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UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CERTAIN STEEL PRODUCTS

Reports of the Panel

The reports of the Panel on *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* are being circulated to all Members, pursuant to the DSU. The reports are being circulated as an unrestricted document from 11 July 2003 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/452). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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These Panel Reports shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the reports. If the Panel Reports are appealed to the Appellate Body, they shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of these Panel Reports is available from the WTO Secretariat.

In the disputes WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258 and WT/DS259, as explained in paragraph 10.725 of the Panel's Findings, the Panel decided to issue its Reports in the form of a single document constituting eight Panel Reports, each of the Reports relating to each one of the eight complainants in this dispute. The document comprises a common cover page, a common Descriptive Part and a common set of Findings in relation to the complainants' claims that the Panel decided to address. This document also contains Conclusions and Recommendations that, unlike the Descriptive Part and the Findings, are particularised for each of the complainants. Specifically, in the Conclusions and Recommendations, separate document numbers/symbols have been used for each of the complainants (WT/DS248 for the European Communities, WT/DS249 for Japan, WT/DS251 for Korea, WT/DS252 for China, WT/DS253 for Switzerland, WT/DS254 for Norway, WT/DS258 for New Zealand and WT/DS259 for Brazil). In addition, separate pagination has been used in the Conclusions and Recommendations for each individual complainant. For instance, the pagination of the Recommendations and Conclusions for the European Communities' complaint is A-1 to A-4, that for Japan is B-1 to B-4, that for Korea is C-1 to C-4, that for China is D-1 to D-4, that for Switzerland is E-1 to E-4, that for Norway is F-1 to F-4, that for New Zealand is G-1 to G-4 and that for Brazil is H-1 to H-4.

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**ABBREVIATIONS USED FOR DISPUTE SETTLEMENT CASES
REFERRED TO IN THE REPORT**

SHORT TITLE	FULL TITLE
<i>Argentina – Footwear (EC)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575.
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515.
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001.
<i>Argentina – Poultry Anti-Dumping Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003.
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003.
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327.
<i>Border Tax Adjustments</i>	Report of the Working Party on Border Tax Adjustments, adopted 2 December 1970, BISD 18S/97.
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:VIII, 3327.
<i>Canada – Periodicals</i>	Panel Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/R and Corr.1, adopted 20 July 1997, as modified by the Appellate Body Report, WT/DS31/AB/R, DSR 1997:I, 481.
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, 3 May 2002, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207/AB/R.
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001.
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591.
<i>EC – Bananas III (US)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by the United States</i> , WT/DS27/R/USA, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 943.
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031.
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002.
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002.

SHORT TITLE	FULL TITLE
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9.
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999:I, 315.
<i>Japan – Alcoholic Beverages I</i>	Panel Report, <i>Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages</i> , adopted 10 November 1987, BISD 34S/83.
<i>Japan – Alcoholic Beverages II</i>	Panel Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125.
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97.
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:1, 3.
<i>Korea – Dairy</i>	Panel Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS98/AB/R, DSR 2000:I, 49.
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3.
<i>Korea – Procurement</i>	Panel Report, <i>Korea – Measures Affecting Government Procurement</i> , WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, 3541.
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001.
<i>Turkey – Textiles</i>	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345.
<i>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
<i>US – Carbon Steel</i>	Panel Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by the Appellate Body Report, WT/DS213/AB/R and Corr.1
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002.
<i>US – Cotton Yarn</i>	Panel Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/R, adopted 5 November 2001, as modified by the Appellate Body Report, WT/DS192/AB/R.
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001.

SHORT TITLE	FULL TITLE
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003.
<i>US – FSC</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1677.
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:IV, 1619.
<i>US – Fur Felt Hats</i>	Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade, GATT/CP/106, adopted 22 October 1951.
<i>US – Gasoline</i>	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29.
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3.
<i>US – Hot-Rolled Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, WT/DS184/AB/R.
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001.
<i>US – Lamb</i>	Panel Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by the Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R.
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001.
<i>US – Line Pipe</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body Report, WT/DS202/AB/R.
<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002.
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003.
<i>US – Section 129(c)(1) URAA</i>	Panel Report, <i>United States – Section 129(c)(1) of the Uruguay Round Agreements Act</i> , WT/DS221/R, adopted 30 August 2002.
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755.
<i>US – Stainless Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea</i> , WT/DS179/R, adopted 1 February 2001.

SHORT TITLE	FULL TITLE
<i>US – Underwear</i>	Panel Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/R, adopted 25 February 1997, as modified by the Appellate Body Report, WT/DS24/AB/R, DSR 1997:I, 31.
<i>US – Underwear</i>	Appellate Body Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11.
<i>US – Wheat Gluten</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R.
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001.
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323.

LIST OF ABBREVIATIONS

AD Agreement	Anti-Dumping Agreement
AUV	Average Unit Value
BOF	Basic Oxygen Furnaces
CCFRS	Certain Carbon Flat-Rolled Steel
COGS	Costs of Goods Sold
CR	Confidential Report
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ERW	Electric Resistance Weld
FFTJ	Fittings, Flanges and Tool Joints
FTA	Free-trade areas
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
GOES	Grain Oriented Electrical Steel
HS	Harmonized System
LDLP	Large Diameter Line Pipe
MFN	Most-Favoured Nation
NAFTA	North American Free Trade Agreement
OCTG	Oil Country Tubular Goods
PR	Public Report
SCM Agreement	Subsidies and Countervailing Measures Agreement
SG&A	Selling, General and Administrative
TPSC	Trade Policy Staff Committee
USITC	United States International Trade Commission
USTR	United States Trade Representative
VRA	Voluntary Restriction Agreement

I. INTRODUCTION

A. FACTUAL BACKGROUND

1. Initiation of safeguards investigation by the USITC

1.1 On 22 June 2001, the USTR requested the initiation of a safeguard investigation under Section 201 of the Trade Act of 1974 to determine whether certain steel products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing products like or directly competitive with the imported products.¹

1.2 Four broad groups of products were covered by this request:

- (a) certain carbon and alloy flat products;
- (b) certain carbon and alloy long products;
- (c) certain carbon and alloy pipe and tubes;
- (d) stainless steel and alloy tool steel products.²

1.3 A number of products were excluded from the request. These included wire rod and line pipe (covered by existing Section 201 relief or specifically excluded in the Section 201 relief), certain OCTGs, certain stainless steel products, certain semi-finished steel products, certain carbon and alloy flat-rolled products and certain tin mill flat-rolled products.³

1.4 The USITC initiated its investigation on 28 June 2001. Public notice of this investigation was published on 3 July 2001.⁴ It provided for hearings on injury commencing on 17 September 2001 and hearings on remedy commencing on 5 November 2001 and allowed for submissions of pre- and post-hearing briefs by interested parties.

1.5 The United States notified the initiation of the safeguard investigation to the Committee on Safeguards on 4 July 2001 and this notification was circulated to WTO Members on 9 July 2001.⁵

2. USITC injury determination

1.6 Pre-hearing briefs on injury were filed by 10 September 2001 and hearings took place from 17 September 2001 to 5 October 2001. Post-hearing briefs were allowed from 27 September 2001 to 9 October 2001 for the various steel products under investigation.

1.7 To collect data, the USITC split the four broad product categories into 33 product classes.⁶

¹ USTR request to the USITC to initiate a safeguard investigation under Section 201 of the Trade Act of 1974, Exhibit CC-1.

² Ibid., Annex I.

³ Ibid., Annex II.

⁴ USITC, Institution and Scheduling of Investigation, Investigation No. TA-201-73, Federal Register Vol. 66 of 3 July 2001, p. 35267, Exhibit CC-2.

⁵ Notification under Article 12.1(a) of the Agreement on Safeguards on initiation of an investigation and the reasons for it (G/SG/N/6/USA/10 of 9 July 2001), Exhibit CC-3.

- (a) seven carbon and alloy flat products⁷ covering: (i) slabs; (ii) plate; (iii) hot-rolled steel; (iv) cold-rolled steel; (v) coated steel; (vi) GOES; (vii) tin- mill products;
- (b) ten carbon and alloy long products⁸ comprising: (i) billets; (ii) hot-rolled bar; (iii) cold-finished bar; (iv) rebar; (v) rails; (vi) heavy structural shapes; (vii) fabricated units; (viii) wire; (ix) nails, staples and woven cloth; (x) strand, rope, cable and cordage;
- (c) five carbon and alloy pipe and tube⁹ divided into: (i) welded pipe; (ii) seamless pipe; (iii) welded OCTG; (iv) seamless OCTG; (v) fittings, flanges and tool joints;
- (d) 11 stainless steel and alloy tool steel products¹⁰ classified in: (i) slabs; (ii) plate; (iii) bar; (iv) rod; (v) wire; (vi) cloth; (vii) seamless tubular products; (viii) welded tubular products; (ix) fittings and flanges; (x) tool steel; (xi) rope.

1.8 From the 33 products sub-categories for which data had been collected, the USITC defined 27 separate domestic industries. These were:

- (a) three domestic industries producing carbon and alloy flat products: (i) certain carbon flat-rolled steel (comprising slabs, plate, hot-rolled, cold-rolled and coated products); (ii) GOES; (iii) tin mill products¹¹;
- (b) ten domestic industries producing carbon and alloy long products comprising: (i) billets; (ii) hot-rolled bar; (iii) cold-finished bar; (iv) rebar; (v) rails; (vi) heavy structural shapes; (vii) fabricated units; (viii) wire; (ix) nails, staples and woven cloth; (x) strand, rope, cable and cordage (including stainless steel rope)¹²;
- (c) four domestic industries producing carbon and alloy pipe and tube split into: (i) welded pipe; (ii) seamless pipe; (iii) OCTG both welded and seamless; (iv) fittings, flanges and tool joints¹³;
- (d) ten domestic industries producing stainless steel products divided into: (i) semi finished products (slabs, blooms, billets and ingots); (ii) plate; (iii) bar; (iv) rod; (v) wire; (vi) cloth; (vii) seamless tubular products; (viii) welded tubular products; (ix) fittings and flanges; (x) tool steel.¹⁴

⁶ USITC, Certain Steel Products, Inv. No. TA-201-73, USITC Pub. 3479 (Dec. 2001): Volume I – Determinations and Views of the Commissioners; (hereinafter USITC Report, Vol. I"), Exhibit CC-6, p. 32, footnote 40 and p. 36, footnote 62.

⁷ USITC Report, Vol. I, Appendix A, pp. 9 and 10, Descriptions and Harmonized Tariff Schedules (HTS) subheadings.

⁸ USITC Report, Vol. I, Appendix A, pp. 11 to 13, Descriptions and Harmonized Tariff Schedules (HTS) subheadings.

⁹ USITC Report, Vol. I, Appendix A, pp. 13 and 14, Descriptions and Harmonized Tariff Schedules (HTS) subheadings.

¹⁰ USITC Report, Vol. I, Appendix A, pp. 14 to 16, Descriptions and Harmonized Tariff Schedules (HTS) subheadings.

¹¹ USITC Report, Vol. I, p. 36.

¹² USITC Report, Vol. I, p. 79.

¹³ USITC Report, Vol. I, p. 147.

¹⁴ USITC Report, Vol. I, p. 190.

1.9 On 22 October 2001, the USITC voted on injury and made negative determinations for the following 15 product groups (based on the 33 product categories it had investigated):

- (a) for carbon and alloy billets, imports have not increased¹⁵;
- (b) for 13 products comprising: (i) carbon and alloy GOES¹⁶; (ii) rails¹⁷; (iii) heavy structural shapes¹⁸; (iv) fabricated units¹⁹; (v) wire²⁰; (vi) nails, staples and woven cloth²¹; (vii) strand, rope, cable and cordage (including stainless steel rope)²²; (viii) seamless pipe²³; (ix) OCTG (including seamless and welded)²⁴; (x) stainless steel slabs²⁵ (xi) plate²⁶; (xii) cloth²⁷; (xiii) seamless tubular products²⁸ and (xiv) welded tubular products²⁹; there was no injury;

1.10 The United States notified these negative determinations to the Committee on Safeguards on 26 October 2001 and this notification was circulated to WTO Members on 1 November 2001.³⁰

1.11 The USITC made affirmative injury determinations for eight of these product groups:

- (a) for seven products, including (1) certain carbon flat-rolled steel³¹, (2) carbon and alloy hot-rolled bar³², (3) carbon and alloy cold-finished bar³³, (4) carbon and alloy rebar³⁴, (5) carbon and alloy fittings, flanges and tool joints³⁵, (6) stainless steel bar³⁶ and (7) stainless steel rod³⁷, imports were a substantial cause of serious injury;
- (b) for carbon and alloy welded pipe, imports were a substantial cause of threat of serious injury³⁸;

1.12 For four products, the USITC delivered divided determinations:³⁹

¹⁵ USITC Report, Vol. I, p. 117.

¹⁶ USITC Report, Vol. I, p. 67.

¹⁷ USITC Report, Vol. I, p. 118.

¹⁸ USITC Report, Vol. I, p. 122.

¹⁹ USITC Report, Vol. I, p. 127.

²⁰ USITC Report, Vol. I, p. 132.

²¹ USITC Report, Vol. I, p. 142.

²² USITC Report, Vol. I, p. 136.

²³ USITC Report, Vol. I, p. 186.

²⁴ USITC Report, Vol. I, p. 181.

²⁵ USITC Report, Vol. I, p. 224.

²⁶ USITC Report, Vol. I, p. 228.

²⁷ USITC Report, Vol. I, p. 239.

²⁸ USITC Report, Vol. I, p. 242.

²⁹ USITC Report, Vol. I, p. 246.

³⁰ Information to be notified to the Committee where a safeguard investigation is terminated with no safeguard measure imposed (G/SG/N/9/USA/4 of 1 November 2001), Exhibit CC-4.

³¹ USITC Report, Vol. I, p. 55.

³² USITC Report, Vol. I, p. 95.

³³ USITC Report, Vol. I, p. 104.

³⁴ USITC Report, Vol. I, p. 111.

³⁵ USITC Report, Vol. I, p. 174.

³⁶ USITC Report, Vol. I, p. 208.

³⁷ USITC Report, Vol. I, p. 217.

³⁸ USITC Report, Vol. I, p. 158.

- (a) for carbon and alloy tin mill products, three Commissioners found that imports were not a substantial cause of injury⁴⁰, whereas three Commissioners ruled the opposite⁴¹;
- (b) for stainless steel wire, three Commissioners found no injury⁴², two Commissioners found that imports were a substantial cause of threat of serious injury⁴³ and one Commissioner found that imports were a substantial cause of serious injury⁴⁴;
- (c) for stainless steel fittings and flanges, three Commissioners found no injury⁴⁵, but three Commissioners found that imports were a substantial cause of serious injury⁴⁶;
- (d) for stainless steel tool steel, three Commissioners found no injury⁴⁷, two Commissioners found that imports were a substantial cause of serious injury⁴⁸ and one Commissioner found that imports were a substantial cause of threat of serious injury⁴⁹;

1.13 The United States notified these affirmative and divided determinations to the Committee on Safeguards on 26 October 2001 and this notification was circulated on 1 November 2001.⁵⁰

3. Remedy recommendation by the USITC

1.14 On 26 October 2001, the TPSC requested public comments on potential safeguard action on imports of certain steel products, including the possibility to request products exclusions.⁵¹

1.15 Pre-hearing briefs on remedy were filed by 29 October 2001 and hearings on remedy took place from 6 to 9 November 2001. Post-hearing briefs were allowed from 13 to 15 November 2001 for the various steel products under investigation.

1.16 On 19 December 2001, the USITC forwarded its remedy recommendations, together with its injury determinations, in its report to the US President.

³⁹ Under United States' law, when the USITC vote is equally divided, both the affirmative and the negative determinations are forwarded to the President and he may consider either one to be the determination of the USITC.

⁴⁰ USITC Report, Vol. I, p. 74.

⁴¹ USITC Report, Vol. I, dissenting opinion of Commissioner Devaney, reflected in p. 36, footnote 64, p. 48, footnote 63 and p. 55, footnote 224; separate views on injury of Commissioner Bragg, p. 295; separate and dissenting views of Commissioner Miller on injury with respect to tin mill products, p. 307.

⁴² USITC Report, Vol. I, p. 235.

⁴³ USITC Report, Vol. I, separate views of Chairman Koplan on injury, pp. 255 and 258 and separate views on injury of Commissioner Bragg, p. 302.

⁴⁴ USITC Report, Vol. I, separate views of Commissioner Devaney on injury, pp. 342 and 345.

⁴⁵ USITC Report, Vol. I, p. 250.

⁴⁶ USITC Report, Vol. I, separate views of Chairman Koplan on injury, pp. 255 and 266; separate views on injury of Commissioner Bragg, p. 303; separate views of Commissioner Devaney on injury, pp. 347 and 350.

⁴⁷ USITC Report, Vol. I, p. 231.

⁴⁸ USITC Report, Vol. I, separate views on injury of Commissioner Bragg, p. 301; separate views of Commissioner Devaney on injury, pp. 336 and 340.

⁴⁹ USITC Report, Vol. I, separate views of Chairman Koplan on injury, pp. 255 and 262.

⁵⁰ Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports (G/SG/N/8/USA/8 of 1 November 2001), Exhibit CC-5.

⁵¹ Public Comments on Potential Action Under Section 203 of the Trade Act of 1974 With Regard to Imports of Certain Steel, Federal Register, Vol. 66, No. 208, 26 October 2001, p. 54312.

1.17 For the eight products for which affirmative injury determinations had been made, the USITC recommended a four-year programme of tariffs and tariff-rate quotas:⁵²

- (a) an additional duty of 20% *ad valorem*, to be reduced to 17% the second year, 14% the third year and 11% the fourth year for: (i) certain carbon flat-rolled steel (excluding slabs); (ii) carbon and alloy hot-rolled bar; (iii) carbon and alloy cold-finished bar; and (iv) stainless steel rod;
- (b) an additional duty of 15% *ad valorem*, to be reduced to 12% the second year, 9% the third year and 6% the fourth year for (v) stainless steel bar;
- (c) an additional duty of 13% *ad valorem*, to be reduced to 10% the second year, 7% the third year and 4% the fourth year for (vi) carbon and alloy fittings, flanges and tool joints;
- (d) an additional duty of 10% *ad valorem*, to be reduced to 8% the second year, 6% the third year and 4% the fourth year for (vii) carbon and alloy rebar;
- (e) a tariff-rate quota with an additional duty on imports in excess of year 2000 United States imports of 20% *ad valorem*, to be reduced to 17% the second year, 14% the third year and 11% the fourth year for (viii) carbon and alloy welded pipe;
- (f) a tariff-rate quota with an additional duty of 20% *ad valorem* on imports in excess of 7 million short tons, to be reduced to 17% for imports in excess of 7.5 million short tons the second year, 14% for imports in excess of 8 million short tons the second year and 11% for imports in excess of 8.5 million short tons the second year for (ix) slabs.

1.18 In addition, the USITC recommended that the remedy on certain carbon flat-rolled steel (including slabs) apply to Mexico but not to Canada, the remedy on carbon and alloy hot-rolled bar, cold-finished bar and stainless steel bar apply to Canada but not Mexico, the remedy on carbon and alloy rebar and stainless steel rod not apply to either Canada or Mexico and the remedy on carbon and alloy fittings, flanges and tool joints apply to both Canada and Mexico. The USITC recommended that the remedy on carbon and alloy welded pipe not apply to Mexico but was equally divided concerning its application to Canada.⁵³

1.19 The USITC further recommended that no remedy apply to Israel, to beneficiaries of the Caribbean Basin Economic Recovery Act, the Andean Trade Preference Act, or to Jordan.⁵⁴

1.20 The USITC finally recommended that the remedy on carbon and alloy welded pipe not apply to certain large diameter products, as primary producers of these products did not object to such exclusion.⁵⁵

1.21 Dissenting opinions on remedy from some Commissioners proposed higher additional duty rates (up to 40%)⁵⁶ or three year programme of quotas, as well as other treatment in respect of imports from Canada and Mexico.⁵⁷

⁵² USITC Report, Vol. I, pp. 2 and 3.

⁵³ USITC Report, Vol. I, p. 3.

⁵⁴ USITC Report, Vol. I, p. 3.

⁵⁵ USITC Report, Vol. I, pp. 3, 378 and 379.

4. Request for supplementary information

1.22 Following issuance of the USITC Report, the United States submitted to the Committee on Safeguards a supplementary notification regarding the USITC determinations with respect to serious injury or threat thereof to the domestic industry producing certain steel products.⁵⁸ In this notification, the USITC recommendations were referred to as "proposed measures".

1.23 On 3 January 2002, the USTR requested additional information from the USITC on: (i) unforeseen developments; (ii) economic analysis of remedy options; and (iii) injury for imports from all sources other than Canada and Mexico for the products for which the USITC recommended the application of the remedy to Canada and/or Mexico.⁵⁹

1.24 This request for additional information was notified to the Committee on Safeguards on 15 January 2002 and the notification was circulated to WTO Members on 15 January 2002.⁶⁰

1.25 The USITC produced supplementary information on the economic analysis of remedy options on 9 January 2002⁶¹ and on unforeseen developments and on injury for imports from all sources other than Canada and/or Mexico on 4 February 2002.⁶²

1.26 On 14 March 2002, the United States notified the Committee on Safeguards that copies of the public versions of the supplementary information provided by the USITC were available for review in the Secretariat of the WTO and this supplementary notification was circulated on 18 March 2002.⁶³

5. Trade Policy Staff Committee actions

1.27 In addition to the information requested of the USITC, the USTR conducted its own separate investigation through the multi-agency TPSC.

