emphasized "that there are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an 'increase' in the sense of Article 2.1 of the Agreement on Safeguards", but added that one cannot conclude "that any increase between any two identified points in time meets the requirements of Article 2.1 of the Agreement on Safeguards."[65]

42. In *US – Steel Safeguards*, the Panel, in a finding confirmed by the Appellate Body, insisted that there are no absolute standards in judging how sudden, recent and significant the increase must be in order to qualify as an "increase" in the sense of Article 2.1 of the Agreement on Safeguards.[66] The Panel said that the evaluation is not to be done in the abstract. Instead according to the Panel "[a] *concrete* evaluation is what is called for" and, thus, a "competent authority must conduct an analysis considering all the features of the development of import quantities and that an increase in imports has a certain degree of being recent and sudden."[67] The Panel went on to state the importance of the analysis of the entire period of investigation:

> "[A] competent authority's findings on increased imports, distinct from its causality and injury findings, *may be informed by the results of its entire investigation*. The competent authority's findings on the first requirement – increased imports – may have effects on the injury findings or on the causation findings, as prescribed by Article 4.2(a). As a competent authority considers the other conditions necessary for imposition of a safeguard, it determines, as directed by the Appellate Body in *Argentina – Footwear (EC)*, whether the increase in imports was recent enough, sudden enough, and significant enough to cause or threaten serious injury to the relevant domestic producers."[68]

43. In *US – Steel Safeguards*, the Panel, in findings upheld by the Appellate Body, identified certain factors that should be taken into account in assessing whether a decrease in imports at the end of the period of investigation, in the individual case, prevents a finding of increased imports in the sense of Article 2.1. The Panel stated that:

> "[This] will … depend on whether, despite the later decrease, a previous increase nevertheless results in the product (still) 'being imported in (such) increased quantities'. In this evaluation, factors that must be taken into account are the duration and the degree of the decrease at the end of the relevant period of investigation, as well as the nature, for instance the sharpness and the extent, of the increase that intervened beforehand.
>
> To give an extreme example, a short and very recent slight decrease would not detract from an overall increase if imports have increased tenfold over the several years beforehand. Conversely, to give an opposite extreme example, one could no longer talk about a product that 'is being imported in (such) increased quantities', or in fact in *any* increased quantities at all, if, at the time of the determination, import numbers have plummeted nearly to zero or to a level below any past point in the period of investigation.[69]

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[63] Panel Report, *Ukraine – Passenger Cars*, paras. 7.182 and 7.184.
[64] Panel Reports, *US – Steel Safeguards*, para. 10.167.
[65] Panel Reports, *US – Steel Safeguards*, para. 10.168.
[66] Panel Reports, *US – Steel Safeguards*, para. 10.168.
[67] Panel Reports, *US – Steel Safeguards*, para. 10.168.
[68] Panel Reports, *US – Steel Safeguards*, para. 10.171.
[69] (*footnote original*) We do not intend to rule out that an exception could be made, if, despite the deep drop, there are indications that this drop is only temporary and in some sense artificial. *See*, also, Panel Report, *Argentina – Footwear (EC)*, para. 8.159.

> The Panel believes that, in their investigation whether imports have increased in the recent period, and whether increased imports are causing serious injury to the domestic producers of like or directly competitive domestic products, competent authorities are required to consider the *trends* in imports over the period of investigation, as suggested by Article 4.2(a).[70] While Article 4.2(a) requires the evaluation of the 'rate and amount of the increase in imports … in absolute and relative terms', the Panel sees no basis for the argument that this rate must always accelerate or that the rate must always be positive at each point in time during the period of investigation."[71]

44. In *US – Steel Safeguards*, the Appellate Body reiterated the importance of trends over the entire period of investigation:

> "A determination of whether there is an increase in imports cannot, therefore, be made merely by comparing the end points of the period of investigation. Indeed, in cases where an examination does not demonstrate, for instance, a clear and uninterrupted upward trend in import volumes, a simple end-point-to-end-point analysis could easily be manipulated to lead to different results, depending on the choice of end points. A comparison could support either a finding of an increase or a decrease in import volumes simply by choosing different starting and ending points.
>
> For instance, if the starting point for the period of investigation were set at a time when import levels were particularly low, it would be more likely that an increase in import volumes could be demonstrated. The use of the phrase 'such increased quantities' in Articles XIX:1(a) and 2.1, and the requirement in Article 4.2 to assess the 'rate and amount' of the increase, make it abundantly clear, however, that such a comparison of end points will *not* suffice to demonstrate that a product 'is being imported in such increased quantities' within the meaning of Article 2.1. Thus, a demonstration of 'any increase' in imports between any two points in time is not sufficient to demonstrate 'increased imports' for purposes of Articles XIX and 2.1. Rather, as we have said, competent authorities are required to examine the trends in imports over the entire period of investigation.[72]"[73]

45. The Appellate Body in *US – Steel Safeguards* referred to the importance of an explanation concerning the trend in imports over the entire period of investigation:

> "In our view, what is called for in every case is an *explanation* of how the *trend* in imports supports the competent authority's finding that the requirement of 'such increased quantities' within the meaning of Articles XIX:1(a) and 2.1 has been fulfilled. It is this *explanation* concerning the *trend* in imports—over the entire period of investigation—that allows a competent authority to *demonstrate* that 'a product is being imported in such increased quantities'."[74]

46. In *US – Steel Safeguards*, the Appellate Body upheld the findings of the Panel that by not explaining the "most recent decrease" in absolute imports, the USITC had *not* provided an explanation concerning the overall *trend* in imports that had occurred during the period of investigation:

> "Again we recall that, in *Argentina – Footwear (EC)*, in clarifying the *Agreement on Safeguards*, we stated that 'authorities are required to examine trends'. [75] In our view, by failing to address the decrease in imports that occurred between interim 2000 and interim 2001(the most recent decrease), the United States did not—and could not—provide a reasoned and adequate explanation of how the facts supported its finding that imports of hot-rolled bar 'increased', as required by

[70] (*footnote original*) Appellate Body Report on *Argentina – Footwear (EC)*, para. 129; and Panel Report on *Argentina – Footwear (EC)*, para. 8.276.
[71] Panel Reports, *US – Steel Safeguards*, paras. 10.163-10.165.
[72] *(footnote original)* Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.
[73] Appellate Body Report, *US – Steel Safeguards*, paras. 354-355.
[74] Appellate Body Report, *US – Steel Safeguards*, para. 374
[75] *(footnote original)* Appellate Body Report on *Argentina – Footwear (EC)*, para. 129.

> Article 2.1 of the *Agreement on Safeguards*. This failure to account for the decrease in absolute imports is all the more serious in the light of the fact that the intervening trend that was not addressed by the USITC occurred at the very end of the period of investigation. In *US – Lamb*, we found that the competent authority 'must assess' the data from the most recent past 'in the context of the data for the entire investigative period'.[76] As the Panel found, it is, precisely, those most recent data that the USITC failed to account for with respect to absolute imports."[77]

47. In *US – Steel Safeguards*, the Appellate Body confirmed that imports need not be increasing at the time of the determination and insisted on the investigating authority's obligation to examine the trends of imports over the entire period of investigation (see paragraph 44 above):

> "We agree with the United States that Article 2.1 does *not* require that imports need to be increasing at the time of the determination. Rather, the plain meaning of the phrase 'is being imported in such increased quantities' suggests merely that imports must *have* increased, and that the relevant products continue 'being imported' in (such) increased quantities. We also do *not* believe that a decrease in imports at the end of the period of investigation would necessarily prevent an investigating authority from finding that, nevertheless, products continue to be imported 'in such increased quantities.'[78]"[79]

48. The Appellate Body in *US – Steel Safeguards*, reiterated its ruling made in *Argentina – Footwear (EC)* (see paragraph 28 above) and emphasized the importance of reading "such increased quantities" in the context of Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards which confirm that such increased imports must be linked to the ability of the relevant increased imports to cause serious injury or threat thereof:

> "We reaffirm this finding [*Argentina – Footwear (EC)*]. In that appeal, we underlined the importance of reading the requirement of 'such increased quantities' in the context in which it appears in both Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*. That context includes the words 'to cause or threaten to cause serious injury'. Read in context, it is apparent that 'there must be 'such increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure.' Indeed, in our view, the term 'such', which appears in the phrase 'such increased quantities' in Articles XIX:1(a) and 2.1, clearly links the relevant increased imports to their ability to cause serious injury or the threat thereof. Accordingly, we agree with the United States that our statement in *Argentina – Footwear (EC)* that the 'increase in imports must have been recent enough, sudden enough, sharp enough and significant enough … to cause or threaten to cause serious injury', was a statement about 'the entire investigative responsibility of the competent authorities under the Safeguards Agreement', and that '[w]hether an increase in imports is recent, sudden, sharp and significant enough to cause or threaten serious injury are questions that are answered as the competent authorities proceed with the remainder of their analysis (i.e., their consideration of serious injury/threat and causation).'"[80]

1.3.1.2 Absolute or relative increase in imports

49. In *US – Line Pipe*, the Panel faced the question of whether the finding of increased imports can be maintained in light of a decline in absolute imports during part of the investigation period. The Panel found that a decline in absolute imports at the end of period of investigation should not be considered in isolation, and does not preclude a finding of imports "in such increased quantities" for the purpose of Article 2.1:

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[76] *(footnote original)* Appellate Body Report on *US – Lamb*, para. 138.
[77] Appellate Body Report, *US – Steel Safeguards*, para. 388.
[78] *(footnote original)* We note that a decrease at the end of a period of investigation may, for instance, result from the seasonality of the relevant product, the timing of shipments, or importer concerns about the investigation. As we have said, the text of Article 2.1 does not necessarily prevent, in our view, a finding of "increased imports" in the face of such a decline.
[79] Appellate Body Report, *US – Steel Safeguards*, para. 367
[80] Appellate Body Report, *US – Steel Safeguards*, para. 346

> "In a safeguard investigation, the period of investigation for examination of the increased imports tends to be the same as that for the examination of the serious injury to the domestic industry. This contrasts with the situation in an anti-dumping or countervailing duty investigation where the period for evaluating the existence of dumping or subsidization is usually shorter than the period of investigation for a finding of material injury. We are of the view that one of the reasons behind this difference is that, as found by the Appellate Body in *Argentina – Footwear Safeguard,* 'the determination of whether the requirement of imports 'in such increased quantities' is met is not a merely mathematical or technical determination.' The Appellate Body noted that when it comes to a determination of increased imports 'the competent authorities are required to consider the *trends* in imports over the period of investigation'. The evaluation of trends in imports, as with the evaluation of trends in the factors relevant for determination of serious injury to the domestic industry, can only be carried out over a period of time. Therefore, we conclude that the considerations that the Appellate Body has expressed with respect to the period relevant to an injury determination also apply to an increased imports determination.
>
> In view of the considerations expressed above we do not believe that the analysis of data for the first semester of 1999 should be considered in isolation. We find the analysis of whether imports had increased on a yearly basis from 1994 to 1998 very relevant to the question of whether there were increased imports. Although we are aware that imports decreased for the first semester of 1999 when compared to the first semester of 1998, we note that regardless of the decrease for the first half of 1999, the ITC in their report found that imports of line pipe 'remained at a very high level in interim 1999'. This high level of imports for 1999 supports a finding that imports were still entering the United States 'in such increased quantities' as prescribed in Article 2.1. In other words, although Korea may be correct in arguing that absolute imports declined, this does not preclude a finding of imports 'in such increased quantities' for the purpose of Article 2.1. Based on the above considerations we conclude that the ITC was correct in its finding of an absolute increase in imports of line pipe."[81]

50. Regarding an absolute increase in imports, see also the Appellate Body Report in *US – Steel Safeguards*[82] and the Panel Reports in *US – Wheat Gluten*[83] and *Argentina – Footwear (EC).*[84]

1.3.1.3 Determination of increase in imports where the product under investigation consists of multiple products

51. The Panel in *Dominican Republic – Safeguard Measures* rejected the argument that an investigating authority is required to make separate findings regarding the increase in imports caused by each product making up the "product under investigation":

> "The Panel understands that the point raised by the complainants is that the determination of the increase in imports is invalid because there was no separate determination of the increase in imports of tubular fabric, on the one hand, and polypropylene bags, on the other. However, as the complainants have not stated an objection to the definition of the product under investigation *per se*, the Panel considers that the definition adopted by the competent authority is that which governs the definition of the *product under investigation,* as well as the way in which the relevant data should have been analysed in the investigation. Given the undisputed definition of tubular fabric and polypropylene bags as the product under investigation, the Panel does not regard as valid the argument of the complainants that the increase in imports should have been demonstrated separately with respect to each of these products."[85]