1.28 On 26 October 2001, before the USITC finished its investigation, the TPSC requested public comments on the potential safeguard action on imports of certain steel products, including domestic producers' written proposals on adjustment actions, requests to exclude products, and what action (if

⁵⁶ USITC Report, Vol. I, pp. 3 and 4.

⁵⁷ USITC Report, Vol. I, p. 5.

⁵⁸ Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports (G/SG/N/8/USA/8/Suppl. 1 of 7 January 2002), Exhibit CC-8.

⁵⁹ Letter from Mr. R. B. Zoellick to Mr. S. Koplan, 3 January 2002 (USTR supplementary information request), Exhibit CC-7.

⁶⁰ Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports (G/SG/N/8/USA/8/Suppl. 2, 15 January 2002), Exhibit CC-9.

⁶¹ USITC supplementary information on the economic analysis of remedy options on 9 January 2002, Exhibit CC-10 (hereinafter referred to as First Supplementary Report).

⁶² USITC supplementary information on unforeseen developments and "affirmative" injury determination for imports from all sources other than Canada and/or Mexico on 4 February 2002, Exhibit CC-11 (hereinafter referred to as Second Supplementary Report).

⁶³ Notification pursuant to Article 12.1(c) and Article 9, Footnote 2, of the Agreement on Safeguards on taking a decision to apply a safeguard measure (G/SG/10/USA/6/Suppl. 2 and G/SG/11/USA/5/Suppl. 2, 18 March 2002), Exhibit CC-12.

any) the President should take in response to affirmative injury and remedy findings by the USITC.⁶⁴ Written comments in response to these submissions were also permitted.

1.29 In addition, during January 2002, the TPSC held a series of meetings with various parties. The meetings were scheduled informally, via e-mail correspondence, and conducted informally. Unlike the USITC hearings, opposing parties were not present and no formal transcript was maintained. Rather, parties met individually with TPSC staff from as many as fifteen federal agencies to summarize their positions and answer questions.

6. Presidential Proclamation

1.30 Under Proclamation No. 7529 of 5 March 2002, bearing the title "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products", completed by a Memorandum for the Secretary of Treasury, the Secretary of Commerce and the USTR, the US President imposed definitive safeguard measures on imports of certain steel products.⁶⁵

1.31 The United States notified these definitive safeguard measures and Proclamation No. 7529 to the Committee on Safeguards on 12 March 2002 and these notifications were circulated to WTO Members on 14 and 15 March 2002.⁶⁶

1.32 The products concerned by these definitive safeguard measures are not only those for which the USITC reached affirmative determinations, but also two of the four products for which the USITC made divided determinations.

1.33 On 26 March 2002, the United States made a supplementary notification to the Committee on Safeguards under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports for carbon and alloy tin mill products and stainless steel wire. In the same notification, the United States provided supplementary information to be notified where a safeguard investigation is terminated with no safeguard measure imposed with respect to stainless steel tool steel and stainless steel flanges and fittings.⁶⁷

1.34 Proclamation No. 7529 lists 11 distinct safeguard measures applicable to 15 steel products. These measures are:

⁶⁴ Trade Policy Staff Committee: Public Comments on Potential Action Under Section 203 of the Trade Act of 1974 With Regard to Imports of Certain Steel, 66 Fed. Reg. 54312, 54323 (26 Oct. 2001) (Exhibit CC-59).

⁶⁵ Proclamation No. 7529 of 5 March 2002, "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products", Federal Register, Vol. 67, No. 45, 7 March 2002, p. 10553; Memorandum for the Secretary of Treasury, the Secretary of Commerce and the USTR of 5 March 2002 on the "Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products by the President of the United States of America", Federal Register Vol. 67, No. 45 of 7 March 2002, p. 10593, Exhibit CC-13.

⁶⁶ Notifications pursuant to Article 12.1(c) and Article 9, Footnote 2, of the Agreement on Safeguards on taking a decision to apply a safeguard measure (G/SG/10/USA/6 and G/SG/11/USA/5, 14 March 2002 and G/SG/10/USA/6/Suppl. 1 and G/SG/11/USA/5/Suppl. 1, 15 March 2002). Exhibit CC-14. Two corrigenda were notified on 18 March 2002 (G/SG/N/10/USA/6/Corr.1 and G/SG/N/11/USA/5/Corr.1, 20 March 2002 and G/SG/N/10/USA/6/Corr.2 and G/SG/N/11/USA/5/Corr.2, 25 March 2002), Exhibit CC-15.

⁶⁷ Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports and Information to be notified to the Committee where a safeguard investigation is terminated with no safeguard measure imposed (G/SG/N/8/USA/8/Suppl. 3 and G/SG/N/9/USA/4/Suppl. 1, 28 March 2002), Exhibit CC-16.

- (a) A tariff of 30% imposed on imports of "Certain Flat Steel"⁶⁸ other than Slabs", that is: (i) plate⁶⁹; (ii) hot-rolled steel⁷⁰; (iii) cold-rolled steel⁷¹; (iv) coated steel.⁷²
- (b) A tariff rate quota on the fifth product of the product group "Certain Flat Steel", that is slabs.⁷³ The out-of-quota tariff (applicable beyond 5.4 million short tons) is 30%.
- (c) A tariff of 30% is imposed on imports of tin mill products⁷⁴;
- (d) A tariff of 30% is imposed on imports of hot-rolled bar⁷⁵;
- (e) A tariff of 30% is imposed on imports of cold-finished bar⁷⁶;
- (f) A tariff of 15% is imposed on imports of rebar⁷⁷;
- (g) A tariff of 15% is imposed on imports of certain tubular products⁷⁸;
- (h) A tariff of 13% is imposed on imports of carbon and alloy fittings and flanges⁷⁹;
- (i) A tariff of 15% is imposed on imports of stainless steel bar⁸⁰;
- (j) A tariff of 8% is imposed on imports of stainless steel wire⁸¹;
- (k) A tariff of 15% is imposed on imports of stainless steel rod.⁸²

⁶⁸ This category comprises slabs, plate, hot-rolled, cold-rolled and coated steel and is referred to elsewhere in this Report as certain carbon flat-rolled steel (CCFRS).

⁶⁹ As defined in the superior text to subheadings 9903.72.50 through 9903.72.60 in the Annex to the Proclamation.

⁷⁰ As defined in the superior text to subheadings 9903.72.62 through 9903.72.77 in the Annex to the Proclamation.

⁷¹ As defined in the superior text to subheadings 9903.72.80 through 9903.72.98 in the Annex to the Proclamation.

⁷² As defined in the superior text to subheadings 9903.72.99 through 9903.73.14 in the Annex to the Proclamation.

⁷³ As defined in the superior text to subheadings 9903.72.30 through 9903.72.48 in the Annex to the Proclamation.

⁷⁴ As defined in the superior text to subheadings 9903.73.15 through 9903.73.27 in the Annex to the Proclamation.

⁷⁵ As defined in the superior text to subheadings 9903.73.28 through 9903.73.38 in the Annex to the Proclamation.

⁷⁶ As defined in the superior text to subheadings 9903.73.39 through 9903.73.44 in the Annex to the Proclamation.

⁷⁷ As defined in the superior text to subheadings 9903.73.45 through 9903.73.50 in the Annex to the Proclamation.

⁷⁸ As defined in the superior text to subheadings 9903.73.51 through 9903.73.62 in the Annex to the Proclamation.

⁷⁹ As defined in the superior text to subheadings 9903.73.66 through 9903.73.72 in the Annex to the Proclamation.

⁸⁰ As defined in the superior text to subheadings 9903.73.74 through 9903.73.81 in the Annex to the Proclamation.

⁸¹ As defined in the superior text to subheadings 9903.73.91 through 9903.73.96 in the Annex to the Proclamation

1.35 The safeguard measures were effective from 20 March 2002 at 12:01 a.m., EST.⁸³ Nevertheless, the US President instructed the Secretary of Treasury to prescribe by regulation a date at which estimated duties should be deposited.

1.36 Accordingly, on 20 March 2002, the United States Customs Services published a notice⁸⁴ indicating that the deposit of estimated duties on imports would be deferred until 19 April 2002. This did not affect collection of duties with effect from the entry into force of Proclamation No. 7529. This notice was notified to the Committee on Safeguards on 26 March 2002 and this notification was circulated on 27 March 2002⁸⁵ (Exhibit CC-17).

7. Country exclusions

1.37 On the basis of the Supplementary Report of the USITC of 4 February 2002, the US President decided to exclude imports from Canada and Mexico from all the safeguard measures.⁸⁶ Imports from Israel and Jordan were also excluded.⁸⁷

1.38 Imports from developing Members of the WTO, whose share of total imports allegedly does not exceed 3% individually and 9% collectively, were exempted from the safeguard measures. On this basis, the following imports were not excluded from the safeguard measures:⁸⁸

- (a) Slabs and certain flat steel from Brazil;
- (b) Carbon and alloy fittings and flanges from India, Romania and Thailand;
- (c) Carbon and alloy rebar from Moldova, Turkey and Venezuela;
- (d) Certain tubular products from Thailand.

8. Product exclusions

1.39 In addition to the exclusions mentioned in the request to initiate a safeguard investigation of 22 June 2002 and accounted for in the scope of the definitive safeguard measures⁸⁹, Proclamation No. 7529 provided for additional products exclusions.⁹⁰ These additional exclusions did not only concern certain tubular products of large diameter, for which the USITC recommended not to apply any safeguard action⁹¹, but also a large number of other products.⁹²

⁸² As defined in the superior text to subheadings 9903.73.83 through 9903.73.89 in the Annex to the Proclamation.

⁸³ Proclamation, clause (8).

⁸⁴ Notice on payment of duties on certain steel products, Federal Register Vol. 67, No. 54, 20 March 2002, p. 12860.

⁸⁵ Notifications pursuant to Article 12.1(c) and Article 9, Footnote 2, of the Agreement on Safeguards on taking a decision to apply a safeguard measure (G/SG/10/USA/6/Suppl. 3 and G/SG/11/USA/5/Suppl. 3, 27 March 2002), Exhibit CC-17. This notification also comprised technical corrections to the Annex to Proclamation No. 7529.

⁸⁶ Proclamation, para. 8.

⁸⁷ Proclamation, para. 11.

⁸⁸ Proclamation, para. 12 and Annex to the Proclamation, para. 11. (d).

⁸⁹ Annex to the Proclamation, para. 11. (b) (i) to (ix).

⁹⁰ Annex to the Proclamation, pp. 10558 to 10592 of the Federal Register, para. 11. (b), Exhibit CC-13.

⁹¹ Annex to the Proclamation, para. 11.(b)(xlviii)(A) to (G), reflecting the USITC Report, Vol. I, pp. 378 and 379, footnote 123.

1.40 The United States President further instructed the USTR to determine whether particular products should be excluded and, if so, within 120 days of the date of the Proclamation (not later than 3 July 2002), to publish a notice in the Federal Register to exclude them from the safeguard measures.⁹³

1.41 In this context, on 5 April 2002, the USTR decided to exclude particular products from the safeguard action.⁹⁴ This decision was notified to the Committee on Safeguards on 11 April 2002 and this notification was circulated to WTO Members on 12 April 2002.⁹⁵

1.42 On 18 April 2002, the USTR specified the procedures to be applied to further consider remaining exclusions requests.⁹⁶ Requestors and objectors were directed to file standardized questionnaires, respectively by 23 April 2002 and 13 May 2002. New exclusions requests were allowed by 20 May 2002.

1.43 On 21 May 2002, the USTR indicated that the same procedures would apply with respect to new exclusions requests filed by 20 May 2002.⁹⁷ On 3 June 2002, the USTR further explained that the same procedures would apply in the annual review process through which future new exclusion requests would be accepted.⁹⁸

1.44 On this basis, the USTR published the list of exclusion requests filed before 5 March 2002 on 23 April 2002 and a first list of 150 new exclusion requests on 5 June 2002, a second list of 134 new exclusion requests on 14 June 2002, a third list of 135 new exclusion requests on 19 June 2002 and a fourth list of new exclusion requests on 27 June 2002.

1.45 The USTR also released a first list of exclusions concerning 61 products on 7 June 2002, a second list of exclusions for 47 products on 17 June 2002 and a third list of exclusions relating to 116 products on 24 June 2002.

⁹² Annex to the Proclamation, para. 11.(b)(x)to (xlvi) and (xlvii).

⁹³ Annex to the Proclamation, para. 11. (c) and Memorandum, Federal Register, Vol. 67, No. 45, 7 March 2002, p. 10596.

⁹⁴ Exclusion of Particular Products From Actions Under Section 203 of the Trade Act of 1974 With Regard to Certain Steel Products; and Conforming Changes to the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 67, No. 65, 5 April 2002, p. 16484.

⁹⁵ Notifications pursuant to Article 12.1(c) and Article 9, Footnote 2 of the Agreement on Safeguards on taking a decision to apply a safeguard measure (G/SG/10/USA/6/Suppl. 4 and G/SG/11/USA/5/Suppl. 4, 12 April 2002), Exhibit CC-18.

⁹⁶ Procedures for Further Consideration of Requests for Exclusions of Particular products from Actions With Regard to Certain Steel products Under Section 203 of the Trade Act of 1974, as Established in the Presidential Proclamation 7529 of March 5, 2002, Federal Register, Vol. 67, No. 75, 18 April 2002, p. 19307, Exhibit CC-19.

⁹⁷ Procedures for Consideration of New Requests for Exclusions of Particular Products from Actions With Regard to Certain Steel products Under Section 203 of the Trade Act of 1974, as Established in the Presidential Proclamation 7529 of 5 March 2002, Federal Register, Vol. 67, No. 98, 21 May 2002, p. 35842, Exhibit CC-20.

⁹⁸ New Requests for Exclusions of Particular products from Actions With Regard to Certain Steel products Under Section 203 of the Trade Act of 1974, as Established in the Presidential Proclamation 7529 of 5 March 2002; Information Collection and Procedures for Consideration, Federal Register, Vol. 67, No. 106, 3 June 2002, p. 38301, Exhibit CC-21.

1.46 By the deadline of 3 July 2002 provided for in Proclamation No. 7519 to consider pending exclusion requests, the President issued a new Proclamation⁹⁹, further extending this deadline until 31 August 2002. The three lists of product exclusions previously released were annexed to that Proclamation.

1.47 On 8 July, the USTR published a fifth list of 82 new exclusion requests. The USTR also released a fourth list of exclusions comprising 23 products on 11 July 2002 and a fifth list of exclusions concerning 14 products on 19 July 2002. The latest product specific exclusions were granted on 22 August 2002.¹⁰⁰

II. WTO PROCEDURAL ASPECTS

A. CONSULTATIONS UNDER ARTICLE 12.3 OF THE AGREEMENT ON SAFEGUARDS

2.1 In its notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports of 28 December 2001, the United States offered to consult with Members of the WTO having a substantial interest as exporters of one or more of the products covered by the investigation.¹⁰¹

2.2 Brazil, the European Communities, Korea and New Zealand requested consultations with the United States under Article 12.3 of the Agreement on Safeguards, but each reserving their right to further consultations once the actual measures had been imposed.

2.3 In Proclamation No. 7529, the US President instructed the USTR to conduct, prior to the date of effective application of the definitive safeguard measures, consultations under Article 12.3 of the Agreement on Safeguards with any Member of the WTO having a substantial interest as an exporter of a product subject to the safeguard measures.¹⁰² Korea requested consultations on 27 February 2002. The consultations took place in Washington, D.C. on 15 March 2002. On 6 March 2002, Japan requested consultations. These consultations took place in Washington D.C. on 14 March 2002. On 7 March, New Zealand and the European Communities requested consultations and Brazil made its request on 11 March 2002. All three sets of consultations were held in Geneva on 19 March 2002. Subsequently, on 12, 18 and 26 March 2002, Norway, China and Switzerland respectively also requested consultations with the United States. The consultations with Norway and China were held on 25 March and 22 March 2002 respectively, in Washington D.C., and the consultations with Switzerland were held in Geneva on 12 April 2002.

B. DISPUTE SETTLEMENT CONSULTATIONS

2.4 On 7 March 2002, the European Communities initiated the procedures under Article 4 of the DSU, Article XXII:1 of the GATT 1994 and Article 14 of the Agreement on Safeguards by requesting the United States to enter into dispute settlement consultations.¹⁰³ Similar requests were made by

⁹⁹ Proclamation No. 7576 of 3 July 2002, To Provide for the Efficient and Fair Administration of Safeguard Measures on Imports of Certain Steel Products, Federal Register, Vol. 67, No. 130, 8 July 2002, p. 45285.

¹⁰⁰ Fact sheet: Exclusion of products from safeguard on steel products, 22 August 2002, Exhibit CC-91; List of additional products to be excluded from the Section 201 safeguards measures, as established in Presidential Proclamation 7529 of 5 March 2002, August 22, 2002, Exhibit CC-92.

¹⁰¹ G/SG/N/8/USA8/Suppl.1, 7 January 2002.

¹⁰² Memorandum, Federal Register, Vol. 67, No. 45, 7 March 2002, p. 10596 (Exhibit CC-13).

¹⁰³ See document WT/DS 248/1

Japan¹⁰⁴ and Korea¹⁰⁵ on 20 March 2002. China¹⁰⁶, Switzerland¹⁰⁷ and Norway¹⁰⁸ also requested consultations with the United States on 26 March, 3 and 4 April 2002 respectively. Consultations were held in Geneva on 11-12 April 2002 jointly with the European Communities, Japan, Korea, China, Switzerland and Norway.

2.5 New Zealand¹⁰⁹ and Brazil¹¹⁰ later requested dispute settlement consultations with the United States on 14 and 21 May 2002 respectively. These consultations took place in Geneva on 13 June 2002.

C. SINGLE PANEL UNDER ARTICLE 9.1 OF THE DSU

2.6 Given that none of the dispute settlement consultations succeeded in resolving the dispute, the parties proceeded separately to request the establishment of panels to examine the issues arising from the consultations.

2.7 In accordance with Article 6 of the DSU, the DSB established multiple panels to examine similar matters raised by the complainants:

- (a) The European Communities was the first to present a request for the establishment of a panel.¹¹¹ The first panel to address this request was set up on 3 June 2002.
- (b) Japan and Korea requested the establishment of a panel.¹¹² The United States opposed these requests at the special meeting of the DSB held on 3 June 2002. However, a single panel was established under Article 9.1 of the DSU at the special meeting of the DSB held on 14 June 2002 to consider the requests made by Japan, Korea and, previously, by the European Communities.
- (c) China, Switzerland and Norway requested the establishment of a panel on 27 May and 3 June 2002.¹¹³ The United States opposed China's first panel request at the special DSB meeting of 7 June 2002 and did the same with Switzerland's and Norway's first panel requests at the special meeting of the DSB of 14 June 2002. Requests made by China, Switzerland and Norway were accepted at the special meeting of the DSB of 24 June 2002. Under Article 9.1 of the DSU, these requests were referred to the single panel already established to consider the requests made by the European Communities, Japan and Korea.

2.8 A procedural agreement was concluded on 27 June 2002 between, on the one hand, the European Communities, Japan, Korea, China, Switzerland, Norway and New Zealand and, on the other hand, the United States.¹¹⁴ Pursuant to this procedural agreement, the United States accepted the

¹⁰⁴ WT/DS249/1.

¹⁰⁵ WT/DS251/1.

¹⁰⁶ WT/DS252/1.

¹⁰⁷ WT/DS253/1.

¹⁰⁸ WT/DS254/1.

¹⁰⁹ WT/DS258/1.

¹¹⁰ WT/DS259/1.

¹¹¹ WT/DS248/12.

¹¹² WT/DS249/6 and WT/DS251/7 respectively.

¹¹³ WT/DS252/5, WT/DS253/5 and WT/DS254/5 respectively.

¹¹⁴ WT/DS248/13, WT/DS249/7, WT/DS251/8, WT/DS252/6, WT/DS253/6, WT/DS254/6, WT/DS258/10.

shortening of the 60-day period for consultations under Article 4.7 of the DSU and the establishment of the panel pursuant to the first request presented by New Zealand, as well as the establishment of a single panel under Article 9.1 of the DSU for all the complainants involved. In return, the complainants agreed not to ask the Director-General to appoint the panelists before 15 July 2002 and agreed on longer time limits for submissions.

2.9 As noted above, New Zealand and Brazil had also requested dispute settlement consultations with the United States on 14 and 21 May 2002 respectively. These consultations took place in Geneva on 13 June 2002.

2.10 New Zealand requested the establishment of a panel on 28 June 2002.¹¹⁵ The United States accepted this first panel request at the special meeting of the DSB of 8 July 2002. Under Article 9.1 of the DSU, this request was also referred to the single panel already established to consider the requests presented by the European Communities, Japan, Korea, China, Switzerland and Norway.

2.11 On 18 July 2002, a procedural agreement was also concluded between Brazil and the United States.¹¹⁶ Under this agreement, the United States accepted the shortening of the 60-day period for consultations and the establishment of a panel pursuant to the first request presented by Brazil.¹¹⁷ Both Brazil and the United States also accepted that, in accordance with Article 9.1 of the DSU, their dispute would be referred to the panel that had already been established to consider the requests of the European Communities, Japan, Korea, China, Switzerland, Norway and New Zealand.