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[81] Panel Report, *US – Line Pipe*, paras. 7.209-7.210.
[82] Appellate Body Report, *US – Steel Safeguards*, paras. 338-389.
[83] Panel Report, *US – Wheat Gluten*, paras. 7.206-7.210.
[84] Panel Report, *Argentina – Footwear (EC)*, paras. 8.153-8.164.
[85] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.236.

1.3.1.4 Relevance of quantity versus value of imports

52. The Panel in *Argentina – Footwear (EC)* acknowledged that both parties had referred to data on both the quantity and the value of imports in connection with this requirement, but observed:

> "The Agreement is clear that it is the data on import quantities … in absolute terms and relative to (the quantity of) domestic production that are relevant in this context, in that the Agreement refers to imports 'in such increased quantities' … Therefore, our evaluation will focus on the data on import quantities.[86]"[87]

1.3.2 "under such conditions"

53. The Panels in *Korea – Dairy*[88], *Argentina – Footwear (EC)*[89] and *US – Wheat Gluten*[90] have held that the phrase "under such conditions" in Article 2.1 does not constitute a separate analytical requirement in a safeguards investigation. Related to this, these Panel Reports observe that this phrase does not necessarily require an analysis of the prices of imported products and like or directly competitive products. The Appellate Body agreed with these findings in *US – Wheat Gluten.*[91]

54. The Panel in *Korea – Dairy* stated:

> "We consider that the phrase 'and under such conditions' does not provide for an additional criterion or analytical requirement to be performed before an importing Member may impose a safeguard measure. We are of the view that the phrase 'and under such conditions' qualifies and relates both to the circumstances under which the products under investigation are imported and to the circumstances of the market into which products are imported, both of which must be addressed by the importing country when performing its assessment as to whether the increased imports are causing serious injury to the domestic industry producing the like or directly competitive products. In this sense, we consider that the phrase 'under such conditions' refers more generally to the obligation imposed on the importing country to perform an adequate assessment of the impact of the increased imports at issue and the specific market under investigation."[92]

55. In this connection, the Panel in *Argentina – Footwear (EC)* explained the relationship between the phrase "under such conditions" in Article 2.1 of the *Agreement on Safeguards* and the analysis under Article 4.2(a) and (b):

> "In our view, the phrase 'under such conditions' does not constitute a specific legal requirement for a price analysis, in the sense of an analysis separate and apart from the increased import, injury and causation analyses provided for in Article 4.2. We consider that Article 2.1 sets forth the fundamental legal requirements (i.e., the conditions) for application of a safeguard measure, and that Article 4.2 then further develops the operational aspects of these requirements."[93]

56. Similarly, the Panel in *Ukraine – Passenger Cars* found that the "conditions" under which imports occur do not have a bearing on the analysis of the quantities of exports:

> "The Panel recalls that Article 2.1 contains the phrase 'such product is being imported into its territory in such increased quantities … and under such conditions as to cause or threaten to cause serious injury to the domestic industry…'. In our view, this

[86] *(footnote original)* We note that the trends in the data on import values generally confirm those on import quantities.
[87] Panel Report, *Argentina – Footwear (EC)*, para. 8.152.
[88] Panel Report, *Korea – Dairy*, para. 7.52.
[89] Panel Report, *Argentina – Footwear (EC)*, para. 8.249.
[90] Panel Report, *US – Wheat Gluten*, para. 8.108.
[91] Appellate Body Report, *US – Wheat Gluten*, para. 78.
[92] Panel Report, *Korea – Dairy*, para. 7.52.
[93] Panel Report, *Argentina – Footwear (EC)*, para. 8.249.