2.12 Pursuant to the two agreements between the parties referred to above and in accordance with Article 9.1 of the DSU, the DSB agreed that all these disputes would proceed according to one single panel, whose mandate would be to examine all the requests for a panel mentioned above.¹¹⁸

2.13 This single Panel was established with the following standard terms of reference:

"To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities, Japan, Korea, China, Switzerland, Norway, New Zealand and Brazil in documents WT/DS248/12, WT/DS249/6, WT/DS251/7, WT/DS252/5, WT/DS253/5, WT/DS254/5, WT/DS258/9 and WT/DS259/10, the matter referred to the DSB by the European Communities, Japan, Korea, China, Switzerland, Norway, New Zealand and Brazil in those documents, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."¹¹⁹

¹¹⁵ WT/DS258/9.

¹¹⁶ WT/DS259/9.

¹¹⁷ WT/DS259/10.

¹¹⁸ WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258 and WT/DS259.

¹¹⁹ WT/DS248/15, WT/DS249/9, WT/DS251/10, WT/DS252/8, WT/DS253/8, WT/DS254/8, WT/DS258/12, WT/DS259/11.

2.14 The Director-General was requested to determine the composition of this single Panel with reference to paragraphs 7 and 10 of Article 8 of the DSU on 15 July 2002. On 25 July, the Director-General appointed the following persons to serve as the Panel:

Chairman: Mr Stefán Jóhannesson

Members: Mr Mohan Kumar
Ms Margaret Liang

2.15 Canada, Chinese Taipei, Cuba, Malaysia Mexico, Thailand, Turkey and Venezuela reserved their rights to participate in the Panel proceedings as third parties. By a letter dated 23 October 2002, Malaysia informed the Panel of its decision to withdraw as a third party from the Panel proceedings.

2.16 On 29 July 2002, the Panel met with the parties for its organizational meeting. On 31 July 2002, the panel wrote to the parties issuing some preliminary organizational rulings and indicating the rules of procedure to be followed by the Panel.

2.17 On 29, 30 and 31 October 2002, the Panel had its first substantive meeting with the parties. The Panel sent questions to the parties on 31 October 2002 and parties forwarded their answers to the Panel's questions on 12 November 2002. On 10, 11 and 12 December 2002, the Panel had its second substantive meeting with the parties. The Panel sent questions to the parties on 13 December 2002. The Panel extended the deadline for responding to the Panel's questions from 21 December 2002 to 6 January 2003. The United States requested permission to comment further on some of the complainants' answers. On 16 January 2003, the Panel authorized all the parties to provide further comments on some of the panel's questions.

2.18 On 28 January 2003, the United States requested the Panel to issue separate reports pursuant to Article 9.2 of the DSU. On 30 January 2003, the complainants opposed that request. A series of communications between the parties followed. On 3 February 2003, the Panel wrote to the parties that a decision on the United States' request would be issued with the Interim Panel Report but that, in any case, should the United States' request be accepted by the Panel, all such separate Panel Reports would have the same descriptive part. The letter reads as follows:

"On 28 January 2003, the Panel received a request from the United States pursuant to Article 9.1 of the DSU that the Panel issue eight separate panel reports rather than one consolidated report. This request was made by the United States in light of the fact that during the previous DSB meeting (held on 27 January 2003) some complainants expressed the view that "in the case of multiple complaints for which a single panel report was issued, individual parties could not seek adoption of the report only in respect of the panel requested by an individual complainant". The United States asserted in its letter that it did not understand the basis for this "all-or-nothing" approach because, for example, a responding party's right to seek a solution to one or more of the individual complaints without adoption of a report (or without an appeal) would be compromised. The United States noted in its letter that while it was sensitive to the work involved in preparing separate reports, in the *EC – Bananas III* dispute, the panel wrote one master report, and issued identical separate reports for each co-complainant, omitting inapplicable paragraphs where necessary.

On 30 January, the complainants wrote to the Panel opposing the request that had been made by the United States for a number of reasons, notably because the request had not been made in a timely fashion; that complying with the request would result

in additional delays; that had the complainants known that multiple reports would be issued, they would have presented their arguments differently and that the United States request was contrary to the procedural arrangements negotiated between all the parties (WT/DS248/13, WT/DS249/7, WT/DS251/8, WT/DS252/6, WT/DS253/6, WT/DS254/6, WT/DS258/10 and WT/DS259/9) and contrary to the Panel's working procedures.

On 31 January, late morning, the Secretariat, on behalf of the Panel, sent a fax to all parties informing them that the Panel was considering the US request of 28 January and the complainants' letter of opposition dated 30 January and that, by close-of-business Monday, 3 February, the Panel's response would be communicated to the parties, including the date of issuance of the descriptive part in disputes WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258 and WT/DS259.

On 31 January, late afternoon, the United States responded to the complainants' letter of 30 January. For the United States, the complainants appeared to confuse the fact that a single panel had been established to consider the separate panel requests with the question of whether that single panel must issue a single report. In the United States' view, the fact that this dispute has been operating as a single proceeding in no way means that the results of the single proceeding would be a single report. The United States insisted that it had never waived its rights under Article 9.2 of the DSU and that the Panel's working procedures do not exclude the possibility of multiple reports. It submitted that, up to this point, the United States had considered that even though it could have requested separate reports, its rights were sufficiently protected with a single report. That situation changed since the last DSB meeting when the United States became aware of the complainants' interpretation of Article 9 of the DSU, which, according to the United States, threatens the United States' dispute settlement rights. For the United States, its request of 28 January 2003 is, indeed, timely. To the complainants' claim that they would have structured their arguments differently had the United States made its request earlier, the United States responded that, throughout the proceedings, individual complainants had maintained their autonomy by raising different claims, arguments, answers to questions, etc. The United States added that the complainants have not indicated how they would have proceeded differently if they had known beforehand that there would be a single panel report. The United States essentially submitted that, in any case, the complainants cannot have more rights under a single report than under multiple reports, since they can have no more rights under a single proceeding than they would have had under separate proceedings. For the United States, the only difference between a single report and separate reports is that the latter approach would make perfectly clear that each complainant has rights only with regard to those claims that it raised. Finally, the United States reiterated that the Panel could use, for instance, the model used in the *EC – Bananas III* dispute, in which the panel wrote one master report, and issued separate reports with regard to each complaint that excised the findings not relevant to that complainant; such an approach for this dispute should minimize any burden to the Secretariat and not delay issuance of the reports.

On 31 January, early evening, Japan, Switzerland and, subsequently, the European Communities, asked the Panel to ignore the second letter from the United States of 31 January and to rule on the US request on the basis of only the first US letter of 28 January 2003 and the complainants' letter of 30 January. Those complainants raised

strong objection to the timing and manner in which the United States had chosen to file the letter of 31 January to the Panel, claiming, *inter alia*, that in so doing, the United States was fully aware that some of the complainants' capitals were already closed for the weekend. Japan argued that the United States was simply trying to delay the Panel's decision and that, in the process, the United States had totally ignored due process and fair play. For the European Communities, all of the arguments that had been raised by the United States were answered either by the text of the DSU, the Appellate Body Report in the *Byrd Amendment* case or the complainants' letter. The European Communities stated that it does not consider that the issuance of a single panel report, rather than multiple reports, reduces or adds to the rights of any of the parties. It also does not consider that multiple panel reports are needed to make this clear. Finally, the European Communities noted that all complainants have an interest in the complaints of the others as evidenced by the fact that they are all third parties in each other's cases.

Afterwards, in the evening of 31 January (just before the receipt of the European Communities' communication mentioned in the preceding paragraph), the United States responded that Japan and Switzerland's communications appeared to assume that complainants have the right to respond to the arguments that the United States has made but the United States should not have the right to respond to the arguments that the complainants have made.

Japan responded by reiterating that the United States was only trying to prolong the debate, burden the Panel and the Secretariat with further communications, and delay the solution of this important dispute. Japan queried why the United States waited a full day, until the evening of Friday, 31 January 2003 to re-start the exchange of communications. Finally, Japan reiterated that the Panel should make its decision only on the basis of the complainants' letter of 30 January 2003 and the first US letter of 28 January 2003.

* * * * *

The Panel is well aware of the time-limit obligations provided for in the DSU including those mentioned in Articles 12.8 and 20, and of the importance of proceeding expeditiously with this dispute (as with all disputes).

The Panel is also well aware of the provisions of Article 9 of the DSU, including the Panel's obligation to ensure that the rights that all parties would have enjoyed had separate panels been proceeded with be taken into account.

The Panel also recalls that the establishment of a single panel was agreed to by the parties. Further, the coordination of the complainants' oral presentations at both substantive meetings of the Panel (as well as parties' answers to the Panel's questions) was encouraged by the Panel and agreed to by all parties. The Panel notes in this regard that the United States, in its letter of 31 January, recognized that a single panel process may benefit all parties, reduce delays and ensure respect of WTO Members' rights in dispute settlement.

The Panel has decided that it will examine and assess the request made by the United States while it is completing its legal analysis of the complainants' claims. The Panel will form a conclusion on this US request, including whether separate panel reports

can be issued when a single panel has been established and when multiple disputes are being examined according to a single panel process and whether an answer to this question is necessary for the settlement of the present dispute. The Panel will communicate to the parties its decision on such matters when it issues its Interim Panel Report.

The Panel notes, however, that as indicated in Article 15 of the DSU, a Panel Report shall contain a Descriptive Part which includes a description of the factual and legal allegations and arguments of the parties to the dispute. The Panel believes that the Descriptive Part of any panel report should include an objective reflection of the relevant panel process. Therefore, in light of (i) the circumstances of the single panel process followed for the disputes WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258 and WT/DS259; (ii) the timing of the US request, that is, a few days before the issuance of the Descriptive Part; (iii) the fact that the Panel is examining a series of safeguard measures that are in place for only three years; (iv) the need to ensure due process, the Panel is of the view that a single Descriptive Part should, in any case, be issued by the Panel. Should the Panel reach the conclusion that multiple Panel Reports are to be issued, all such Panels Report will have the same Descriptive Part.

The parties will note when they receive the draft Descriptive Part of the Panel Report this week, that the Panel has tried to ensure that collective and individual complainant's claims, allegations and arguments are properly reflected, together with the relevant United States' defenses. As provided for in Article 15.1 of the DSU, all parties will be invited to comment and suggest changes to this draft Descriptive Part to ensure that it is an objective reflection of all the parties' legal and factual allegations and arguments.

The draft Descriptive Part in disputes WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258 and WT/DS259 will, therefore, be issued on Thursday, 6 February 2003 and, pursuant to Article 15 of the DSU, all parties will be invited to comment on such draft Descriptive Part by 5 p.m. on Wednesday 19 February 2003.

Finally, the Panel would like to reassure the parties that, irrespective of the Panel's ultimate decision on whether or not to issue separate panel reports, the Panel's work will not be unduly delayed. The Panel is exercising its utmost efforts to proceed as expeditiously as possible in its examination of the complainants' claims, bearing in mind that the parties have submitted more than 3,500 pages of submissions, oral statements and answers to questions together with more than 3,000 pages of exhibits in support of numerous claims both under GATT 1994 and the Agreement on Safeguards, all of which raise complex and sensitive issues of facts and law."

2.19 On 6 February 2003, the Panel issued its draft Descriptive Part, pursuant to Article 15.1 of the DSU. On 19 February 2003, the Panel received comments from the parties on the draft Descriptive Part. On 26 March 2003, the Panel issued its Interim Reports to the parties. On 9 and 16 April 2003, the Panel received comments from the parties. On 2 May 2003, the Panel issued its Final Reports to the parties.

[Sections III through VIII deleted from this version.]

IX. INTERIM REVIEW

9.1 On 6 February 2003, pursuant to Article 15.1 of the DSU, Article 16 of the Panel's working procedures and the revised timetable at paragraph 3(h), the Panel issued a single draft Descriptive Part for its Reports. Pursuant to the revised timetable, on 19 February 2003, the parties provided their comments on the draft Descriptive Part. The Panel issued its Interim Report on 27 March 2003. On 9 April 2003, pursuant to Article 15.2 of the DSU, Article 16 of the Panel's working procedures and the revised timetable at paragraphs 3(j) and (k), the parties provided their comments on the Interim Report. None of the parties requested that the Panel hold a further meeting with the parties to review part(s) of the Panel's Reports. Pursuant to the revised timetable at paragraph 3(l), on 16 April 2003, the parties submitted further written comments on the comments that had already been provided on the Panel's Interim Reports on 9 April 2003.

9.2 Pursuant to Article 15.3 of the DSU, this section of the Panel's Reports contains the Panel's response to the comments made by the parties in relation to both the draft Descriptive Part and the Interim Reports, and forms part of the Findings of the Panel's Reports.

B. DESCRIPTIVE PART

9.3 With respect to the draft Descriptive Part, the Panel reviewed all comments made by the parties on 19 February 2003. The complainants provided additional comments on the draft Descriptive Part in their comments of 9 April 2003 and 16 April 2003 on the Interim Findings. A number of the comments made by the parties suggested insertion of text of the parties' submissions. The Panel accepted all such suggestions except those for which sources for such text were not indicated by the parties in their comments and could not be located by the Panel. A number of the comments made by the parties suggested insertion of footnote references or changes to the existing footnote references. These suggestions were largely accepted except those which the Panel considered to be erroneous or in cases where the Panel considered that the suggested footnote did not support the text to which the footnote related. Some of the comments contained suggested changes to, or insertions of, headings in the draft Descriptive Part. Again, the Panel accepted these suggestions unless it considered that the insertions or changes were not appropriate. The parties suggested re-ordering of the text in a number of sections of the draft Descriptive Part. The Panel accepted these changes where it considered it appropriate. Finally, the parties also suggested corrections to typographical and editorial errors which were accepted by the Panel. The Panel also made additional typographical and editorial changes to the Descriptive Part. Finally, the Panel recalls that in its cover letter dated 19 February 2003 attaching comments on the draft Descriptive Part, the complainants noted that they "have not insisted on systematically assuring that every argument is attributed to every complainant who made it (often in rather different contexts). The important point is that the arguments be present somewhere in the common descriptive part." We note, in this regard, in the Descriptive Part for our Reports, we made reference to specific complainants when indicating arguments that had been advanced. This was done not to attribute the argumentation exclusively to the identified complainants but, rather, to facilitate the review of the Descriptive Part by the parties.

C. PANEL'S FINDINGS AND CONCLUSIONS

9.4 In addition to comments on the draft Descriptive Part, the parties' provided comments on the Panel's findings and conclusions in their comments of 9 April 2003 and 16 April 2003. In summary, the parties' comments can be divided into a number of categories, which have been listed and dealt with below.

1. Typographical and editorial changes

9.5 The parties have suggested a number of editorial changes to the Panel's Interim Reports and corrections of typographical errors. The Panel has accepted all of these suggestions (sometimes with some minor additional amendments), except those for which the suggested changes appear to be erroneous (for example, in cases where a change has been suggested to a footnote reference but the source to which that reference pertains does not support the relevant text). The Panel notes in this regard that it has amended cross-references to the Descriptive Part of its Reports as well as cross-references within the section of the Panel's Reports containing its findings. The Panel has also corrected other typographical errors and made some additional editorial changes. The suggestions for editorial changes made by the parties that have been accepted by the Panel include those pertaining to paragraphs 10.1, 10.18, 10.20, 10.131, 10.370, 10.398, 10.444, 10.702 and 10.711 of the Panel's Interim Reports.

2. Graphs generated by the Panel and the data used as basis for graphs

9.6 With respect to graphs that were generated by the Panel on the basis of USITC data and which are contained in its Reports, the Panel notes that, at the suggestion of the complainants, it has included footnote references indicating the source(s) of data used for all such graphs. It has also clarified the units for the productivity graphs that are contained in the Panel's findings on causation. The United States noted that the productivity graph following paragraph 10.367 of the Panel's Interim Reports reflected incorrect data. The Panel has re-generated this graph using the correct productivity data.

3. Ways in which facts and parties' arguments are reported

9.7 A number of the comments made by the parties suggested changes to the way in which the facts, the parties' arguments and the USITC's findings had been reported in the Reports.

9.8 In particular, the parties suggested changes to paragraph 10.1 of the Panel's Interim Reports to clarify that the DSB did not establish five different panels that were conducted through a single panel process but, rather, it accepted eight requests for the establishment of a panel and referred them all to a single panel pursuant to Article 9.1 of the DSU. The complainants also argued that paragraph 10.213 of the Panel's Interim Reports should be modified so as to fully reflect the European Communities' arguments that there had not been an adequate explanation by the USITC for a sufficient increase in imports of cold-finished bar. China also requested clarification of paragraph 10.157 of the Panel's Interim Reports to make it clear that China has not challenged the USITC's choice of a five-year period of investigation *per se*. The Panel has accepted, at least partially, these suggested amendments and revised its findings accordingly.

9.9 The United States requested amendment to paragraph 10.357 of the Panel's Interim Reports to make it clear that the USITC findings that had been excerpted in that paragraph were not complete (although they had been cited elsewhere in the Panel's causation findings). The Panel has accepted this suggestion and made all the necessary consequential changes to accommodate this request. The United States also requested changes to paragraphs 10.639 and 10.676 of the Panel's Interim Reports to ensure that they correctly reflect the USITC findings. These suggested changes were accepted by the Panel and we have revised our findings accordingly.

4. Clarifications of certain aspects of the Interim Findings

9.10 The parties have also made suggestions to clarify certain aspects of the Interim Reports.

9.11 In particular, the Panel agreed with the complainants that the Panel's increased imports finding for "welded pipe" is without prejudice to the question of the product definition. However, the Panel rejected the complainants' requests that paragraph 10.595 of the Panel's Interim Reports be amended and agreed with the United States that the pre-existing order of the Panel's findings was logical.

9.12 The Panel also accepted the United States' request in relation to paragraphs 10.291-10.292 of the Panel's Interim Reports to make it clear that it was the Panel and not the USITC that characterized the USITC's causation analysis as a "coincidence" or "conditions of competition" analysis. In requesting this amendment, the United States noted that the USITC does not segregate its causal link analysis into two forms of analysis – that is, a "coincidence" analysis or a "conditions of competition" analysis. In accepting the suggestion made by the United States, the Panel notes that it considered it necessary to develop an analytical framework to assess the USITC's findings on causal link for each of the safeguard measures for the following reasons. First, the Agreement on Safeguards does not prescribe how causal link should be demonstrated. At the same time, WTO jurisprudence indicates that coincidence is central to a causation analysis. In this regard, a number of complainants have argued that the failure by the USITC to undertake a coincidence analysis in relation to some of the safeguard measures was fatal. Finally, the Panel is of the view that tools other than a coincidence analysis, such as a conditions of competition analysis, could be used to establish or support causal link findings under Article 4.2(b) of the Agreement on Safeguards. The analytical framework developed in paragraphs 10.306-10.308 takes the above-mentioned consideration into account.

9.13 The Panel notes that the United States has requested a number of additional changes in the Panel's measure-by-measure analysis to reflect the fact that the Panel, rather than the USITC, categorized the USITC analysis as a coincidence or conditions of competition analysis. In light of the Panel's changes to paragraphs 10.291 and 10.292 of the Panel's Interim Reports, the Panel does not consider that the majority of these additional changes are necessary. However, in its measure-by-measure analysis, the Panel has, despite the changes made to paragraphs 10.291 and 10.292 of the Panel's Interim Reports, made the additional changes where confusion might exist.

9.14 In addition, the United States notes that in paragraph 10.375 of the Panel's Interim Reports, the Panel states that the sources for domestic and import average values for CCFRS are unclear. The United States has in its review comments provided clarification of the source for these values. On the basis of this clarification, the Panel has deleted its statement that the source for such data is unclear, despite arguments by the complainants in their comments of 16 April 2003 of the continuing lack of clarity concerning the source for such data. Nevertheless, in light of the United States' explanation of the basis for calculation of the average unit values for domestic CCFRS together with comments made by the United States in relation to paragraph 10.421 of the Panel's Interim Reports dealing with the relevance of the product definition of CCFRS in the context of the USITC's causation analysis, the Panel has added to what was paragraph 10.375 of its Interim Reports to note the difficulties associated with the aggregation of data by the USITC, which were acknowledged by the USITC itself in its Report.

9.15 Linked to the comments made by the United States regarding the availability of data in the USITC report on CCFRS as a single product, the United States argues that paragraph 10.421 of the Panel's Interim Reports mistakenly states that "on a number of occasions, the USITC failed to produce necessary data for CCFRS as a whole and/or it relied upon data for the items that comprised CCFRS rather than for CCFRS without explaining why and how such specific data on such items related to the determination concerning CCFRS as a whole". In light of the data that was pointed to by the United States above in relation to paragraph 10.375 of the Panel's Interim Reports, the Panel has made the necessary changes to paragraph 10.421 of the Interim Reports.

9.16 The United States has also requested, in relation to paragraph 10.421 of the Panel's Interim Reports, that the Panel confirm that in its view the USITC's exclusive reliance upon sub-category data and failure to produce or consider aggregate data was the *sole* basis for the Panel to conclude that the USITC admitted that CCFRS could not be subjected to the application of the causation requirement and that that, in turn, it was also the sole basis for the Panel to conclude that the CCFRS grouping is inconsistent with the requirements of Article 4.2(b) of the Agreement on Safeguards. The Panel has clarified paragraph 10.421 of the Panel's Interim Reports. As stated, there were a *number* of bases upon which the Panel considered that the product definition for CCFRS was such that it could not properly be subjected to the requirements of Article 4.2(b) of the Agreement on Safeguards. In this regard, the Panel notes that the clarificatory amendments that have been made by the Panel to the paragraph take account of the concerns raised by the complainants in their comments of 16 April 2003. The Panel has also taken into account the United States' comment that the conclusion of violation with Article 4.2(b) on the basis of the product definition of CCFRS is not necessary to the Panel's overall conclusions on causation with respect to CCFRS.

9.17 The United States has made a number of comments that essentially request clarification of the distinction between "average unit values" and "prices". In particular, the United States has requested the Panel to modify the language contained in paragraph 10.432 of the Panel's Interim Reports and the accompanying graph to make it clear that the Panel is referencing "average unit values" rather than "prices". Similar requests were made by the United States in relation to paragraphs 10.456, 10.477 and 10.521 of the Panel's Interim Reports and their accompanying graphs. The Panel has made the requested changes. In addition, the Panel has amended the Reports to make it clear that in reviewing pricing analyses undertaken by the USITC as part of its causal link analysis, the Panel treated unit values as a proxy for prices. As noted in our findings below, we consider that this is acceptable given that this is apparently what the USITC itself did. Further, we understand that price trends mirror unit value trends. As a related point which appears to be raised by the requests for amendments made by the United States, in our reports, we do not consider that any distinction exists between "unit values" on the one hand and "average unit values" on the other hand. More particularly, in the context of this case, we consider that unit values for a particular year are implicitly averages.

9.18 The complainants requested the Panel to clarify that it did not find that there was any USITC determination other than that made on 22 October 2001 and that the Supplementary Reports were only part of the explanation of that determination. The Panel agrees that, for each imported product, the USITC made, on 22 October 2001, one determination for the purposes of Articles 2 and 4 of the Agreement on Safeguards. However, the Panel is of the view that the requirement to demonstrate the circumstances of unforeseen developments pursuant to Article XIX of GATT 1994 is additional to the requirement to provide a determination indicating compliance with the conditions of Articles 2 and 4 of the Agreement on Safeguards. Indeed, the Panel notes that none of the complainants have claimed that the requirement to demonstrate unforeseen developments is one of the conditions for imposition of a safeguard measure pursuant to Articles 2 and 4 of the Agreement on Safeguards.⁴⁸⁴⁶ The WTO jurisprudence explicitly states that the WTO pre-requisites for the imposition of a WTO-compatible safeguard include both the factual demonstration of unforeseen developments pursuant to Article XIX of GATT 1994 and the determination that the conditions of Articles 2 and 4 of the Agreement on Safeguards have been fulfilled.⁴⁸⁴⁷ A coherent, reasoned and adequate explanation that all such requirements have been respected must be included in the report of the competent authority, as required by Article 3.1 of the Agreement on Safeguards and before a safeguard measure is applied.

⁴⁸⁴⁶ None of the complainants have suggested that the basis for their unforeseen developments claims were found in Articles 2 or 4 of the Agreement on Safeguards. See in this regard the content of the complainants' requests for establishment of a panel in Articles 3.1 to 3.8 of the Descriptive Part.

⁴⁸⁴⁷ Appellate Body Report, *US – Lamb*, para. 72.

9.19 The Panel has also clarified other aspects of its Interim Findings, including paragraphs 10.13, 10.17, 10.29, 10.48, 10.74 (footnote 4924), 10.122, 10.132, 10.143, 10.148, 10.149, 10.406-10.411, 10.419, 10.445, 10.448, 10.471, 10.489, 10.505, 10.538, 10.567, 10.617, 10.623, 10.630, 10.641 and 10.668.

5. The Panel's appraisal of the parties' arguments and facts

9.20 The United States has challenged the Panel's appraisal of arguments and facts in relation to a number of the measures at issue. In particular, the United States challenges the basis for the Panel's conclusions in paragraph 10.401 of the Panel's Interim Reports arguing that the USITC did not state that legacy costs had caused any of the declines in the condition of the CCFRS industry during the period of investigation because legacy costs actually declined during the period of investigation. The United States continues by arguing that the fact that legacy costs had been a burden on the industry prior to the period of investigation or that they might present difficulties to the industry in the future says nothing about whether legacy costs caused declines in the industry's condition during the period of investigation. On the basis of the foregoing, the United States requests the Panel to remove its finding that the USITC's analysis of legacy costs failed to establish that the injury caused by this factor together with other factors was not attributed to increased imports. The complainants oppose this request.

9.21 The Panel has decided to reject the United States' requested amendment. The Panel has reviewed the USITC's findings and the arguments made in relation to legacy costs and remains of the view that the USITC failed to ensure that injury caused by legacy costs, together with other factors, was not attributed to increased imports when assessing whether increased imports of CCFRS were causing injury to the relevant domestic producers. However, in light of comments made by the United States in this regard, the Panel has elaborated upon its findings to highlight the absence of an adequate explanation by the USITC and to emphasize that the mere fact that the issue of legacy costs pre-dated the period of investigation and may have decreased during the period of investigation does not necessarily mean that they did not play a role in causing injury to the domestic industry.

9.22 The United States has also challenged the Panel's conclusion in paragraph 10.440 of the Panel's Interim Reports that the USITC acknowledged that inefficient producers were a possible cause of injury to the hot-rolled bar industry. In light of the United States' comments, the Panel has reviewed the USITC's findings and the claims and arguments made by the parties on this issue and has revised its findings to reflect its agreement with the United States. Necessary consequential changes have also been made to our Reports.

9.23 With respect to paragraph 10.455 of the Panel's Interim Reports, the United States argues that there is no basis for the Panel to be unclear regarding the USITC's reasons for using quarterly data for individual cold-finished bar products when average data was available. The United States points in this regard to note 627 on page 105 of the USITC Report. The Panel has examined the cited note and is of the view that it relates to the relative merits of pricing data for specific products within the cold-finished bar product category. The Panel does not consider that this note contains a discussion of the relative merits of quarterly versus (annual) average unit values and, therefore, does not provide any justification for the use of quarterly data by the USITC in the absence of a reasoned and adequate explanation as to why the available annual data had not been used on this occasion while such data had been used for a number of the other measures at issue. We note that the quarterly data upon which the USITC relied suggested underselling whereas the annual average data did not.

9.24 The United States has also challenged the Panel's review of the USITC's assessment of domestic capacity increases for FFTJ contained in paragraph 10.527 of the Panel's Interim Reports.

As a first point, the United States argues that the Panel misunderstood the reference to "substantial" to mean "enormous" when interpreting the USITC comment that "the increase in capacity would not be expected to place substantial pressure on domestic prices". The Panel was under no such misunderstanding. The USITC Report indicates that downward pressure *was* exerted by capacity on prices, however one interprets "substantial". The Panel is of the view that all relevant "other factors" – even those with limited injurious effects on the domestic industry – must be, together with other relevant factors, identified, distinguished and assessed with a view to reaching an overall conclusion on whether or not increased imports had a genuine and substantial relationship of cause and effect with the injury suffered by the relevant domestic industry.

9.25 The United States also requested the Panel to explain why it concluded that the USITC acknowledged that domestic capacity increases played a role in causing the injury that was suffered by the domestic industry. The Panel notes that in paragraphs 10.527-10.531 of the Panel's Interim Reports, it explained why it considered that the USITC conceded that increases in capacity lead, at least in part, to downward pressure on domestic prices which, in turn, impacted upon the state of the domestic industry.

9.26 The United States has also requested the Panel to revise its findings in paragraphs 10.559 and 10.563 of the Interim Reports that the USITC could have provided a reasoned and adequate non-attribution analysis for demand declines by explaining that operating margin declined irrespective of demand trends. In making this request, the United States submits that the very analysis sought by the Panel was provided on page 212 of the USITC Report. The Panel has considered the mentioned page of the USITC report and is of the view that it confirms the Panel's conclusion, which is challenged by the United States. The relevant page states clearly that demand declined *in late 2000 and interim 2001* whereas substantial declines in the situation of the domestic industry occurred *prior to 2000 and 2001*. The fact that injury occurred prior to the point at which a factor comes into play does not detract from the conclusion that the factor may still play a role in causing injury beyond that point in time. We have elaborated our findings to make this clear.

6. Omissions

9.27 The parties have also raised what they consider to be omissions from the Panel's Interim Reports. The Panel agreed with the following suggestions made by the parties. The complainants requested elaboration of paragraph 10.370 of the Panel's Interim Reports to correctly sum up all the reasons why the Panel considered the USITC's finding to be inadequate. The complainants also suggested that the Panel's Interim Reports should indicate that the Panel did not consider it necessary to specifically address the argument made by a number of complainants that a gap between the range of products for which increased imports and serious injury were allegedly found and those on which safeguard measures were finally imposed also constituted a violation of the principle of parallelism.

9.28 However, there were a number of instances where the Panel did not agree either fully or partly that an omission existed and, in those circumstances, declined to make any amendment or, at least, declined to make the requested amendment. In particular, in their comments, the complainants note that Japan had included a claim under Article XIX:1 of GATT 1994 concerning the United States' failure to abide by the increased imports, causation and parallelism standards. The complainants further noted that although the Panel addressed this claim in its findings on increased imports, it failed to include a reference to Article XIX in its summary findings on increased imports. According to the complainants, nor did the Panel address this claim in its findings on causation and parallelism. The United States did not agree with the complainants' comments in this regard.

9.29 The Panel is well aware of the claims made by Japan and other complainants under Article XIX of GATT 1994. However, the Panel does not consider that a specific finding on Article XIX in relation to increased imports, causation and parallelism would enhance the complainants' rights. The Panel notes that Article XIX was not much argued by most parties other than in the context of unforeseen developments. Accordingly, the Panel has decided to reject the request made by the complainants to add a reference to Article XIX in its findings on causation and parallelism. In addition, the Panel does not consider that a reference to Article XIX is necessary in relation to its findings on increased imports. Accordingly, consistent with its approach in relation to the other sections of its Reports, the Panel has revised its findings on increased imports to remove references to Article XIX. In our view, the removal of such references will not in any way diminish the complainants' rights with reference to their claims on increased imports in the present dispute.

9.30 Similarly, the complainants note that Japan and Norway included a claim under Article 4.2(c) of the Agreement on Safeguards concerning the US decision-making process for tin mill products and stainless wire products. The complainants note that although this claim is a part of the Panel's findings on causation, Article 4.2(c) is not listed in the summary findings on causation. They also argue that the Article 4.2(c) claim should also have been addressed by the Panel in its findings on increased imports. They argue that given that the Panel found a violation of Article 3.1 with respect to increased imports for tin mill products and stainless steel wire, a violation of Article 4.2(c) should have been found to exist. The United States did not agree with the complainants' comments in this regard.

9.31 With respect to the first point, namely whether a finding of violation of Article 4.2(c) is necessary in relation to the issue of causation, the Panel considers that such a reference would not enhance the complainants' rights. In addition, the Panel observes that Article 4.2(c) was not extensively addressed by the parties as a discrete basis for violation of the causation requirements. Accordingly, consistent with its approach in relation to the other sections of its Reports, the Panel has revised its findings on causation to remove references to Article 4.2(c) in its discussion on the claims of violation of the causation requirements for tin mill products and stainless steel wire. In our view, the removal of such references will not diminish the parties' rights with regard to causation matters in the present dispute.

9.32 As for the second point, the Panel agrees that certain parallels can be drawn between Article 4.2(c) and Article 3.1 of the Agreement on Safeguards. However, the Panel does not consider that an additional reference to Article 4.2(c) in relation to the Panel's findings on increased imports or causation would enhance the complainants' rights. Accordingly, the Panel has decided to reject the suggestion made by the complainants to add a reference to Article 4.2(c) to its summary findings on causation and in its findings on increased imports for tin mill products and stainless steel wire.

7. Confidentialization of data

9.33 The United States has raised a number of concerns regarding comments made by the Panel in its Interim Reports in relation to the confidentialization of data. The Panel agrees that, in some circumstances, Members have the obligation to confidentialize certain information and this obligation should not reduce Members' right to take safeguard actions. The Panel also accepts that the United States should not be held responsible for having confidentialized certain data. To the extent that a reasoned and adequate alternative means of supporting its conclusions were provided by the USITC, the Panel has made the necessary changes to paragraph 10.455 (dealing with cold-finished bar), paragraph 10.552 (dealing with stainless steel bar) and 10.577 and 10.583 (dealing with stainless steel rod) of the Panel's Interim Reports.

9.34 With respect to paragraph 10.455 of the Panel's Interim Reports, the United States challenges the Panel's statement that "difficulties with data call into question whether 'underselling' actually existed" on the basis, *inter alia*, that the Panel had questioned the confidentialization of certain relevant data. We have reviewed our findings in light of our comments above with respect to data or information that can be used in substitution for redacted data. Nevertheless, the Panel maintains its findings in this regard with respect to cold-finished bar in light of the absence of explanation regarding the data relied upon by the USITC, which calls into question whether "underselling" actually existed.⁴⁸⁴⁸

9.35 With respect to paragraph 10.552 of the Panel's Interim Reports (dealing with stainless steel bar) which states that the Panel was unable to assess whether significant import underselling occurred during the period of investigation due to the confidentialization of relevant information, the United States notes that while domestic prices were redacted from the price comparisons contained in a number of tables to which the Panel had referred, the USITC Report contained another table, Table STAINLESS-99, in which it summarized the instances of underselling by Canadian, Mexican and non-NAFTA imports.

9.36 The Panel has examined that table and considers that it is sufficient to indicate that import underselling occurred. In particular, as indicated in our revised findings, Table STAINLESS-99 refers to 40 instances of underselling by non-NAFTA imports and provides a range of the margins of underselling of 0.1 to 51.8 % that applied for all of those instances. As indicated in our findings, this fact – that there were 40 instances of underselling by non-NAFTA imports – has not been contested by the complainants and we consider that it is contrary to our standard of review to reassess the quality of this evidence in the absence of any *prima facie* challenge. In our view, although relevant data was redacted from the USITC Report, the USITC nevertheless provided alternative information that sought to substitute the redacted data. We have revised our findings accordingly to reflect our conclusions in this regard.

9.37 The United States has challenged the basis for the Panel's comments in paragraphs 10.578-10.579 of the Panel's Interim Reports that the USITC's analysis with respect to stainless steel rod does not contain any comparison between import and domestic prices. The United States points to note 1419 on page 220 of the USITC Report together with Table STAINLESS-100 and Table STAINLESS-C-5 to indicate that such a price comparison was undertaken. While Table STAINLESS-C-5 does not contain any public data, the Panel accepts that Table STAINLESS-100 does contain relevant information and has revised its findings accordingly.

9.38 The complainants have also suggested that paragraph 10.559 of the Interim Reports be amended to indicate that, when information has been confidentialized, in order for an explanation to be reasoned and adequate, there should be an indication of the applicable trends sufficient to substantiate the investigating authority's findings. As discussed in paragraphs 10.272-10.275 of our findings, we consider that, in some circumstances, Members have the obligation pursuant to Article 3.2 of the Agreement on Safeguards to confidentialize certain information although they can base their determination on such confidentialized information. Such an obligation should not reduce Members' rights to take safeguard actions. In cases where information has been confidentialized, the Panel has examined whether the competent authority provided a reasoned and adequate explanation through means other than full disclosure of that data. In our view, trends derived from data that has been redacted may provide sufficient evidence that the relevant explanation is reasoned and adequate. However, the Panel considers that trends are not the only way in which to support allegations based upon confidentialized data.

⁴⁸⁴⁸ See para. 9.23 above.

8. Request for separate panel reports

9.39 With regard to the United States' request for separate panel reports, the United States requested the Panel to clarify in paragraph 10.728 of the Interim Reports its statement that the issuance of a single consolidated Descriptive Part reflected the fact that "each of the complainants relied upon arguments made and evidence adduced by other complainants in relation to their respective claims ...". According to the United States, this statement could mistakenly be read to entitle a complainant to rely on another Member's arguments and evidence in order to satisfy that complaining party's burden of proof.

9.40 The Panel agrees with the United States that a complaining party bears the burden of establishing a prima facie case for each of the claims it makes and it may not rely on the other complaining parties to make its prima facie case, if they had litigated their respective disputes independently. The Panel recalls that the complainants made common claims for all measures and all these common claims are properly before the Panel. The Panel notes that in the present dispute, with the apparent agreement of the United States, the co-complainants referred to and relied upon each other's arguments and demonstrations and explicitly stated as much.⁴⁸⁴⁹ From the initiation of the panel process, parties have recognized⁴⁸⁵⁰ that the complainants would act together on some common claims and the United States would respond to such common claims while responding as well to claims specific to some of the complainants. The complainants often cross-referenced each others' written submissions, they coordinated their presentations to the Panel and divided among themselves the argumentation on common claims, often explicitly stating that they were speaking on behalf of all complainants. The complainants submitted common comments on the Descriptive Part, common comments on the Interim Findings as well as a common response to the United States' comments on the Interim Findings. At all these stages, the United States provided one response addressing collectively the arguments made by the complainants. We are aware that Panels are not entitled to make the case for the complainants.⁴⁸⁵¹ WTO jurisprudence recognizes that panels may, after an assessment of the evidence and argumentation made by complainants, reach a conclusion as to whether, overall, the complainants made their prima facie case.⁴⁸⁵² We believe that in the present case, each of the complainants has made a prima facie case that the safeguard measures at issue were inconsistent with the WTO provisions listed in our Recommendations, through their own and with each other's demonstration. We have revised our findings to clarify this point.

9. Release of the confidential Interim Reports

9.41 Finally, we would like to address the issue of confidentiality of the Interim Reports. When, on 26 March 2002, we transmitted our Interim Reports to the parties, we clearly indicated that such Reports were confidential. Indeed, pursuant to the DSU, all panel proceedings remain confidential until the Panel Report is circulated to WTO Members. We had also explicitly emphasized at all our

⁴⁸⁴⁹ See for example, European Communities' first written submission, paras. 16-17; Switzerland's first written submission, para. 10; Norway's first written submission, para. 8; Brazil's first written submission, para. 3; New Zealand's first written submission, para. 1.5; China's first written submission, para. 8; Japan's first written submission, para. 5; Korea's first written submission, para. 7. Throughout their written and oral submissions the complainants referred to each other's allegations and arguments. See also the oral statements of the complainants (before the Panel) stating that each of the complainant was speaking on a specific matter on behalf of the other complainants.

⁴⁸⁵⁰ See para. 5 of the Panel's working procedures quoted in para. 6.1 of the Descriptive Part

⁴⁸⁵¹ Appellate Body Report, *Japan – Agricultural Products II*, paras. 126-130.

⁴⁸⁵² Appellate Body Report, *Korea – Dairy*, para. 145. The Appellate Body confirmed this view in *Thailand – H-Beams*, para. 134. See also the Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.50.

meetings with the parties that the panel proceedings were confidential. This was accepted by the parties and reflected in the Panel's working procedures and in all our relevant correspondence with the parties. Therefore, we are concerned to discover that parties have not respected this confidentiality obligation and have disclosed aspects of the Panel's Interim Reports. We consider that this lack of respect of a specific requirement imposed by the DSU and the Panel's working procedures is regrettable and should not remain unmentioned.

X. FINDINGS

A. INTRODUCTION

1. Panel's terms of reference – a single panel established

10.1 In accordance with Article 6 of the DSU, eight requests for the establishment of a panel were filed with the DSB in relation to the present dispute. The DSB accepted these requests and, pursuant to Article 9, we were ultimately given the mandate to examine the eight requests for the establishment of a panel, through a single panel process.⁴⁸⁵³

10.2 On 29 July 2002, the Panel met with the parties for its organizational meeting. On 31 July 2002, the Panel wrote to the parties issuing some preliminary and organizational rulings including its timetable and working procedures.⁴⁸⁵⁴ The Panel notes, at this early stage, that its Working Procedures do not make reference to a "single" or "multiple" panel report(s). The working procedures refer to "interim report" (in paragraph 16). The timetable only refers to various aspects of the "report" (again in singular) in paragraphs 3(h), (i), (m) and (n) of the timetable. The timetable as well as the size and content of the executive summaries of the United States reflected the fact that the United States would have to reply to common claims and claims specific to some of the complainants.

10.3 The Panel met with the parties for the first substantive meeting on 29, 30 and 31 October 2002. With a view to ensuring an efficient process for this single panel, the complainants coordinated their oral presentations. The Panel met with the parties for the second substantive meeting on 10, 11 and 12 December 2002; once again the complainants coordinated their presentations to the Panel. Numerous questions to the parties were asked by the Panel and the parties. The complainants often responded individually to the Panel's and the United States' questions. On 28 January 2003, the United States requested the issuance of separate panel reports instead of a single report. We address the United States' request in paragraphs 10.716 ff.

2. Claims

10.4 The complainants claim that the United States' safeguard measures do not satisfy the WTO prerequisites for taking such action, including those mentioned in Articles 2, 3, 4, 5, 7, 8, 9 and 12 of the Agreement on Safeguards and Articles X and XIX of GATT 1994. All complainants are challenging all safeguard measures but not all their claims are the same. All complainants have raised

⁴⁸⁵³ The first panel request (European Communities – WT/DS248/6) was accepted on 3 June 2002; the second and third (Japan – WT/DS249/6; Korea – WT/DS251/7) on 14 June 2002 the fourth, fifth and sixth (China – WT/DS252/5; Switzerland – WT/DS253/5; Norway – WT/DS254/5) on 24 June, the seventh (New Zealand – WT/DS258/9) on 8 July and finally the eighth (Brazil – WT/DS/259/10) on 29 July 2002. The content of the panel requests can be found in paras. 3.1 to 3.8 of the Descriptive Part. See also the following minutes of the DSB: WT/DSB/M/125, WT/DSB/M/127, WT/DSB/M/128, WT/DSB/M/129 and WT/DSB/M/130.

⁴⁸⁵⁴ The Panel's working procedures are contained in para. 6.1 of the Descriptive Part of the present Reports.

some common claims in respect of all of the measures. Some complainants have raised specific claims in respect of all or some of the measures. The detailed claims of the complainants are listed in Section III *supra*.