> phrase identifies two distinct elements. The first element refers to increased quantities of imports, while the second refers to the conditions under which they occur, which must be such as to make it possible for those increased quantities to cause serious injury or threat thereof. The 'conditions' under which imports occur in our view have no bearing on whether or not there have been increased quantities of imports. Consequently, we do not consider that an analysis of the 'conditions' under which imports occur forms an integral part of the analysis of the quantities in which imports occur. This view is consistent with the finding of the panel in *Argentina – Footwear (EC)*, which stated that 'the phrase 'under such conditions' in fact refers to the substance of the causation analysis that must be performed under Article 4.2(a) and (b)'. The Appellate Body in *US – Wheat Gluten* agreed with the panel's analysis and linked the phrase 'under such conditions' to the analysis of causation under Article 4.2(b). We thus agree with Ukraine that the examination of the conditions under which the imports occur is relevant to the question of causation. Accordingly, we will consider whether Ukraine analysed the conditions under which the imports occurred when we address Ukraine's determination of the causal link between increased imports and serious injury or threat thereof to the domestic industry later in our report."[94]

57. In *Argentina – Footwear (EC)*, the Panel also considered the phrase "under such conditions" as referring to the conditions of competition between the imported product and the domestic like or directly competitive products in the importing country's market. The Panel held that the phrase "under such conditions" in fact refers to the substance of the causation analysis that must be performed under Article 4.2(a) and (b):

> "We believe that the phrase 'under such conditions' would indicate the need to analyse the *conditions of competition* between the imported product and the domestic like or directly competitive products in the *importing country's market*. That is, it is these 'conditions of competition' in the importing country's market that will determine whether increased imports cause or threaten to cause serious injury to the domestic industry. The text of Article 2.1 supports this interpretation, as the relevant phrase in its entirety reads 'under such conditions *as to cause* or threaten to cause serious injury' (emphasis added). Seen another way, for a safeguard measure to be permitted, the investigation must demonstrate that conditions of competition in the importing country's market are such that the increased imports can and do cause or threaten to cause serious injury. Article 4.2(a) confirms this interpretation, in requiring that the competent authorities 'evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry', which is further reinforced by Article 4.2(b)'s requirement that the analysis be conducted on the basis of 'objective evidence'. In our view, these provisions give meaning to the phrase 'under such conditions', and support as well our view that for an analysis to demonstrate causation, it must address specifically the nature of the interaction between the imported and domestic products in the domestic market of the importing country. That is, we believe that the phrase 'under such conditions' in fact refers to the substance of the causation analysis that must be performed under Article 4.2(a) and (b)."[95]

58. In the view of the Panel in *Argentina – Footwear (EC)*, the factors underlying competition between domestic and imported like products are to be analysed within the context of the causation analysis:

> "We note in this regard that there are different ways in which products can compete. Sales price clearly is one of these, but it is certainly not the only one, and indeed may be irrelevant or only marginally relevant in any given case. Other bases on which products may compete include physical characteristics (e.g., technical standards or other performance-related aspects, appearance, style or fashion), quality, service, delivery, technological developments consumer tastes, and other supply and demand factors in the market. In any given case, other factors that affect the conditions of competition between the imported and domestic products may be relevant as well. It

[94] Panel Report, *Ukraine – Passenger Cars*, para. 7.190.
[95] Panel Report, *Argentina – Footwear (EC)*, para. 8.250.

> is these sorts of factors that must be analysed on the basis of objective evidence in a causation analysis to establish the effect of the imports on the domestic industry."[96]

59. The Panel in *US – Wheat Gluten* also effectively equated the phrase "under such conditions" with the causation analysis:

> "We are of the view that the phrase 'under such conditions' does not impose a separate analytical requirement in addition to the analysis of increased imports, serious injury and causation. Rather, this phrase refers to the substance of the causation analysis that must be performed under Article 4.2(a) and (b) SA."[97]

60. The Panel in *Korea – Dairy* specifically addressed the issue of the analysis of price competition between domestic and imported like products has been in the context of the phrase "under such conditions":

> "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[98], 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."[99]

61. In *US – Wheat Gluten*, the Appellate Body expressed its agreement with the Panel's analysis. Like the Panel, the Appellate Body considered the phrase "under such conditions" to refer to the analysis to be performed under Article 4.2. The Appellate Body also referred to the phrase "under such conditions" in Article 2.1 as support for its view that Article 4.2 contemplates an analysis of whether increased imports, in conjunction with other relevant factors, cause serious injury:

> "Article 2.1 reflects closely the 'basic principles' in Article XIX:1(a) of the GATT 1994 and also sets forth 'the conditions for imposing a safeguard measure', including those relating to causation. The rules on causation, which are elaborated further in the remainder of the *Agreement on Safeguards*, therefore, find their roots in Article 2.1. According to that provision, a safeguard measure may be applied if a 'product is being imported … *in such increased quantities … and under such conditions as to cause* …' serious injury. Thus, under Article 2.1, the causation analysis embraces two elements: the first relating to increased 'imports' specifically and the second to the 'conditions' under which imports are occurring.
>
> Each of these two elements is, in our view, elaborated further in Article 4.2(a). While Article 2.1 requires account to be taken of the 'increased quantities' of imports, both in 'absolute' terms and 'relative to domestic production', Article 4.2(a) states, correspondingly, that 'the rate and amount of the increase in imports of the product concerned in absolute and relative terms, [and] the share of the domestic market taken by increased imports' are relevant.
>
> As for the second element under Article 2.1, we see it as a complement to the first. While the first element refers to increased imports specifically, the second relates more generally to the 'conditions' in the marketplace for the product concerned that may influence the domestic industry. Thus, the 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

[96] Panel Report, *Argentina – Footwear (EC)*, para. 8.251.
[97] Panel Report, *US – Wheat Gluten*, para. 8.108.
[98] *(footnote original)* Contrary to the explicit references to prices in Article 3 of the Agreement on Implementation of Article VI of GATT 1994 ("AD Agreement") and Article 15 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").
[99] Panel Report, *Korea – Dairy*, para. 7.51.

> 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.[100]"[101]

62. The Appellate Body in *US – Steel Safeguards* concluded that assessing whether increased imports justify the application of a safeguard measure calls for the assessment of the "conditions" under which those imports occur:

> "We further note that Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* require that the relevant product 'is being imported in such increased quantities *and under such conditions* as to cause or threaten to cause serious injury'. The question whether 'such increased quantities' of imports will suffice as 'increased imports' to justify the application of a safeguard measure is a question that can be answered only in the light of 'such conditions' under which those imports occur. The relevant importance of these elements varies from case to case."[102]

63. In *Argentina – Footwear (EC)*, the Panel considered that a price analysis may be required in the specific circumstances of a particular case:

> "Therefore, in the present dispute, while the phrase 'under such conditions' does not require a price analysis per se, it nevertheless has an implication for the nature and content of a causation analysis, which may logically necessitate a price analysis in a given case. Moreover, the absence of an analysis of the conditions of competition in the domestic market for the product in question, in which the interaction of the imported with the domestic product is explained in the report on the investigation (including inter alia a price analysis where relevant), results in an incomplete analysis of the causal link."[103]

64. The Panel in *US – Wheat Gluten* also adopted an approach to price analysis as a non-mandatory, but potentially relevant point of analysis:

> "'Price' is not expressly listed in Article 4.2(a) [of the Agreement on Safeguards] 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."[104]

65. The Panel in *US – Steel Safeguards* was of the view that price is the most important factor when analysing conditions of competition:

> "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.[105] The Panel agrees

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[100] *(footnote original)* We do not, of course, exclude the possibility that "serious injury" could be caused by the effects of increased imports *alone*.

[101] Appellate Body Report, *US – Wheat Gluten*, paras. 76-78.

[102] Appellate Body Report, *US – Steel Safeguards*, para. 350.

[103] Panel Report, *Argentina – Footwear (EC)*, para. 8.252.

[104] Panel Report, *US – Wheat Gluten*, paras. 8.109-8.110.

[105] *(footnote original)* 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

> 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. Indeed, we consider that relative price trends as between 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."[106]

66. After referring to the Panel Reports on *Argentina – Footwear (EC)* (see paragraph 58 above) and *US – Wheat Gluten* (see paragraph 64 above), the Panel in *US – Steel Safeguards* noted that pricing trends must always be considered in context:

> "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, 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."[107]

1.3.3 "cause or threaten to cause serious injury"

67. In *US – Line Pipe*, the Appellate Body held that a discrete finding of injury or threat of serious injury was not required under Article 2.1. Although the Appellate Body agreed with the Panel that the definitions of "serious injury" and "threat of serious injury" are two distinct concepts, it reversed the Panel's finding[108] by clarifying that the crucial word "or" in the text of Article 2.1 could mean *either one or the other, or both in combination:*