3. The measures at issue

10.5 By Proclamation No. 7529 of 5 March 2002, bearing the title "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products", accompanied by a Memorandum for the Secretary of Treasury, the Secretary of Commerce and the USTR, the US President imposed on 20 March 2002 definitive safeguard measures on imports of the following steel products:⁴⁸⁵⁵

- A tariff of 30% imposed on imports of "Certain Flat Steel other than Slabs", that is: (i) Plate⁴⁸⁵⁶; (ii) Hot-Rolled Steel⁴⁸⁵⁷; (iii) Cold-Rolled Steel⁴⁸⁵⁸; (iv) Coated Steel.⁴⁸⁵⁹

A tariff rate quota on the fifth product of the product group "Certain Flat Steel", that is Slabs.⁴⁸⁶⁰ The out-of-quota tariff (applicable beyond 5.4 million short tons) is 30%.

- A tariff of 30% imposed on imports of tin mill products⁴⁸⁶¹;
- A tariff of 30% imposed on imports of hot-rolled bar⁴⁸⁶²;
- A tariff of 30% imposed on imports of cold-finished bar⁴⁸⁶³;
- A tariff of 15% imposed on imports of rebar⁴⁸⁶⁴;
- A tariff of 15% imposed on imports of certain tubular products⁴⁸⁶⁵;

⁴⁸⁵⁵ Proclamation No. 7529 of 5 March 2002, "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products", Federal Register, Vol. 67, No. 45, 7 March 2002, p. 10553; Memorandum for the Secretary of Treasury, the Secretary of Commerce and the USTR of 5 March 2002 on the "Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products by the President of the United States of America", Federal Register Vol. 67, No. 45 of 7 March 2002, p. 10593, Exhibit CC-13.

⁴⁸⁵⁶ As defined in the superior text to subheadings 9903.72.50 through 9903.72.60 in the Annex to the Proclamation.

⁴⁸⁵⁷ As defined in the superior text to subheadings 9903.72.62 through 9903.72.77 in the Annex to the Proclamation.

⁴⁸⁵⁸ As defined in the superior text to subheadings 9903.72.80 through 9903.72.98 in the Annex to the Proclamation.

⁴⁸⁵⁹ As defined in the superior text to subheadings 9903.72.99 through 9903.73.14 in the Annex to the Proclamation.

⁴⁸⁶⁰ As defined in the superior text to subheadings 9903.72.30 through 9903.72.48 in the Annex to the Proclamation.

⁴⁸⁶¹ As defined in the superior text to subheadings 9903.73.15 through 9903.73.27 in the Annex to the Proclamation.

⁴⁸⁶² As defined in the superior text to subheadings 9903.73.28 through 9903.73.38 in the Annex to the Proclamation.

⁴⁸⁶³ As defined in the superior text to subheadings 9903.73.39 through 9903.73.44 in the Annex to the Proclamation.

⁴⁸⁶⁴ As defined in the superior text to subheadings 9903.73.45 through 9903.73.50 in the Annex to the Proclamation.

⁴⁸⁶⁵ As defined in the superior text to subheadings 9903.73.51 through 9903.73.62 in the Annex to the Proclamation.

- A tariff of 13% imposed on imports of carbon and alloy fittings and flanges⁴⁸⁶⁶;
- A tariff of 15% imposed on imports of stainless steel bar⁴⁸⁶⁷;
- A tariff of 8% imposed on imports of stainless steel wire⁴⁸⁶⁸;
- A tariff of 15% imposed on imports of stainless steel rod.⁴⁸⁶⁹

10.6 From its examination of the complainants' requests for establishment of a panel, the Panel notes first, that *all* complainants have challenged *all* the safeguard measures imposed by the United States pursuant to Proclamation No. 7529 of 5 March 2002. The Panel also notes that the complainants are challenging the *application* of the United States' safeguard measures but none of the complainant is challenging the United States' statute on safeguards *per se*, nor are the complainants challenging the practices of the USITC *per se*.

10.7 However, the complainants in their argumentation have discussed and challenged what they call the "methodologies" used by the USITC when making its determinations for those safeguard measures. Nevertheless, as noted by the European Communities in its oral statement to the second substantive meeting, "complainants have not chosen in this case to request any findings relating to US safeguards law or general practice. ... When we say that the complainants are not attacking the methodologies of the USITC *per se* we mean that we are simply attacking the methods of analysis actually *used in this case* – not necessarily the methodologies that the USITC traditionally uses, as the US seems to believe. ... I repeat again – our complaint is with the steps that the USITC actually took – or failed to take – in this case."⁴⁸⁷⁰

10.8 The Panel believes, therefore, that the complainants' reference(s) to the USITC methodologies or practices in their argumentation may be helpful to its understanding of the way in which the United States actually made its determination for each of the safeguard measures at issue.

B. GENERAL CONSIDERATIONS FOR THIS DISPUTE

1. Interpretation of the Agreement on Safeguards and Article XIX of GATT 1994

10.9 Article XIX of GATT 1994 and the Agreement on Safeguards provide WTO Members with the conditional right to limit market access (and take measures that would otherwise be inconsistent with incurred obligations) and obtain temporary relief when unforeseen developments have resulted in increased imports (absolute or relative) that are causing or threatening to cause serious injury to the relevant domestic producers.

10.10 Safeguard actions may be needed for the very reason that a Member has incurred obligations (namely, market-access commitments) which prohibit that Member from taking any measure that is

⁴⁸⁶⁶ As defined in the superior text to subheadings 9903.73.66 through 9903.73.72 in the Annex to the Proclamation.

⁴⁸⁶⁷ As defined in the superior text to subheadings 9903.73.74 through 9903.73.81 in the Annex to the Proclamation.

⁴⁸⁶⁸ As defined in the superior text to subheadings 9903.73.91 through 9903.73.96 in the Annex to the Proclamation

⁴⁸⁶⁹ As defined in the superior text to subheadings 9903.73.83 through 9903.73.89 in the Annex to the Proclamation.

⁴⁸⁷⁰ European Communities' oral statement on behalf of all complainants to the second substantive meeting, paras. 5-6.

inconsistent with its bindings or the GATT prohibition of quantitative restrictions, for instance. In this sense, Article XIX of GATT 1994 and the Agreement on Safeguards operate as exceptions, particularly to Articles II and XI of GATT 1994.

10.11 Article XIX of GATT and the Agreement on Safeguards provide for exceptions to general GATT market access rules in situations of emergency. In *US – Line Pipe*, the Appellate Body reiterated the following statement that it had made in *Argentina – Footwear (EC)* :

"As part of the context of paragraph 1(a) of Article XIX, we note that the title of Article XIX is: '*Emergency Action on Imports of Particular Products*'. The words 'emergency action' also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:1(a) requires that a product be imported '*in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers*'. (emphasis added) Clearly, this is not the language of ordinary events in routine commerce. In our view, the text of Article XIX:1(a) of GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions'. And, such 'emergency actions' are to be invoked only in situations when, as a result of obligations incurred under GATT 1994, a Member finds itself confronted *with developments it had not 'foreseen' or 'expected' when it incurred that obligation*. The remedy that Article XIX:1(a) allows in this situation is temporarily to 'suspend the obligation in whole or in part or to withdraw or modify the concession'. Thus, Article XIX is clearly, and in every way, an extraordinary remedy.

This reading of these phrases is also confirmed by the object and purpose of Article XIX of GATT 1994. *The object and purpose of Article XIX is, quite simply, to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with 'unexpected' and, thus, 'unforeseen' circumstances which lead to the product 'being imported' in 'such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products'*. ...

... In furthering this statement of the object and purpose of the *Agreement on Safeguards*, it must always be remembered that safeguard measures result in the temporary suspension of concessions or withdrawal of obligations, such as those in Article II and Article XI of GATT 1994, which are fundamental to the *WTO Agreement*. ..."⁴⁸⁷¹ (emphasis added)

10.12 In *US – Line Pipe*, the Appellate Body also emphasized that:

"[P]art of the *raison d'être* of Article XIX of the GATT 1994 and the *Agreement on Safeguards* is, unquestionably, that of *giving a WTO Member the possibility*, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation *that, in the judgement of that Member, makes it necessary to protect a domestic industry temporarily*."⁴⁸⁷² (emphasis added)

⁴⁸⁷¹ Appellate Body Report, *Argentina – Footwear (EC)*, paras. 93–95. See also, Appellate Body Report, *Korea – Dairy*, paras. 86–88.

⁴⁸⁷² Appellate Body Report, *US – Line Pipe*, para 82.

There is, therefore, 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. A WTO Member seeking to apply a safeguard measure will argue, correctly, that the *right* to apply such measures must be respected in order to maintain the *domestic* momentum and motivation for ongoing trade liberalization. In turn, a WTO Member whose trade is affected by a safeguard measure will argue, correctly, that the *application* of such measures must be limited in order to maintain the *multilateral* integrity of ongoing trade concessions. *The balance struck by the WTO Members in reconciling this natural tension relating to safeguard measures is found in the provisions of the Agreement on Safeguards.*" (emphasis added)⁴⁸⁷³

10.13 Moreover, the Panel, when interpreting Article XIX of GATT 1994 and the Agreement on Safeguards, must bear in mind that exceptions under WTO law are not to be interpreted narrowly⁴⁸⁷⁴ but rather in light of the ordinary meaning of the terms of such exception provisions taking into account the object and purpose of the Agreement on Safeguards, including the need to maintain a balance between market access and safeguards rights and obligations. Since the Agreement on Safeguards itself would have been drafted so as to recognize its exceptional nature and the emergency character of safeguard measures, the Agreement on Safeguards does not call for any especially restrictive interpretation.

2. The two fundamental enquiries under the Agreement on Safeguards: the (conditional) right to take a safeguard measure and the application of a chosen measure

10.14 The distinction between the (conditional) right to take a safeguard measure and the application of a specific measure was clearly recognized by the Appellate Body in *US – Line Pipe*:

"This natural tension is likewise inherent in 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 exercised, 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

⁴⁸⁷³ Appellate Body Report, *US – Line Pipe*, para. 83.

⁴⁸⁷⁴ This principle of interpretation in WTO law was first established by the Appellate Body in *EC – Hormones* (para. 104) for the SPS Agreement. It was reiterated recently in the Appellate Body Report in *EC – Sardines* (para. 271), when discussing Article 2.4 of the TBT Agreement; in the Panel Report in *US – Carbon Steel* (para. 8.45, upheld by the Appellate Body) when discussing Article 21.3 of the SCM Agreement; in the Article 21.5 Appellate Body Report in *US – FSC* (para. 127) when discussing the scope and meaning of footnote 59 of the SCM Agreement; and in the Appellate Body Report in *Brazil – Aircraft* (para. 137) when dealing with the scope of the provisions on developing countries.

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 exercised—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'." (emphasis added)⁴⁸⁷⁵

10.15 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.

10.16 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 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.

3. The Agreement on Safeguards is concerned with the "determination"

10.17 The Panel recalls that the Agreement on Safeguards is concerned with the ultimate determination made and reflected in the Member's report of investigation. There is no provision on how or when the investigation is to be initiated or whether, in a specific Member, the initiation of the investigation should be undertaken by the King, the President or the industry. Nor does the Agreement on Safeguards dictate the manner in which determinations are to be arrived at. What matters is that, ultimately, there is a reported determination of the right to take a safeguards measure (pursuant to Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994) and that, if, and when, challenged *prima facie* before a WTO panel, the choice of safeguard measure (Articles 5, 7 and 9) can be justified. The Appellate Body made that clear in *US – Line Pipe*:

"We note also that we are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. *We are concerned only with the determination itself*, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or—as here—six individual decision-makers under the municipal law of that

⁴⁸⁷⁵ Appellate Body Report, *US – Line Pipe*, para. 84.

WTO Member. *What matters to us is whether the determination, however it is decided domestically, meets the requirements of the Agreement on Safeguards.*"⁴⁸⁷⁶

"Article 5.1 does not establish a general procedural obligation to demonstrate compliance with Article 5.1, first sentence, at the time a measure is applied."⁴⁸⁷⁷
(emphasis added)

10.18 The Panel recalls that, in the present dispute, the United States explained that the USITC made its determination on 22 October 2001 pursuant to Articles 2 and 4 and that it was contained in a report published in December 2001 (the "initial USITC Report"). The USITC provided Supplementary Reports in February 2002. The complainants in the present dispute have challenged the findings supporting the October determination on the basis of the data and evidence contained in the Report published in December 2001. The Panel has thus examined the December 2001 Report when assessing the complainants' claims and arguments relating to increased imports in Section X.D of the present Panel Reports as well as complainants' claims on causation, in Section X.E of the present Panel Reports.

10.19 The United States, following its October determination, decided to exclude all imports from Canada, Mexico, Jordan and Israel from the application of its safeguard measures. Seemingly, in an attempt to comply with the United States' parallelism obligations, USTR requested, *inter alia*, additional information from USITC on the impact of the exclusions from the measure of imports from Israel and Jordan, and for certain steel products from Canada and Mexico. This was (partly) the subject of the February Second Supplementary Report. The complainants have challenged whether the October and February reports satisfy the requirements of parallelism, on the basis of the data contained in those reports. The Panel has examined the complainants' claims and arguments relating to parallelism in Section X.F of the present Panel Reports and has reviewed both reports.

10.20 The February Second Supplementary Report also contains information relating to "unforeseen developments". For the reasons mentioned in paragraphs 10.55-10.58 below, we have decided to assume, *arguendo*, for the purposes of reviewing the unforeseen developments' demonstration under Article XIX of the GATT 1994 in the present dispute that the February Second Supplementary Report was part of the "report of the competent authority". We have, therefore, decided that when assessing the complainants' claims relating to unforeseen developments, in Section X.C, we will examine the USITC's initial report as well as its explanations relating to unforeseen developments contained in the February Second Supplementary Report.

4. Standard of review

10.21 The Panel discusses specific applications of its standard of review throughout its Reports. The Panel would like to recall at this early stage that the general standard of review contained in Article 11 of the DSU⁴⁸⁷⁸ is applicable to disputes involving claims of violation of the Agreement on Safeguards and Article XIX of GATT 1994.

⁴⁸⁷⁶ Appellate Body Report, *US – Line Pipe*, para. 158.

⁴⁸⁷⁷ Appellate Body Report, *US – Line Pipe*, paras. 233-234.

⁴⁸⁷⁸ Article 11 of the DSU reads as follows: "Function of Panels: The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the

10.22 The jurisprudence has examined the application of such general standard of review in the specific context of the Agreement on Safeguards. In *Argentina – Footwear (EC)*, the Appellate Body stated that, pursuant to Article 4, a Panel cannot conduct a *de novo* review of the evidence or substitute its analysis and judgment for that of the importing Member, but "[t]o determine whether the safeguard investigation and the resulting safeguard measure applied by [a Member] were consistent with Article 4 of the *Agreement on Safeguards*, the Panel was obliged, by the very terms of Article 4, to assess whether the [Member's] authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination."⁴⁸⁷⁹

10.23 The panels in *US – Wheat Gluten* and in *US – Line Pipe* concluded that a panel must assess whether a reasoned and adequate explanation has been provided as to how the facts support the determination⁴⁸⁸⁰. In *US – Lamb*, the Appellate Body added that "a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate only if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation."⁴⁸⁸¹

10.24 In *US – Cotton Yarn*, the Appellate Body referred to its jurisprudence developed under the Agreement on Safeguards and relied upon it for a dispute under the Agreement on Textiles and Clothing:

"Our Reports in these disputes under the *Agreement on Safeguards* spell out key elements of a panel's standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations. This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority."⁴⁸⁸²

10.25 The Panel is of the view that the standard of review applicable in the present dispute must be seen in light of the distinction between the first and second enquiry that the Panel must perform when assessing a Member's compliance with the requirements of the Agreement on Safeguards and Article XIX of GATT 1994. When assessing a Member's compliance with its obligations pursuant to Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT, the Panel is *not* the initial fact-finder. Rather, the role of the Panel is to "review" determinations and demonstrations made and reported by an investigating authority.

covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."

⁴⁸⁷⁹ Appellate Body Report, *Argentina – Footwear (EC)*, paras. 118 and 121.

⁴⁸⁸⁰ Panel Report, *US – Wheat Gluten*, para. 8.5; Panel Report, *US – Line Pipe*, para. 7.194

⁴⁸⁸¹ Appellate Body Report, *US – Lamb*, para. 106.

⁴⁸⁸² Appellate Body Report, *US – Cotton Yarn*, para. 74

10.26 The situation is different in the context of the second enquiry when assessing whether the measures were applied only to the extent necessary to prevent the serious injury caused by increased imports. In that situation, it is before the Panel, during the WTO dispute settlement process, that the importing Member is forced for the first time to respond to allegations relating to the level and extent of its safeguard measures. For us, this is clear from the following statement of the Appellate Body in *US – Line Pipe*:

"[I]t is clear, therefore, that, [...] Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied "only to the extent necessary."

Article 5.1 does not establish a general procedural obligation to demonstrate compliance with Article 5.1, first sentence, at the time a measure is applied."⁴⁸⁸³

10.27 In that second enquiry, the Panel is thus reviewing whether the measures "as applied" comply with the requirements of Articles 5, 7, 8 and 9 of the Agreement on Safeguards on the basis of the evidence and arguments put forward by the parties during the WTO dispute settlement process.

5. Burden of proof

10.28 In general, under WTO law, the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption (or *prima facie* case) that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence and arguments to rebut the presumption. Therefore, it is for the complainants to convince the Panel that the United States did not comply with the provisions of the Agreement on Safeguards when it imposed its safeguards measures.

10.29 As discussed above, in the context of the Panel's first enquiry, it is for the complainants to convince the Panel that, in its Report, the United States failed to provide a reasoned and adequate explanation that the WTO pre-requisites for the imposition of safeguard measures were satisfied. In practice, before the WTO panel, the United States will defend USITC's demonstrations and determinations, and the complainants will challenge their WTO-compatibility. In the context of the Panel's second enquiry – when assessing whether the safeguard measures were imposed only to the extent necessary – the Appellate Body has ruled that when the panel concludes, at the end of its first enquiry, that the safeguard measures were imposed in violation of Article 4.2(b), a reversal of the burden of proof occurs so that there is a presumption that the safeguard measures were applied in a manner inconsistent with Article 5.1.⁴⁸⁸⁴

6. USITC data

10.30 As noted throughout our Reports, all data that has been relied upon by the Panel has been obtained directly from the USITC Report or from the various tables and annexes to which that report refers. In a number of sections in our Reports, we have represented USITC data in graphical form. In cases where data was available for interim 2001, the relevant graphs plot interim 2000 data together with interim 2001 data. We have indicated the USITC Report references to the sources for graphs contained in the Panel's Reports.

⁴⁸⁸³ Appellate Body Report, *US – Line Pipe*, paras. 233-234.

⁴⁸⁸⁴ See Appellate Body Report, *US – Line Pipe*, paras. 261-262.

C. CLAIMS RELATING TO UNFORESEEN DEVELOPMENTS

1. Claims and arguments of the parties

10.31 The arguments of the parties can be found in Section VII.C.1 *supra*.

10.32 The European Communities, China, Switzerland, Norway and New Zealand claim that the USITC Report was issued without examining the issue of unforeseen developments, and/or that it did not provide an adequate and reasoned explanation of those developments and the manner in which they resulted in increased imports.⁴⁸⁸⁵ New Zealand adds that the competent authority has failed to demonstrate the existence of unforeseen developments as a matter of fact.⁴⁸⁸⁶ Moreover, the European Communities, China, Norway and New Zealand claim that no opportunity was provided by the USITC to interested parties to present evidence and their views on the issue of unforeseen developments.⁴⁸⁸⁷ For all of these reasons, they claim that the United States has failed to comply with the provisions of both Article 3.1 of the Agreement on Safeguards and Article XIX:1(a) of GATT 1994.

10.33 The United States responds that the USITC identified the unforeseen developments that resulted in increased imports of certain steel products in a manner that was consistent with the United States' obligations under Article XIX of GATT 1994 and Article 3.1 of the Agreement on Safeguards.⁴⁸⁸⁸

2. Relevant WTO provisions

10.34 Article XIX:1(a) of GATT 1994 provides as follows:

"If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

10.35 Article 3.1 of the Agreement on Safeguards provides:

"A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the

⁴⁸⁸⁵ European Communities' first written submission, paras. 122-123; China's first written submission, para. 86; Switzerland's first written submission, paras. 109-110; Norway's first written submission, paras. 110-111; New Zealand's first written submission, para. 4.11.

⁴⁸⁸⁶ New Zealand's first written submission, para. 4.29

⁴⁸⁸⁷ European Communities' first written submission, para. 178; China's first written submission, para. 125; Norway's first written submission, paras. 166; New Zealand's first written submission, para. 4.30; see also their respective written replies to Panel question No. 1 at the first substantive meeting.

⁴⁸⁸⁸ United States' first written submission, para. 925.

presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law."