> "We emphasize that we are dealing here with … whether there is a right in a particular case to apply a safeguard measure. The question at issue is whether the right exists in this particular case. And, as the right exists if there is a finding by the competent authorities of a 'threat of serious injury' or—something *beyond*—'serious injury', then it seems to us that it is irrelevant, *in determining whether the right exists*, if there is 'serious injury' or only 'threat of serious injury'—so long as there is a determination that there is *at least* a 'threat'. In terms of the rising continuum of an injurious condition of a domestic industry that ascends from a 'threat of serious injury' up to 'serious injury', we see 'serious injury'—because it is something *beyond* a 'threat'—as necessarily *including* the concept of a 'threat' and *exceeding* the presence of a 'threat' for purposes of answering the relevant inquiry: is there a right to apply a safeguard measure?
>
> Based on this analysis of the most relevant context of the phrase 'cause or threaten to cause' in Article 2.1, we do not see that phrase as necessarily meaning *one or the other, but not both*. Rather, that clause could also mean *either one or the other, or both in combination*. Therefore, for the reasons we have set out, we do not see that it matters—for the purpose of determining whether there is a right to apply a safeguard measure under the *Agreement on Safeguards*—whether a domestic authority finds that there is 'serious injury', 'threat of serious injury', or, as the USITC found here, 'serious injury or threat of serious injury'. In any of those events, the right to apply a safeguard is, in our view, established."[109]

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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."

[106] Panel Reports, *US – Steel Safeguards*, para. 10.320.

[107] Panel Reports, *US – Steel Safeguards*, para. 10.322.

[108] The Panel concluded that the exporting Member could not have it both ways; it needed to find either serious injury or threat. Panel Report, *US – Line Pipe*, para. 7.264.

[109] Appellate Body Report, *US – Line Pipe*, paras. 170-171.

68. The Appellate Body in *US – Line Pipe* elaborated on the difference between a "threat of serious injury" finding and a "serious injury" finding:

> "In the sequence of events facing a domestic industry, it is fair to assume that, often, there is a continuous progression of injurious effects eventually rising and culminating in what can be determined to be 'serious injury'. Serious injury does not generally occur suddenly. Present serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury, as we indicated in *US – Lamb*. Serious injury is, in other words, often the realization of a threat of serious injury. Although, in each case, the investigating authority will come to the conclusion that follows from the investigation carried out in compliance with Article 3 of the *Agreement on Safeguards*, the precise point where a 'threat of serious injury' becomes 'serious injury' may sometimes be difficult to discern. But, clearly, 'serious injury' is something *beyond* a 'threat of serious injury'.
>
> In our view, defining 'threat of serious injury' separately from 'serious injury' serves the purpose of setting a *lower threshold* for establishing the *right* to apply a safeguard measure. Our reading of the balance struck in the *Agreement on Safeguards* leads us to conclude that this was done by the Members in concluding the Agreement so that an importing Member may act sooner to take preventive action when increased imports pose a 'threat' of 'serious injury' to a domestic industry, but have not yet caused 'serious injury'. And, since a 'threat' of 'serious injury' is defined as 'serious injury' that is 'clearly imminent', it logically follows, to us, that 'serious injury' is a condition that is above that *lower threshold* of a 'threat'. A 'serious injury' is *beyond* a 'threat', and, therefore, is *above* the threshold of a 'threat' that is required to establish a right to apply a safeguard measure."[110]

69. In conclusion, the Appellate Body in *US – Line Pipe* also cited the 1947 *US – Fur Felt Hats* case, in which it noted that the Working Party had "conducted a single analysis based on the presence of serious injury or threat of serious injury, and that it did not consider it necessary to make a discrete determination of serious injury or threat of serious injury":

> "Following the *Vienna Convention* approach, we have also looked to the GATT *acquis* and to the relevant negotiating history of the pertinent treaty provisions. We have concluded that our view is reinforced by the jurisprudence under the GATT 1947. In the only relevant GATT 1947 case, *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade* ('*US – Fur Felt Hats*'), the Working Party established under the GATT 1947 was required to assess the consistency of a safeguard measure with Article XIX of the GATT 1947. The Working Party concluded that the available data presented supported the view 'that increased imports had caused or threatened some adverse effect to United States producers.' We note that the Working Party conducted a single analysis based on the presence of serious injury or threat of serious injury, and that it did not consider it necessary to make a discrete determination of serious injury or of threat of serious injury. The question of a discrete determination apparently was not an issue in that case."[111]

1.3.4 Relationship with other provisions of the Safeguards Agreement

70. The Panel in *Argentina – Footwear (EC)*, in examining whether in the case at hand there were "increased imports in the sense of Articles 2.1 and 4.2(a) of the Agreement," noted that Article 2.1 "sets forth the conditions for the application of a safeguard measure," and that Article 4.2 "sets forth the operational requirements for determining whether the conditions in Article 2.1 exist."[112] The Panel made the following statement, subsequently confirmed by the Appellate Body:

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[110] Appellate Body Report, *US – Line Pipe*, paras. 168-169.
[111] Appellate Body Report, *US – Line Pipe*, para. 174.
[112] Panel Report, *Argentina – Footwear (EC)*, para. 8.140. The Appellate Body characterized Article 2.1 as a provision which sets forth the conditions for *imposing* a safeguard measure. See para. 61 of this Section.

> "Thus, to determine whether imports have increased in 'such quantities' for purposes of applying a safeguard measure, these two provisions require an analysis of the rate and amount of the increase in imports, in absolute terms and as a percentage of domestic production."[113]

71. The Panel in *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of the GATT 1994 and with Articles 2.1, 4.1(c), and 4.2(b) of the Agreement on Safeguards, exercised judicial economy with respect to claims raised under Articles 2.2, 3.1, 5.1, 8, 11 and 12 of the Agreement on Safeguards.[114]

72. The Panel in *Argentina – Footwear (EC)* considered that, in light of its findings "concerning the investigation and the definitive measure" (the Panel had found a violation of Articles 2.1, 4.2(a), 4.2(b) and 4.2(c)), it was not necessary to make a finding concerning a claim under Article 6.[115]

1.3.5 Relationship with other WTO Agreements

1.3.5.1 GATT 1994

73. The Appellate Body in *Argentina – Footwear (EC)* rejected the conclusion of the Panel that because the clause "[i]f, as a result of unforeseen developments … concessions" in Article XIX:1(a) had been expressly omitted from Article 2.1, safeguard measures that meet the requirements of the Agreement on Safeguards will automatically also satisfy the requirements of Article XIX of the GATT 1994. The Appellate Body considered the Panel's conclusion as inconsistent with the principles of effective treaty interpretation and with the ordinary meaning of Articles 1 and 11.1(a) of the Agreement on Safeguards, and added:

> [W]e are obliged to apply the provisions of Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 *cumulatively*, in order to give meaning, by giving legal effect, to all the applicable provisions relating to safeguard measures."[116]

1.4 Article 2.2

1.4.1 Relationship with other provisions of the Safeguards Agreement

74. The Panel in *US – Lamb*, after making findings of inconsistency with Articles 2.1, 4.1(c) and 4.2(b) of the Agreement on Safeguards (and with Article XIX:1(a) of the GATT 1994), exercised judicial economy with respect to claims raised under Article 2.2 (and Articles 3.1, 5.1, 8, 11 and 12) of the Agreement on Safeguards.[117]

1.4.2 Relationship with other WTO Agreements

1.4.2.1 GATT 1994

75. The Panel in *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of the GATT 1994 (and with Articles 2.1, 4.1(c) and 4.2(b) of the Agreement on Safeguards), exercised judicial economy with respect to claims raised under Article 2.2 (and Articles 3.1, 5.1, 8, 11 and 12) of the Agreement on Safeguards.[118]

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[113] Panel Report, *Argentina – Footwear (EC)*, para. 8.141. See Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.
[114] Panel Report, *US – Lamb*, para. 7.280.
[115] Panel Report, *Argentina – Footwear (EC)*, para. 8.292.
[116] Appellate Body Report, *Argentina – Footwear (EC)*, para. 89.
[117] Panel Report, *US – Lamb*, para. 7.280.
[118] Panel Report, *US – Lamb*, para. 7.280.