3. Analysis by the Panel

(a) The cumulative application of Article XIX of GATT 1994 and the Agreement on Safeguards

10.36 Article XIX of GATT 1994 provides that a Member is entitled to impose a safeguard measure "[i]f, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products". There is no reference to unforeseen developments in the Agreement on Safeguards. However, as repeatedly affirmed by the Appellate Body, Articles 1 and 11.1(a) of the Agreement on Safeguards express the continuing applicability of Article XIX of GATT which has been clarified and reinforced by the Agreement on Safeguards.⁴⁸⁸⁹ This interpretation ensures that the provisions of the Agreement on Safeguards and those of Article XIX are given their full meaning and their full legal effect within the context of the WTO Agreement.⁴⁸⁹⁰

10.37 It is now clear that the circumstances of unforeseen developments within the meaning of Article XIX:1(a) of GATT 1994 must be demonstrated as a matter of *fact*, together with the conditions mentioned in Article 2.1 of the Agreement on Safeguards, in the report of the competent authority and before a safeguard measure can be applied.⁴⁸⁹¹

(b) Standard of review

10.38 As mentioned in paragraphs 10.21-10.24 above, the role of this Panel in the present dispute is not to conduct a *de novo* review of the USITC's determination.⁴⁸⁹² Rather, the Panel must examine whether the United States respected the provisions of Article XIX of GATT 1994 and of the Agreement on Safeguards, including Article 3.1. As further developed below, the Panel must examine whether the United States demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers.⁴⁸⁹³

10.39 In considering whether the United States demonstrated as a matter of fact that unforeseen developments resulted in increased imports causing serious injury, the Panel will also examine, in

⁴⁸⁸⁹ See for instance the Appellate Body Report in *Korea – Dairy* at para. 74: "We agree with the statement of the Panel that: It is now well established that the WTO Agreement is a "Single Undertaking" and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously ..." and para. 78: "Having found that the provisions of *both* Article XIX:1 of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* apply to any safeguard measure taken under the *WTO Agreement* ".

⁴⁸⁹⁰ Appellate Body Reports, *Argentina – Footwear (EC)*, para. 95; *Korea – Dairy*, para. 85; *US – Lamb*, para. 71.

⁴⁸⁹¹ Appellate Body Report, *US – Lamb*, para. 72; Appellate Body Report, *Korea – Dairy*, para. 85.

⁴⁸⁹² Appellate Body Report, *Argentina – Footwear (EC)*, paras. 116-117; Appellate Body Report, *US – Lamb*, para. 97.

⁴⁸⁹³ Appellate Body Report, *US – Lamb*, paras. 103-106.

application of its standard of review, whether the competent authorities "considered all the relevant facts and had adequately explained how the facts supported the determinations that were made."⁴⁸⁹⁴

(c) What can constitute an unforeseen development?

10.40 An unforeseen development, pursuant to Article XIX:1(a) GATT 1994, is an unexpected circumstance which has led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to relevant domestic producers.⁴⁸⁹⁵ In the current dispute, the United States argues that the USITC identified the financial crises that engulfed Southeast Asia (Asian crisis) and the former USSR (Russian crisis), the continued strength of the United States' market and persistent appreciation of the US dollar, and the confluence of all of these events as unforeseen developments.⁴⁸⁹⁶ The European Communities, China, Switzerland and Norway contend that none of these events constituted unforeseen developments, nor did any combination of them.⁴⁸⁹⁷ The same four complainants as well as New Zealand argue that the developments mentioned by the United States were not unforeseen because they were not unexpected.⁴⁸⁹⁸

10.41 The legal standard that is used to determine what constitutes an unforeseen development is, as agreed by the parties, at least in part, subjective. This is supported by the Appellate Body, who stated in *Korea – Dairy* that safeguard measures "are to be invoked only in situations when ... an importing Member finds itself confronted with developments *it had not 'foreseen' or 'expected'* when *it* incurred [its] obligation [under GATT 1994]." (emphasis added)⁴⁸⁹⁹

10.42 What was "unforeseen" when the contracting parties negotiated their first tariff concessions in all likelihood differs from what can be considered to be unforeseen today. The Panel notes that after 50 years of GATT, tariffs have, for many products, disappeared or reached very low levels. Further, what constitutes "unforeseen developments" for an importing Member will vary depending on the context and the circumstances. Nevertheless, the subjectivity of the standard does not take away from the fact that the unexpectedness of a development⁴⁹⁰⁰ for an importing Member is something that must be demonstrated through a reasoned and adequate explanation.

10.43 In addition, the standard for unforeseen developments may also be said to have an objective element. The appropriate focus is on what should or could have been foreseen in light of the circumstances. The standard is not what the specific negotiators had in mind but rather what they could (reasonably) have had in mind. This was recognized early in GATT by the *US – Fur Felt Hats* decision, which characterized unforeseen developments as "developments [...] which it would not be

⁴⁸⁹⁴ Appellate Body Report, *Argentina – Footwear (EC)*, para. 121; Appellate Body Report, *US – Lamb*, para. 102.

⁴⁸⁹⁵ Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

⁴⁸⁹⁶ United States' first oral statement, para. 72.

⁴⁸⁹⁷ European Communities' first written submission, para. 151; China's first written submission, para. 97; Switzerland's first written submission, para. 137; Norway's first written submission, para. 139.

⁴⁸⁹⁸ Switzerland's first oral statement on behalf of the complainants, para. 15.

⁴⁸⁹⁹ Appellate Body Report, *Korea – Dairy*, para. 86 and Appellate Body Report, *Argentina – Footwear (EC)*, para. 93 (emphasis added).

⁴⁹⁰⁰ Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".⁴⁹⁰¹

10.44 Moreover, since all the WTO prerequisites, including the demonstration of unforeseen developments, must be satisfied by each safeguard measure, the Panel believes that the factual demonstration of unforeseen developments⁴⁹⁰² must also relate to the specific product(s) covered by the specific measure(s) at issue. Therefore the reasoned and adequate explanation relating to unforeseen developments must contain *specific* factual demonstrations of unforeseen developments identified to have resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers for each safeguard measure at issue.

10.45 In assessing whether the USITC provided a reasoned and adequate explanation of unforeseen developments that resulted in increased imports causing serious injury, it is logical to consider whether the USITC addressed unforeseen developments at all in its published reports, as required by Article 3.1 of the Agreement on Safeguards and Article XIX of GATT 1994, which has been challenged by the complainants.

(d) Demonstration of "unforeseen developments" as a matter of fact: when, where and how to demonstrate unforeseen developments

(i) *Claims and arguments of the parties*

10.46 The arguments of the parties can be found in Sections VII.C.1; C.2(f) *supra*.

(ii) *Analysis by the Panel*

10.47 The Panel recalls that the complainants first raised issues relating to the format and timing of the demonstration of unforeseen developments. The complainants argue that the USITC Report was issued without examining the issue of unforeseen development. They submit that the initial USITC Report, with the exception of a discussion on the Asian and Russian crises, never addressed the requirement of unforeseen developments. They add that the Second Supplementary Report does not form part of the USITC Report and is an *ex post* attempt to demonstrate the existence of unforeseen developments, which did not feature in the same report as the USITC's determination. They argue, therefore, that the Second Supplementary Report should be disregarded. The United States responds that it is perfectly acceptable to issue separate reports, as there is no express guidance on "when, where and how" a demonstration of unforeseen developments must be made. According to the United States, the choice of whether the components of the report are issued at the same time or over a period of time is left to the discretion of the individual Member.⁴⁹⁰³ The Panel will deal with the issues of the form and timing of the competent authorities' report in turn.

The "form" of the demonstration of unforeseen developments in relation to the decision to apply safeguard measures

10.48 In *US – Lamb*, the Appellate Body made it clear that the demonstration of unforeseen developments must be found in the report of the competent authority.⁴⁹⁰⁴ As the parties have pointed

⁴⁹⁰¹ *US – Fur Felt Hats*, para. 9, cited with approval in Appellate Body Report, *Argentina – Footwear (EC)*, para. 96; Appellate Body Report, *Korea – Dairy*, para. 89.

⁴⁹⁰² Appellate Body Report, *US – Lamb*, para. 72; Appellate Body Report, *Argentina – Footwear (EC)*, para. 92; Appellate Body Report, *Korea – Dairy*, para. 85.

⁴⁹⁰³ United States' first written submission, para. 952.

⁴⁹⁰⁴ Appellate Body Report, *US – Lamb*, para. 72; Appellate Body Report, *Korea – Dairy*, para. 85.

out, the requirement to publish a report is a necessary step in conducting an investigation consistent with Article 3.1. However, Switzerland argues that the demonstration of unforeseen developments must be found in the same report as the one containing the determination made pursuant to Articles 2 and 4 of the Agreement on Safeguards and seems to imply that these elements should be contained in a single document.

10.49 The Panel agrees with the United States that nothing in the requirement to publish a report dictates the form that the report must take, provided that the report complies with all of the other obligations contained in the Agreement on Safeguards and Article XIX of GATT 1994. In the end, it is left to the discretion of the Members to determine the format of the report, including whether it is published in parts, so long as it contains all of the necessary elements, including findings and reasoned conclusions on all pertinent issues of fact and law. Together, these parts can form the report of the competent authority.

10.50 The Panel believes that a competent authority's report can be issued in different parts but such multi-part or multi-stage report must always provide for a coherent and integrated explanation proving satisfaction with the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards, including the demonstration that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers. Whether a report drafted in different parts or a multi-stage report constitutes "the report of the competent authority" is to be determined on a case-by-case basis and will depend on the overall structure, logic and coherence between the various stages or the various parts of the report. If separate parts of the report are issued at different times, the discussion relating to unforeseen developments must, in all cases, be integrated logically in the overall explanation as to how the importing Member's safeguard measures satisfies the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards. The publication of a report in many stages may produce added difficulties for the competent authorities to set forth coherent findings in a reasoned and adequate manner.

10.51 The complainants have also argued that the timing of the USITC's demonstration is not in accordance with the requirements of Article XIX of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as articulated by the Appellate Body. We deal with this issue below

The timing of the demonstration of unforeseen developments: before the application of the measure

10.52 Given that the demonstration of unforeseen developments is a prerequisite for the application of a safeguard measure⁴⁹⁰⁵, it cannot take place after the date as of which the safeguard measure is applied. This has been confirmed by the Appellate Body, which noted, in *US – Lamb*, that although Article XIX provides no express guidance on where and when the demonstration of unforeseen developments is to be made, it is nonetheless a prerequisite, and "it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed."⁴⁹⁰⁶ Any demonstration made after the start of the application of a safeguard measure would have to be disregarded automatically as it cannot afford legal justification for that measure.

10.53 Article 3.1 of the Agreement on Safeguards requires *inter alia* that Members apply a safeguard measure only after competent authorities set forth "their findings and reasoned conclusions

⁴⁹⁰⁵ Appellate Body Report in *Korea – Dairy*, paragraph 85; see also, Appellate Body Report, *Argentina – Footwear (EC)*, para. 92.

⁴⁹⁰⁶ Appellate Body Report, *US – Lamb*, para. 72 (emphasis in original); see also Panel Report, *US – Line Pipe*, para. 7.296.

reached on all pertinent issues of fact and law." Accordingly, the Appellate Body Report in *US – Lamb* stated that since the demonstration of unforeseen developments is a pertinent issue of fact and law for the application of a safeguard measure, "it follows that the published report of the competent authorities ... must contain a 'finding' or 'reasoned conclusion' on 'unforeseen developments'."⁴⁹⁰⁷ Such a reasoned and adequate explanation of how unforeseen developments resulted in increased imports causing serious injury must form part of the overall reported explanation by the competent authority that it has satisfied all the WTO prerequisites for the imposition of a safeguard measure. Since the demonstration of unforeseen developments must be included in the published report of the competent authorities it is necessary to look for the demonstration of unforeseen developments in the "report of the competent authority", completed and published prior to the application of the safeguard measures.

10.54 The Panel notes that, according to the United States, 22 October 2001 was the date of the determination made pursuant to Articles 2 and 4 of the Agreement on Safeguards.⁴⁹⁰⁸ This determination was included in the USITC's Report published in December 2001. On 22 October 2001, the USITC had not completed its demonstration relating to unforeseen developments. In the Second Supplementary Report of 4 February 2002, findings were made principally with respect to the issues of "unforeseen developments" and potential exclusions of certain countries from the application of the safeguard measures. The safeguard measures came into effect on 20 March 2002, pursuant to a proclamation by the President on 5 March 2002.⁴⁹⁰⁹ We recall that the demonstration of unforeseen developments must be made in the report of the competent authority and before the measure is applied. To the extent that the February Second Supplementary Report formed part of the competent authority' report – an issue which we will ultimately not need to decide for reasons explained below – the demonstration of unforeseen developments was not necessarily made in an untimely fashion, since this later report was published before the measure was applied.

Conclusion

10.55 Before a decision to apply a safeguard measure can be made in accordance with Article 2 of the Agreement on Safeguards and Article XIX of GATT, a number of conditions must be fulfilled, and certain circumstances must be demonstrated. It is only once all of these prerequisites or requirements are fulfilled, including the completion of the investigation and the issuance of a report containing findings and reasoned conclusions, that a Member is entitled to impose a WTO-compatible safeguard measure.

10.56 The United States refers to 22 October 2001 as the date of the determination pursuant to Articles 2 and 4 of the Agreement on Safeguards. In the Panel's opinion that date cannot constitute the time at which full compliance was achieved with the requirements of Article XIX of GATT and the Agreement on Safeguards, since the USITC could only have completed its demonstration of unforeseen developments on 4 February 2002.

10.57 The Panel is of the view that the determination of satisfaction with the conditions mentioned in Articles 2 and 4 of the Agreement on Safeguards, as well as the factual demonstration of unforeseen developments required by Article XIX of GATT 1994, are distinct elements for which specific findings can be made by the competent authorities at different moments, as long as all such findings are logically and coherently integrated in a report published before the safeguard measure is applied.

⁴⁹⁰⁷ Appellate Body Report, *US – Lamb*, para. 76.

⁴⁹⁰⁸ United States' written reply to Panel question No. 15 at the first substantive meeting.

⁴⁹⁰⁹ Proclamation 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, 7 March 2002.

10.58 For the purpose of the present review, the Panel will assume, *arguendo*, that the USITC Second Supplementary Report of February 2002 is part of the "USITC Report" for the purposes of Article 3.1 of the Agreement on Safeguards (and XIX of GATT 1994 relating to unforeseen developments). Therefore, any demonstration of unforeseen developments which must take place before the measure is applied must also be found in the USITC multi-stage report. The Second Supplementary Report was the last document published by the competent authority before the application of the safeguards measure, that could be said to form part of the "report of the competent authority". Since the Second Supplementary Report is the last pronouncement with regard to "unforeseen developments" before the application of the measures, the findings contained within it are the latest the Panel will take into consideration.

(e) The conduct of the investigation – the obligation to consult interested parties

(i) *Claims and arguments of the parties*

10.59 The arguments of the parties can be found in Section VII.C.2.(f)(iii) *supra*.

(ii) *Analysis by the Panel*

10.60 The Panel recalls that the European Communities, China, Norway and New Zealand argue that, because the issue of unforeseen developments was only discussed in the Second Supplementary Report which came out after the conclusion of the investigation, the interested parties were not given an opportunity to comment on the discussion. This, they argue, is contrary to Article 3.1 of the Agreement on Safeguards, which contains a general obligation to allow interested parties to express their views and comment on the views and evidence of other parties concerning all pertinent issues of law and fact, including the issue of unforeseen developments.⁴⁹¹⁰ The United States responds that the USITC Report shows that the unforeseen conditions, which are demonstrated in the USITC Second Supplementary Report, informed its injury determination.⁴⁹¹¹ Moreover, the USITC specifically sought information on unforeseen developments in the course of its investigation. Accordingly, argues the United States, the allegation that interested parties had no opportunity to present evidence and their views on this issue is patently incorrect.⁴⁹¹²

10.61 The Panel recognizes that Article 3.1 of the Agreement on Safeguards provides certain procedural guarantees to interested parties, such as "reasonable public notice" and "public hearings or other appropriate means [to] present evidence and their views". The important role of interested parties was recognized by the Appellate Body in *US – Wheat Gluten*, when it stated as follows:

"The focus of the investigative steps mentioned in Article 3.1 is on 'interested parties', who must be notified of the investigation, and who must be given an opportunity to submit 'evidence', as well as their 'views', to the competent authorities. The interested parties are also to be given an opportunity to 'respond to the presentations of other parties'. The *Agreement on Safeguards*, therefore, envisages that the interested

⁴⁹¹⁰ European Communities' first written submission, para. 177; China's first written submission, para. 124; Norway's first written submission, para.165; New Zealand's first written submission, para. 4.29; European Communities', China's and Norway's written replies to Panel question No. 1 at the first substantive meeting.

⁴⁹¹¹ USITC Report, pp. OVERVIEW-17, OVERVIEW-18, OVERVIEW-57.

⁴⁹¹² United States' first written submission, para. 954; United States' written reply to Panel question No. 1 at the first substantive meeting.

parties play a central role in the investigation and that they will be a primary source of information for the competent authorities."⁴⁹¹³

10.62 Since the opportunity of interested parties to present evidence and their views is a necessary part of the investigation, it must be reflected in the published report. The United States does not dispute this, but argues instead that the interested parties were given multiple opportunities to present evidence and the USITC actively sought their input.⁴⁹¹⁴ According to the United States, this is reflected in the USITC Report.⁴⁹¹⁵

10.63 In particular, the USITC requested, by way of questionnaires to be returned by 30 July 2001, that the importers, producers and purchasers:

"[P]lease identify any developments during the last ten years that resulted in certain steel products under investigation being imported into the United States in such increased quantities as to have an adverse impact on the domestic industry[ies] during the period January 1996-June 2001. For each development, please describe the development, when it occurred, and whether it was unexpected."⁴⁹¹⁶

10.64 Based on the above questions, it is clear that the issue of unforeseen developments was part of the investigation. By inviting comments in response to the questionnaires, and addressing the issue during its public hearings⁴⁹¹⁷, the Panel is of the view that the United States has complied with its Article 3.1 obligation to provide "appropriate means in which importers, exporters and other interested parties [can] present evidence and their views".

⁴⁹¹³ Appellate Body Report, *US – Wheat Gluten*, para. 54.

⁴⁹¹⁴ In response to the Panel's question No.1 at the first substantive meeting, the United States replied: "In this investigation, the ITC gave public notice of its institution of the steel investigation. (66 Fed. Reg. 35267 (3 July 2001)). The ITC invited public comments and suggestions regarding the content of its questionnaires, which included a question regarding unforeseen developments. (66 Fed. Reg. 34717 (29 June 2001)). The ITC received extensive responses to that public request, including one 110-page submission from respondents from a variety of countries, including Japan, Korea, Brazil, and New Zealand. (Joint Comments of Respondents on Draft Questionnaires, 2 July 2001, Exhibit US-67.) The ITC accepted prehearing written submissions with no page limits, and several of those initial written submissions discussed unforeseen developments. (*E.g.*, Respondents' Joint Prehearing Framework Brief, 12 Sept. 2001 (Joint filing from 40 companies in 25 countries, including Japan, Brazil, Thailand, Korea, the European Communities, Venezuela, Norway, India, New Zealand, and China), pp. 106-109 (Exhibit US-68); Prehearing Submission of the European Commission, 10 Sep. 2001, pp. 4-5 (Exhibit US-69); AK Steel Prehearing Brief, 11 Sep. 2001, pp. 60-63 (Exhibit US-70); Prehearing Brief of United Steelworkers of America, 11 Sep. 2001, pp. 129-131 (Exhibit US-71); Prehearing Brief of Domestic Carbon Flat Steel Producers, 11 Sep. 2001, pp. 31-36 (Exhibit US-72); Respondents' Joint Prehearing Brief for Product #18, Seamless Tubular Products other than OCTG, 10 Sep. 2001, pp. 11-13 (Exhibit US-73); Minimill Coalition (Long Products) Prehearing Brief, 11 Sep. 2001, pp. 18-22 (Exhibit US-74).) The ITC's prehearing Staff Report included information on the Asian economic crisis, continuing post-dissolution difficulties in the former USSR republics, and the appreciation of the US dollar. (Prehearing Staff Report at OVERVIEW-22-24 and OVERVIEW-70-71 (Exhibit US-75)). The ITC held a series of public hearings at which various Commissioners directly solicited comments from the parties on unforeseen developments. (Tr., pp. 326-327 (Chairman Koplan) (Exhibit US-44); 343 (Commissioner Hillman) (Exhibit US-45); 1445 (Vice Chairman Okun) (Exhibit US-46); and 2626 (Vice Chairman Okun) (Exhibit US-47)). The ITC accepted post-hearing written submissions with no page limits, several of which also discussed the issue of unforeseen developments."

⁴⁹¹⁵ United States' second written submission, para. 168.

⁴⁹¹⁶ Domestic Producer's Questionnaire, question I-7 (US-41); Importer's Questionnaire, question I-6 (US-42); Purchaser's Questionnaire, question I-6 (US-43).

⁴⁹¹⁷ United States' first written submission, para. 954.

10.65 The European Communities complains that "there was no provisional reasoning on or explanation of unforeseen developments on which interested parties could comment".⁴⁹¹⁸ The Panel does not believe that Article 3 of the Agreement on Safeguards requires the competent authority to send to interested parties "draft findings" of its demonstration relating to unforeseen developments in order to allow them to comment prior to the publication of the competent authority's report.

10.66 We, therefore, reject the European Communities, China, Norway and New Zealand's claims that the United States violated Article 3.1 in refusing to provide to interested parties an opportunity to present evidence and share their views on unforeseen developments.

- (f) Reasoned and adequate explanation that unforeseen developments resulted in increased imports causing serious injury

10.67 Following the approach suggested by the Appellate Body in *US – Lamb*⁴⁹¹⁹, the Panel will now consider whether the USITC offered a reasoned and adequate explanation as to why and how the cited unforeseen developments could be so regarded. This requires, at a minimum, some discussion by the competent authority as to how the developments were unforeseen at the appropriate time, and why conditions in the second clause of Article XIX:1(a) occurred as a result of circumstances in the first clause.

- (i) *Unforeseen developments*

Claims and arguments of the parties

10.68 The arguments of the parties can be found in Section VII.C.1 *supra*.

Analysis by the Panel

10.69 We will begin our assessment of the USITC's explanation of the unforeseen developments by considering the competent authority's explanation of why they were unforeseen. The Panel will then move on to consider the explanation of how the unforeseen developments "resulted in" increased imports. In order to answer these questions, it is necessary to ask what the alleged unforeseen developments were and as of when they must have been unforeseen.

10.70 The Appellate Body in both *Argentina – Footwear (EC)* and *Korea – Dairy* quoted the following statement from the *US – Fur Felt Hats* GATT Working Party report of 1951:

"[U]nforeseen developments' should be interpreted to mean *developments occurring after the negotiation of the relevant tariff concession* which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated."⁴⁹²⁰

10.71 In its report in *Korea – Dairy*, the Appellate Body made the following finding:

"And, such 'emergency actions' are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself

⁴⁹¹⁸ European Communities' second written submission, para. 85.

⁴⁹¹⁹ Appellate Body Report, *US – Lamb*, para. 73.

⁴⁹²⁰ See Appellate Body Reports, *Argentina – Footwear (EC)*, para. 96, and *Korea – Dairy*, para. 89, citing *US – Fur Felt Hats*, adopted 22 October 1951.

confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation."⁴⁹²¹

10.72 The United States argues that the four factors cited by the USITC, namely the Russian crisis, the Asian crisis and the continued strength of the United States' market together with the persistent appreciation of the US dollar, each constituted unforeseen developments. It also argues that the confluence, or simultaneous occurrence, of these three events amounted to an unforeseen development.⁴⁹²²

10.73 The complainants argue that none of the above events constituted unforeseen developments, nor did any combination of them.⁴⁹²³ Moreover, they argue that the explanation of how the above events have resulted in increased imports has not been performed in a manner that is reasoned and adequate.

10.74 Parties agree that, in the present dispute, the point in time at which developments should have been unforeseen is that of the completion of the Uruguay Round. The Panel will apply the above interpretation to determine if the USITC assessed whether the developments which it identified were unforeseen as at the time that the Uruguay Round negotiations were concluded.

The Asian and Russian crises

10.75 The complainants argue that the Asian and Russian crises could not have been unforeseen because they were not unexpected.⁴⁹²⁴ With respect to the Russian crisis, the dissolution of the USSR occurred in 1991. New Zealand argues that the United States' negotiators were fully aware of this when they agreed to tariff concessions during the Uruguay Round.⁴⁹²⁵ The complainants contend that if a development had started before the concessions were granted, it could not be considered to have been unforeseen. For them, there is normally a close temporal connection between the unforeseen developments and the increased imports.⁴⁹²⁶ Taking the figures from the USITC Report that show consumption drops and export increases, they argue that the changes in steel markets were much more pronounced after the dissolution of the former Soviet Union in 1991 than later on and could, therefore, not be unforeseen after 1994.⁴⁹²⁷

10.76 The United States responds that the Southeast Asia and former USSR crises were perhaps foreseeable in the general, hypothetical sense, but the timing, extent and ongoing effect on global steel trade were not foreseen by the United States until well after the conclusion of the Uruguay Round.⁴⁹²⁸ It claims that the unforeseen developments that it is invoking took place after the Uruguay Round. The East Asian financial crisis began in mid-1997, and although the Soviet Union collapsed in 1991, with resulting dislocations in the successor states, these were not the developments that the USITC found to be unforeseen. Rather, the developments in question were such that those countries'

⁴⁹²¹ See Appellate Body Reports, *Argentina – Footwear (EC)*, para. 93, and *Korea – Dairy*, para. 86.

⁴⁹²² United States' first oral statement, para. 72.

⁴⁹²³ European Communities' first written submission, para. 151; China's first written submission, para. 97; Switzerland's first written submission, para. 137; Norway's first written submission, para. 139.

⁴⁹²⁴ Switzerland's first oral statement, delivered on behalf of the complainants, para. 15.

⁴⁹²⁵ New Zealand's first written submission, paras. 4.25-4.27.

⁴⁹²⁶ European Communities' first written submission, para. 133; Norway's first written submission, para. 121; China's first written submission, para. 90.

⁴⁹²⁷ Switzerland's first oral statement, delivered on behalf of the complainants, paras. 16-17.

⁴⁹²⁸ United States' first written submission, para. 930.

conditions changed after 1996 from the condition prevalent at the time of the Uruguay Round negotiations.⁴⁹²⁹

10.77 The Panel will first consider the USITC's explanation of the Asian crisis as an unforeseen development before considering the Russian crisis, the invocation of the strength of the United States' economy and the appreciation of the US dollar, as well as the confluence of those factors.

Asian crisis

10.78 The USITC offered the following explanation in its initial report:

"[S]ignificant production capacity increases occurred during a period of disruption in world steel markets. The depreciation of several Asian currencies in late 1997 and early 1998 significantly curtailed steel consumption in those countries and created a pool of steel seeking alternative markets."⁴⁹³⁰

10.79 For the Panel, this statement amounts to an identification of the depreciation of Asian currencies, which occurred in 1997 and 1998, and its effects on the steel world market, as unforeseen developments. Although it does not provide an explanation as to why the development was unforeseen, we can assume that, as the crisis began in 1997, it could not have been foreseen by the United States negotiators in 1994, when the Uruguay Round ended. Moreover, it is consistent with the following statement of the USITC, which was made in the Second Supplementary Report:

"Growth rates in [South East Asian] countries exceeded eight percent per year in the first half of the 1990s. These high growth rates were supported by even sharper growth in exports. As late as the fall of 1997, economists projected continued growth at similarly impressive rates for these emerging markets. Despite this period of intense growth and generally optimistic predictions, the 'Asian Financial Crisis' began with the depreciation of the Thai baht in mid-1997. The depreciation of the baht and loss of investor confidence sparked a wider crisis that affected many developing markets. The crisis slowed economic growth and reduced demand for steel in many emerging country markets. Between 1997 and 1998, steel consumption in Indonesia, Korea, Malaysia, the Philippines, and Thailand fell by 29.6 million tons, a drop of 41.4 percent. In Korea alone finished steel consumption dropped by 14.5 million tons or 34.4 percent. The crisis also led to depreciations in the currencies of the Philippines, Indonesia, Malaysia, and Korea with respect to the US dollar. By January 1998, these currencies had declined between 38 and 76 percent in nominal terms."⁴⁹³¹

10.80 Likewise, this statement identifies the Asian financial crisis as an unforeseen development, which began in 1997. It also explains that the development was not foreseen. Based on the USITC statements quoted above, the Panel concludes that the United States demonstrated that the Asian crisis and its effects on the steel world market could constitute an unforeseen development within the meaning of Article XIX of GATT 1994, since the Asian Crisis took place after the United States last negotiated its tariff concessions on the steel products covered by the investigation at issue. We explore in paragraphs 10.96-10.101 below, the USITC's explanation that the confluence of the Asian financial crisis, together with other factors (the Russian financial crisis, the strong United States'

⁴⁹²⁹ United States' written reply to Panel question No. 11 at first substantive meeting.

⁴⁹³⁰ USITC Report, p. 58 (footnotes omitted).

⁴⁹³¹ USITC Second Supplementary Report, p. 4 (footnotes omitted).

economy and the strong US dollar) constituted unforeseen developments that resulted in increased imports causing serious injury to the relevant domestic producers.

Russian crisis

10.81 With respect to the Russian crisis, the USITC stated, in its initial Report, that:

"The dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries."⁴⁹³²

10.82 Further, in the Second Supplementary Report, the USITC explains that:

"Although the dissolution of the former Soviet Union and the resulting economic dislocations in the former Soviet republics predated the conclusion of the Uruguay Round, unanticipated financial difficulties led to a sharp increase in exports of steel from the former Soviet Union between 1996 and 1999.⁴⁹³³ In particular, as Russia and other former republics experienced intense financial disruptions and currency fluctuations in this period, steel exports rose nearly 22 percent.⁴⁹³⁴ Other Eastern European countries also emerged as net exporters of steel."⁴⁹³⁵

10.83 The unforeseen developments, as identified by the USITC, were the "unanticipated financial difficulties", which, in particular, were the "intense financial disruptions and currency fluctuations" between 1996 and 1999, resulting from the dissolution of the Soviet Union.

10.84 The Panel is of the view that this statement distinguishes between the foreseen financial difficulties that arose from the dissolution of the USSR, and the financial difficulties that were unforeseen. The Panel is also of the view that there may be instances when an event which is already known will develop into a situation initially unforeseen. Therefore, an unforeseen development may evolve from well-known prior facts. Nevertheless, the competent authority must provide a reasoned and adequate explanation as to how the later developments were unforeseen given the earlier known facts.

10.85 Therefore, the Panel will accept, *arguendo*, that there may have been, between 1996 and 1999, unforeseen financial disruptions and currency fluctuations linked to the USSR dissolution that were thus unforeseen at the conclusion of the Uruguay Round.

The strength of the US economy and the appreciation of the US dollar

10.86 The European Communities, Norway, Switzerland and China argue that the "robustness" of the United States' market cannot be considered an "unforeseen development" by the United States, because United States' economic policy was likely to have been conducted with this objective.⁴⁹³⁶ These complainants argue that the growth of the United States' economy started in 1990, well before

⁴⁹³² USITC Report, p. 58 (footnotes omitted).

⁴⁹³³ (original footnote) Exports increased because reductions in steel production in the former Soviet Union did not keep pace with declines in consumption. Steel consumption fell more than 70 percent from 1991 to 1998. USITC Pub. 3479, Vol. II at Table OVERVIEW-4.

⁴⁹³⁴ (original footnote) USITC Pub. 3479, Vol. II at OVERVIEW-19 and Table OVERVIEW-5.

⁴⁹³⁵ USITC Second Supplementary Report, p. 4.

⁴⁹³⁶ European Communities' first written submission, para. 150; Switzerland's first written submission, para. 136; Norway's first written submission, para. 138; China's first written submission, para. 100.

the Uruguay Round, so it must have been foreseen.⁴⁹³⁷ The European Communities, Norway and Switzerland also challenge the notion that such favourable developments are capable of being considered unforeseen developments, since the term within the meaning of Article XIX is meant to cover unfavourable developments or shocks to the system that are susceptible to lead to adverse consequences. Such is not the case of the "robustness" of the United States' economy and the strength of the US dollar.⁴⁹³⁸

10.87 The United States responds that nothing in Article XIX prevents the continued strength of a market or the appreciation of a currency from constituting an unforeseen development.⁴⁹³⁹ It argues that in *US – Fur Felt Hats*, the unforeseen development was a shift in fashion to a different sort of hat. That shift in fashion was presumably unfavourable to the industries making the less fashionable hats, but that shift could probably not be described as "unfavourable" in any broader sense. According to the United States, *US – Fur Felt Hats* supports the conclusion that an unforeseen development may be a development that could be described as neutral or even positive in general terms, but which results in a change in trade patterns that proves injurious to a particular industry.⁴⁹⁴⁰

10.88 The Panel turns immediately to the explanation afforded by the USITC, which states that:

"While other markets experienced significant turmoil and contraction after 1997, demand in the United States remained robust. Indeed, the US economy enjoyed an overall economic expansion in the 1990s of unprecedented length. Consequently, US demand for steel remained strong."

10.89 From the above statement, it seems that the competent authority did not interpret the robustness of the United States' economy to be an "unforeseen development" in and of itself⁴⁹⁴¹, but rather, it viewed the strength of the economy in the context of the turmoil in other markets. Therefore, the Panel is of the view that the strength of the United States' market was considered by the

⁴⁹³⁷ Switzerland's first oral statement, delivered on behalf of the complainants, para. 19.

⁴⁹³⁸ European Communities' second written submission, para. 56; Norway's second written submission, para. 40; Switzerland's second written submission, para. 31.

⁴⁹³⁹ United States' first written submission, paras. 972-973, citing USITC Second Supplementary Report, p.1; USITC Report, Table OVERVIEW-16.

⁴⁹⁴⁰ United States' second oral statement, para. 106.

⁴⁹⁴¹ However see at para. 976 of its first written submission, the United States argues that:

"The ITC report cited a number of unforeseen developments that resulted in the ten steel products being imported into the United States in such increased quantities and under such conditions as to cause serious injury to the domestic industries. Each of those developments was unforeseen in and of itself. However, the confluence of this particular set of events can be described as an unforeseen development."

See also the United States' written reply to Panel question No. 18 at the first substantive meeting:

"Are you relying/did the ITC rely on the robustness of the United States Dollar as an unforeseen development?"

The robustness of the United States dollar was a development which combined with the other developments, namely, the currency crises in Southeast Asia and the former USSR countries and the continued growth in steel demand in the US market as other markets declined, to produce the increased volume of imports."

USITC along with the other alleged unforeseen developments and as part of a set of world events which *together* constituted unforeseen developments.

10.90 As regards the US dollar appreciation, the European Communities, Norway, China and Switzerland argue that a change in the value of a currency such as the US dollar cannot be accepted as an unforeseen development.⁴⁹⁴² According to the European Communities, China and Norway, exchange-rate developments are foreseeable in two main senses.⁴⁹⁴³ First, it is foreseeable that the exchange rate between two currencies that are not fixed will change over time. Second, it is foreseeable that the exchange rate of a currency of a country with a robust economy and low inflation (such as the United States in the 1990s) will rise over time compared with the currency of a country with a weak economy and high inflation rate (such as Russia).⁴⁹⁴⁴ For them, the value of the dollar in relation to other currencies has regularly changed by significant amounts since the collapse of the Bretton Woods system of fixed exchange rates in 1971. Such changes can no longer be considered to be "unforeseen", but it must, on the contrary, be considered to be quite expected that the dollar would not remain stable vis-à-vis other currencies.⁴⁹⁴⁵

10.91 The United States responds that nothing in Article XIX prevents the appreciation of a currency from constituting an unforeseen development. The period under investigation saw persistent and widespread appreciation of the US dollar against virtually all other major currencies.⁴⁹⁴⁶ The United States argues that the fact that exchange rates change over time could be described as foreseeable, but not necessarily foreseen. Particular exchange rate developments, such as an unusually rapid or severe change in rates, are not likely to have been foreseen at the time of a particular concession. It argues that the complainants have presented no evidence that the currency disruptions that occurred prior to the import surges were in fact foreseen by anyone, much less that those events were foreseen by any negotiator from the United States during the Uruguay Round.⁴⁹⁴⁷

10.92 Once again, the Panel turns immediately to the USITC explanation, which states that:

"Continued growth in the US market, combined with uncertainty and contraction in other markets, led to significant upward pressure on the US dollar. The dollar appreciated significantly against many currencies during the period of investigation, and that appreciation became more notable after the foreign currency dislocations of 1997 and 1998. Between 1996 and the first quarter of 2001, many currencies experienced double-digit declines, in real terms, relative to the dollar.⁴⁹⁴⁸ The high value of the US dollar made the US market an especially attractive market for steel products displaced from other markets."

10.93 Like the statement above regarding the strength of the United States' economy, this statement by the competent authority shows that the appreciation of the US dollar was not thought to be a stand-alone "unforeseen development". Instead, the USITC considered the relevance of the appreciation of

⁴⁹⁴² European Communities' first written submission, para. 152; Switzerland's first written submission, para. 138; Norway's first written submission, para. 140; China's first written submission, para. 101.

⁴⁹⁴³ European Communities', China's, and Norway's written replies to Panel question No. 10 at the first substantive meeting.

⁴⁹⁴⁴ European Communities', China's, and Norway's written replies to Panel question No. 10 at the first substantive meeting.

⁴⁹⁴⁵ Switzerland's first oral statement, delivered on behalf of the complainants, para. 20.

⁴⁹⁴⁶ United States' first written submission, paras. 972-973, citing USITC Second Supplementary Report, p.1; USITC Report, Table OVERVIEW-16.

⁴⁹⁴⁷ United States' written reply to Panel question No. 10 at the first substantive meeting.

⁴⁹⁴⁸ (original footnote) USITC Pub. 3479, Vol. II, Table OVERVIEW-16.

the US dollar "after the foreign currency dislocations of 1997 and 1998". Presumably, it was the fact that the United States dollar remained high while the Thai baht, the Russian ruble and other Southeast Asian and Eastern European currencies became weak that allegedly resulted in increased imports. Moreover, the competent authority recognized the link between the upward pressure on the dollar and the combination of the growth in the United States' market with the contraction in other markets.

10.94 Since we believe the USITC did not regard the continued strength of the United States' market and appreciation of the US dollar as a distinct development, separate from the other alleged unforeseen developments, the Panel does not need to address the arguments of the complainants that such factors could not constitute unforeseen developments.

10.95 The Panel will thus review the explanation provided by the USITC which, in our view, treated the strength of the United States' market and the appreciation of the US dollar as factors that were part of a confluence of developments that together caused turmoil in these markets.

The confluence of developments

10.96 The European Communities, China, Switzerland and Norway argue that no combination of events cited by the USITC can constitute an unforeseen development.⁴⁹⁴⁹

10.97 The United States argues that the robustness of the US dollar was a development which combined with the other developments, namely, the currency crises in Asia and the former USSR and the continued growth in steel demand in the United States' market as other markets declined, lead to increased imports.⁴⁹⁵⁰

10.98 The Panel has already accepted that the Russian and the Southeast Asian financial crises, at least conceptually, could be considered unforeseen developments that did not exist at the end of the Uruguay Round. We have also found that the USITC did not consider the strength of the United States' economy and the appreciation of the US dollar as unforeseen developments *per se*; it had referred to these factors in relation to other unforeseen developments, which *together* had resulted in increased imports causing or threatening to cause injury.

10.99 Article XIX does not preclude consideration of the confluence of a number of developments as "unforeseen developments". Accordingly, the Panel believes that confluence of developments can form the basis of "unforeseen developments" for the purposes of Article XIX of GATT 1994. The Panel is of the view, therefore, that it is for each Member to demonstrate that a confluence of circumstances that it considers were unforeseen at the time it concluded its tariff negotiations resulted in increased imports causing serious injury.

10.100 To the complainants' argument that the changes in steel markets were much more pronounced in 1991 following the dissolution of the former Soviet Union than later on and could not, therefore, be unforeseen after 1994, the Panel notes that the fact that the dissolution of the USSR and its overall effects may have constituted an unforeseen development in 1991 does not mean that a subsequent financial crisis also resulting somehow from the dissolution of the USSR, cannot, with other

⁴⁹⁴⁹ European Communities' first written submission, para. 151; China's first written submission, para. 97; Switzerland's first written submission, para. 137; Norway's first written submission, para. 139.

⁴⁹⁵⁰ United States' written reply to Panel question No. 17 at the first substantive meeting.

developments, be considered part of a "confluence of unforeseen developments" in 1997 for the purpose of Article XIX of GATT 1994.⁴⁹⁵¹

10.101 The Panel will now proceed to an assessment of whether the USITC provided a reasoned and adequate explanation that the Asian and Russian crises taken together, alongside the additional factors of the strength of the United States' economy and the appreciation of the US dollar, and their effects on steel world markets, *resulted* in increased imports into the United States causing or threatening to cause serious injury to the relevant domestic producers.

(ii) *"as a result of unforeseen developments and tariffs concessions"*

Claims and arguments of the parties

10.102 The arguments of the parties can be found in Section VII.C.2.(d).

Analysis by the Panel

10.103 We recall that Article XIX of GATT 1994 reads as follows:

"If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, (...)."

10.104 The Appellate Body has interpreted the phrase "as a result of" in Article XIX:1(a) of GATT 1994 as a logical connection that exists between the first two clauses of that Article. In other words, a logical connection must be demonstrated to have existed between the elements of the first clause of Article XIX:1(a) – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions" – and the conditions set forth in the second clause of that Article – "increased imports causing serious injury" – for the imposition of a safeguard measure.⁴⁹⁵²

Logical connection between unforeseen developments and "increased imports so as to cause serious injury"

10.105 In the following paragraphs, we note some of the references to the Russian crisis, the Asian crisis and exchange rates in the initial USITC Report and the Second Supplementary Report including the separate views of Commissioners Okun and Bragg.

10.106 The USITC offered the following statements, in its initial Report, with respect to:

"CCFRS:

These significant production capacity increases occurred during a period of disruption in world steel markets. The depreciation of several Asian currencies in late 1997 and early 1998 significantly curtailed steel consumption in those countries and created a

⁴⁹⁵¹ Switzerland's first oral statement, delivered on behalf of the complainants, paras. 16-17.

⁴⁹⁵² Appellate Body Reports, *Argentina – Footwear (EC)*, para. 92; *Korea – Dairy*, para. 85.

pool of steel seeking alternative markets.⁴⁹⁵³ The dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries.^{4954 4955}

Hot-rolled bar:

The timing of domestic producers' price declines do not correspond precisely to the timing of the import surges. The record, however, indicates that imports had a negative effect on prices and that the domestic industry used different strategies over the course of the period examined to compete with the imports. The largest increase in hot-rolled bar imports occurred in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries. Import volumes increased by 29.5 percent from 1997 to 1998.^{4956 4957}

Cold-finished bar:

A substantial increase in cold-finished bar imports occurred in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries.⁴⁹⁵⁸

Rebar:

Rebar imports increased significantly in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries.⁴⁹⁵⁹

Stainless Steel Wire Rod:

We have taken into account a number of factors that affect the competitiveness of domestic and imported stainless rod in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, market conditions, and exchange rates."⁴⁹⁶⁰

10.107 In a separate decision, Commissioner Okun made the following remark with respect to the "Selection of Import Quotas" as part of a "Justification for Form of Relief":

"[T]he record indicates that the currencies of selected countries, many of which export substantial amounts of steel to the United States, demonstrated substantial depreciations relative to the US dollar.⁴⁹⁶¹ Exchange rate fluctuations between the US dollar and foreign currencies can have a significant effect on the relative competitiveness of global steelmakers selling products in the US market. Quotas

⁴⁹⁵³ (original footnote) CR and PR, p. OVERVIEW-17.

⁴⁹⁵⁴ (original footnote) CR and PR, p. OVERVIEW-18.

⁴⁹⁵⁵ USITC Report, p. 58.

⁴⁹⁵⁶ (original footnote) CR and PR, Table LONG-5.

⁴⁹⁵⁷ USITC Report, p. 96.

⁴⁹⁵⁸ USITC Report, p.106, fn. 630.

⁴⁹⁵⁹ USITC Report, p. 113.

⁴⁹⁶⁰ USITC Report, p. 217.

⁴⁹⁶¹ (original footnote) CR/PR at Table OVERVIEW-16. All but two countries showed depreciations.

prevent a surge of low-priced imports from countries that have experienced currency depreciations."⁴⁹⁶²

10.108 The USITC also appended the following to its December 2001 Report:

"THE ASIAN FINANCIAL CRISIS

The 'Asian Financial Crisis' began with the depreciation of the Thai baht in mid-1997, followed by depreciations in the currencies of the Philippines, Indonesia, Malaysia and Korea. During January 1996-January 1998, the currencies of these five countries depreciated between 38 and 76% in nominal terms. As these economies slowed, their finished steel consumption fell significantly (figure OVERVIEW-7). Finished steel consumption in Indonesia, Korea, Malaysia, the Philippines and Thailand together fell by 29.6 million tons during 1997-98, with the largest decline occurring with respect to Korean finished steel consumption, 14.5 million tons.⁴⁹⁶³

[...]

POST-USSR DEVELOPMENTS

Changes in Russia and other states formerly part of the USSR during 1991-2000 have had an impact on the global steel market. The shift in these states toward market forces in 1992 precipitated a drop in overall economic activity, especially in industrial output and investment such as machine building, which has been a major focus of the USSR steel industry. The problems in the overall post-USSR economy resulted in sharp declines in both steel production (table OVERVIEW-3) and steel consumption (table OVERVIEW-4).

Table OVERVIEW-3
Production of Crude Steel in Russia, Ukraine and the Former USSR, 1991-2000

Country	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Quantity (1,000 tons)										
Russia	(¹)	73,902	64,329	53,817	56,879	54,303	53,475	48,315	56,792	65,160
Ukraine	(¹)	46,041	35,953	26,550	24,596	24,622	28,257	26,951	30,268	34,620
Former USSR ²	146,460	130,077	108,171	86,281	87,194	85,088	89,334	82,051	94,975	(¹)
¹ Not available ² Includes all of the states of the former USSR. Virtually all of the steel production is in Russia, Ukraine and Kazakhstan (in order of the volume produced). Source: IISI										

Table OVERVIEW-4

⁴⁹⁶² Views of Vice Chairman Deanna Tanner Okun on Remedy, USITC Report, p.437.

⁴⁹⁶³ USITC Report, Vol. II, p. OVERVIEW-17; Followed this excerpt is Figure OVERVIEW-7, a graph entitled "Finished steel consumption in selected Asian countries, 1991-99", demonstrating the consumption trends for Indonesia, Korea, Malaysia, the Philippines and Thailand. Unfortunately, we are unable to reproduce the graph in the present Panel Reports because we do not have the data upon which the graph was based, p. OVERVIEW-18.

Apparent Consumption of Finished Steel in Russia, Ukraine and the Former USSR,
1991-2000

Country	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Quantity (1,000 tons)										
Russia	⁽¹⁾	50,539	34,026	21,904	20,728	18,082	17,200	16,979	18,633	25,358
Ukraine	⁽¹⁾	27,901	16,510	7,718	6,505	6,946	9,041	5,954	9,592	10,695
Former USSR ²	111,029	84,495	56,997	37,785	35,502	33,407	34,840	31,753	37,045	44,873
¹ Not available ² Includes all of the states of the former USSR.										
Source: IISI										

The movement toward a market economy also resulted in a disruption of traditional trade flows for steel within the former COMECON structure. COMECON was set up in 1949 to facilitate trade and economic cooperation between the USSR and certain communist countries. The organization attempted to integrate the economies of Eastern Europe with that of the USSR. From 1949 to 1991, USSR steel exports primarily went to COMECON members. With the breakup of the USSR and movement by the former USSR toward a market economy, COMECON became obsolete. The ending of COMECON in 1991 marked a loss to the former USSR of its traditional foreign buyers of its steel. The position of the former USSR in the global steel market changed from a minor player in 1991 to the largest steel exporter in the world by 1999. These developments have resulted in trade frictions in many markets. Anti-dumping investigations or orders have been initiated against imports of Russian steel by 21 trading partners including Argentina, Brazil, Canada, Chile, China, Colombia, the EU, India, Indonesia, Korea, Malaysia, Mexico, Peru, the Philippines, South Africa, Taiwan, Thailand, Turkey, the United States, Venezuela and Vietnam. In addition, both the EU and the United States have negotiated agreements setting quotas on imports of most Russian steel products. The United States also has two suspension agreements in place on imports of Russian hot-rolled steel and steel plate.

With the restructuring of the economy in the post-USSR period, energy and transportation costs are rising, resulting in a significant increase in production costs. Full restructuring and movement toward market relations is hindered in part because these mills continue to provide the entire wage base in some areas. Several also accounted for a sizable share of USSR regional agricultural production. Therefore, steel producers face decreased domestic demand and increased energy, transportation and input costs while lacking the ability to cut costs by substantially reducing the number of employees. One way steel producers have tried to resolve these problems is to substantially increase exports (table OVERVIEW-5).

Table OVERVIEW-5
Exports of Steel from Russia, Ukraine and the Former USSR, 1991-2000

Country	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Quantity (1,000 tons)										
Russia	⁽¹⁾	7,912	18,388	28,275	30,178	29,762	28,798	27,377	30,313	⁽¹⁾

Ukraine	(1)	8,580	12,083	12,831	12,848	13,387	17,803	17,583	20,896	(1)
Former USSR ²	6,101	21,375	33,160	44,278	46,481	46,763	51,696	49,916	57,018	(1)
¹ Not available ² Includes all of the states of the former USSR. Source: IISI										

[...]

EXCHANGE RATES

Exchange rate fluctuations between the US dollar and foreign currencies can have a significant effect on the relative competitiveness of global steelmakers selling products in the US market. As shown in table OVERVIEW-16, the dollar has strengthened considerably against the currencies of many of the major import sources for subject steel products during the period examined. As a country's currency depreciates against the dollar, the foreign producer can lower product prices expressed in dollars in the US market while still receiving the same price expressed in its home currency. These shifts are mitigated somewhat in many countries as the major raw materials used in steelmaking, such as iron ore, scrap, and metallurgical coal and coke, are sold on a dollar-basis throughout the world. However, for countries that purchase raw materials in the global market, an estimated two-thirds of the costs of steelmaking are still in local currencies.⁴⁹⁶⁴

[...]

Table OVERVIEW-16
Overall Appreciation and Depreciation Amounts for Currencies
of Selected Countries relative to the US dollar,
January-March 1996 through January-March 2001

Country	Nominal Exchange Rate		Real Exchange Rate	
	Appreciation	Depreciation	Appreciation	Depreciation
Argentina	–	–	–	11.5
Australia	43.4	–	48.1	–
Brazil	–	52.0	–	24.9
Canada	–	10.5	–	9.1
Germany	–	30.4	–	36.0
India	–	33.5	–	8.2
Indonesia	–	76.3	–	31.1
Italy	–	24.8	–	25.0
Japan	–	10.4	–	20.1

⁴⁹⁶⁴(original footnote) Peter Marcus and Karlis Kirsis, *Steel in 2001: Constraints Unparalleled, Opportunities Unmatched*, presented to Steel Success Strategies XVI, World Steel Dynamics, 19 June 2001.

Korea	–	38.4	–	31.7
Latvia	–	11.3	–	13.8
Mexico	–	22.4	36.7	–
Netherlands	–	31.1	–	33.6
Poland	–	37.9	55.8	–
Romania	–	89.7	10.9	–
Russia	–	83.3	–	45.6
South Africa	–	51.9	–	37.1
Spain	–	31.2	–	31.2
Thailand	–	41.5	–	37.0
Turkey	–	91.9	–	19.2
United Kingdom	4.8	–	2.2	–
Source: International Monetary Fund, <i>International Financial Statistics</i> , December 1999 and July 2001.				

10.109 On 3 January 2002, the USTR asked the USITC to provide, *inter alia*, additional information on unforeseen developments. On 9 February 2002, the USITC responded to this request, submitting its Second Supplementary Report, which states by way of introduction:

"We provide the following response to USTR's request that we identify any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof. (...)

To the extent that WTO panel decisions have suggested that the concept of 'unforeseen' developments relates to the expectations of negotiators of the relevant tariff concessions, we note that such an assessment is in many respects outside of the purview of this agency, since multilateral trade negotiations are not within its mandate, but are the responsibility of the USTR and relevant Executive Branch agencies."⁴⁹⁶⁵

10.110 The Second Supplementary Report then goes on to provide an explanation of "unforeseen developments". The USITC's explanation is rather brief:

"At the time of the Uruguay Round negotiations, and for some time after its conclusion, there had been substantial overall economic growth in a number of emerging markets, most notably those in southeast Asia. Growth rates in those countries exceeded eight percent per year in the first half of the 1990s.⁴⁹⁶⁶ These high growth rates were supported by even sharper growth in exports.⁴⁹⁶⁷ As late as the fall

⁴⁹⁶⁵ (original footnote) USITC Second Supplementary Report, Attachment I, pp. 1-4 (Exhibit CC-11).

⁴⁹⁶⁶ (original footnote) World Economic Outlooks, October 1995-October 1997, Surveys by the Staff of the International Monetary Fund, Exh. 19 of Minimill 201 Coalition (Long Products) Prehearing Injury Brief.

⁴⁹⁶⁷ (original footnote) World Economic Outlooks and APEC Economic Forecasts, Exhs. 19 and 20 of Minimill 201 Coalition (Long Products) Prehearing Injury Brief.

of 1997, economists projected continued growth at similarly impressive rates for these emerging markets.⁴⁹⁶⁸ Despite this period of intense growth and generally optimistic predictions, the "Asian Financial Crisis" began with the depreciation of the Thai baht in mid-1997.⁴⁹⁶⁹ The depreciation of the baht and loss of investor confidence sparked a wider crisis that affected many developing markets. The crisis slowed economic growth and reduced demand for steel in many emerging country markets. Between 1997 and 1998, steel consumption in Indonesia, Korea, Malaysia, the Philippines, and Thailand fell by 29.6 million tons, a drop of 41.4 percent.⁴⁹⁷⁰ In Korea alone finished steel consumption dropped by 14.5 million tons or 34.4 percent.⁴⁹⁷¹ The crisis also led to depreciations in the currencies of the Philippines, Indonesia, Malaysia, and Korea with respect to the US dollar.⁴⁹⁷² By January 1998, these currencies had declined between 38 and 76 percent in nominal terms.⁴⁹⁷³

Although the dissolution of the former Soviet Union and the resulting economic dislocations in the former Soviet republics predated the conclusion of the Uruguay Round, unanticipated financial difficulties led to a sharp increase in exports of steel from the former Soviet Union between 1996 and 1999.⁴⁹⁷⁴ In particular, as Russia and other former republics experienced intense financial disruptions and currency fluctuations in this period, steel exports rose nearly 22 percent.⁴⁹⁷⁵ Other Eastern European countries also emerged as net exporters of steel.⁴⁹⁷⁶

While other markets experienced significant turmoil and contraction after 1997, demand in the United States remained robust. Indeed, the US economy enjoyed an overall economic expansion in the 1990s of unprecedented length. Consequently, US demand for steel remained strong. Apparent US consumption of certain flat-rolled carbon steel products rose by 7.8 percent between 1996 and 2000, and apparent US consumption peaked in 2000.⁴⁹⁷⁷ Apparent US consumption of long products rose by 20.5 percent between 1996 and 2000 and apparent US consumption for the period peaked in 2000.⁴⁹⁷⁸ Apparent US consumption of tubular products rose 18.2 percent between 1996 and 2000, with apparent US consumption peaking in 2000.⁴⁹⁷⁹ Apparent US consumption of stainless products increased 29.5 percent between 1996 and 2000, with apparent US consumption peaking in 2000.⁴⁹⁸⁰

⁴⁹⁶⁸ (original footnote) World Economic Outlooks, Exh. 19 of Minimill 201 Coalition (Long Products) Prehearing Injury Brief and pp. 20-21.

⁴⁹⁶⁹ (original footnote) *Steel*, Inv. No. TA-201-73, USITC Pub. 3479 (Dec. 2001), Vol II, OVERVIEW-17.

⁴⁹⁷⁰ (original footnote) USITC Pub. 3479, Vol. II, OVERVIEW-17.

⁴⁹⁷¹ (original footnote) USITC Pub. 3479, Vol. II, OVERVIEW-17.

⁴⁹⁷² (original footnote) USITC Pub. 3479, Vol. II at OVERVIEW-17.

⁴⁹⁷³ (original footnote) USITC Pub. 3479, Vol. II at OVERVIEW-17.

⁴⁹⁷⁴ (original footnote) Exports increased because reductions in steel production in the former Soviet Union did not keep pace with declines in consumption. Steel consumption fell more than 70 percent from 1991 to 1998. USITC Pub. 3479, Vol. II at Table OVERVIEW-4.

⁴⁹⁷⁵ (original footnote) USITC Pub. 3479, Vol. II at OVERVIEW-19 and Table OVERVIEW-5.

⁴⁹⁷⁶ (original footnote) Questionnaire Responses of US producers, importers, purchasers, and foreign producers.

⁴⁹⁷⁷ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁴⁹⁷⁸ (original footnote) USITC Pub. 3479, Vol. III at Table LONG-C-1.

⁴⁹⁷⁹ (original footnote) USITC Pub. 3479, Vol. III at Table TUBULAR-C-1.

⁴⁹⁸⁰ (original footnote) USITC Pub. 3479, Vol. III at Table STAINLESS-C-1.

Continued growth in the US market, combined with uncertainty and contraction in other markets, led to significant upward pressure on the US dollar. The dollar appreciated significantly against many currencies during the period of investigation, and that appreciation became more notable after the foreign currency dislocations of 1997 and 1998. Between 1996 and the first quarter of 2001, many currencies experienced double-digit declines, in real terms, relative to the dollar.⁴⁹⁸¹ The high value of the US dollar made the US market an especially attractive market for steel products displaced from other markets.

Steel imports historically have played a role in the US market.⁴⁹⁸² After the beginning of the Asian and Russian economic crises, however, unusually large volumes of foreign steel production were displaced from foreign consumption. The US market, in which demand remained strong, was the destination for a significant portion of that displaced foreign production. Widespread currency devaluations made the displaced exports especially attractive to US purchasers on price terms. As currency depreciations and economic contractions disrupted other markets, the share of steel imports to the US market increased sharply and US prices declined.^{4983 4984 4985}

10.111 We also looked at Commissioner Bragg's separate opinion in the Second Supplementary Report with respect to "unforeseen developments". Her statement, in its entirety, is as follows:

"For each affirmative determination I rendered under Section 202(b)(1) of the Trade Act, as I stated in my separate views on injury, I considered the condition of the domestic industry over the course of the relevant business cycle, in order to properly understand the role of imports in the US market over the period of investigation. I further examined factors other than imports that may be a cause of serious injury or threat to the domestic industry.⁴⁹⁸⁶ Importantly, these other factors were also considered within the context of the relevant business cycle.

⁴⁹⁸¹ (original footnote) USITC Pub. 3479, Vol. II at Table OVERVIEW-16.

⁴⁹⁸² (original footnote) USITC Pub. 3479, Vol. II at Figure OVERVIEW-10.

⁴⁹⁸³ (original footnote) USITC Pub. 3479, Vol. II at Figures OVERVIEW-10 and OVERVIEW-16.

⁴⁹⁸⁴ (original footnote) Most of the increase in stainless and tool steel imports occurred late in the period of investigation. The record indicates that the dramatic changes in exchange rates for the US dollar during the period of investigation led to increased imports of stainless and tool steel products during the latter half of the period. Moreover, while the Asian financial crisis and the dissolution of the Soviet Union (and the consequent changes in the Russian and Eastern European markets for steel) may have played a smaller role than they did on imports of other steel products covered by this investigation, their continued effect made the US market more attractive to imports of stainless and tool steel products. These unforeseen developments affected the conditions of competition under which stainless and tool steel imports caused serious injury or threatened to cause serious injury to the domestic stainless bar, stainless wire rod, stainless wire, stainless fittings, and tool steel industries. See INV-Z-013.

⁴⁹⁸⁵ USITC Second Supplementary Report.

⁴⁹⁸⁶ (original footnote) In the investigation questionnaires, US producers, US importers, foreign producers, and US purchasers identified certain developments (and whether the developments were unexpected) during the last ten years that resulted in certain steel products under investigation being imported into the United States in such increased quantities as to have an adverse impact on the domestic industries during the period January 1996 to June 2001. Generally, for each of the like product categories I found in my determinations, the responses identified several common unforeseen developments, including the Asian economic crisis, Russian economic crisis, the collapse of the USSR., emergence of Eastern Europe and China as global steel producers, increasing US demand, the strength of the US dollar relative to foreign currencies, and lower prices of imports.

The framework of my injury analyses was based upon the statutory directive that the Commission consider the condition of each domestic industry over the course of the relevant business cycle⁴⁹⁸⁷, as well as examine factors other than imports that may be a cause of serious injury or threat to the domestic industry.⁴⁹⁸⁸ Importantly, both the timing and trend of each domestic industry's business cycle are difficult, if not impossible to anticipate, as well as those conditions of competition which can magnify or diminish the operation of each domestic industry's business cycle. Although the nature and importance of the business cycle for each domestic industry is empirically recognized to varying degrees, it is only within the context of the course of the relevant business cycle, including the unexpected and uncontrollable upturn and downturn in the cycle, together with the unprecedented level of injury demonstrated by the domestic industries and the unforeseen volume and timing of increased imports, that one can adequately determine the full and relevant impact of increased imports on the domestic industries over the entire period of investigation.

In particular, as the record data indicate, imports increased over the period of investigation with many product categories at issue experiencing peak import volumes in 1998. It is apparent that these increased imports were the result of the unforeseen global financial crises in Asia and Russia, as well as unanticipated levels of global steel overcapacity, the collapse of foreign steel markets, emerging countries beginning massive steel production, and foreign producers focusing their sales into the lucrative US market, as discussed in my colleagues' response.⁴⁹⁸⁹ Each of these factors was identified in several questionnaire responses. The timing of these imports was such that the volume of imports increased just as the domestic producers expected to enjoy gains in profitability given the simultaneous upswing in the relevant business cycle. As stated in my views, historically, gains during upswings are essential for domestic producers to build financial resources to withstand the inevitable downturn in the cycle. Thus, here the impact of opportunities lost during an upswing in the cycle not only had an immediate impact on the domestic industry by virtue of suppressed and depressed prices, lost sales, and resulting lost revenues, but also produced carryover effects on the domestic industry, which lingered as the cycle turned lower.

Having lost opportunities to the unforeseen increase and timing of imports during the upturn in the relevant business cycle of each domestic industry, many of the industries were therefore weakened in their ability to withstand a downturn and unprepared for the continued impact of lower-priced and sustained imports. As the cycles turned lower towards the end of the investigation period, imports continued entering the United States at relatively high levels further pressuring the domestic market. The effects of injury carryover from the unexpected 1998 surges, together with the more contemporaneous injury resulting from imports continuing to enter the United States at high levels, had a combined hammering effect on the various

See Commission questionnaire responses from US producers, US importers, foreign producers, and US purchasers indicating any developments and whether such developments were unexpected.

⁴⁹⁸⁷ (original footnote) 19 U.S.C. § 2252(c)(2)(A).

⁴⁹⁸⁸ (original footnote) 19 U.S.C. § 2252(c)(2)(B).

⁴⁹⁸⁹ (original footnote) I concur with my colleagues' discussion regarding the response to question 1- Unforeseen developments, with exception of the first three paragraphs. Although I do not necessarily disagree with the perspective provided in the first three paragraphs, I note that the parties and others did not have an opportunity to comment on this construction of "unforeseen developments."

domestic industries and disrupted the ability of each domestic industry to adjust to the business cycle. As a result, profits for most domestic industries declined sharply and several domestic producers were forced into bankruptcy.

Accordingly, the unforeseen developments identified in this investigation include the Asian economic crisis, Russian economic crisis, the collapse of the USSR., emergence of Eastern Europe and China as global steel producers, increasing US demand, the strength of the US dollar relative to foreign currencies, and lower prices of imports. Within the context of the relevant business cycle of each domestic industry, these unforeseen developments, as identified by several questionnaire responses, led to the relevant steel products being imported into the United States in such unforeseen timing and increased quantities as to be a substantial cause of unprecedented level of serious injury demonstrated by the domestic industry."

Claims and arguments of the parties

10.112 The arguments of the parties can be found in Section VII.C.2(d)(i) *supra*.

Analysis by the Panel

10.113 Although all of the parties to this dispute recognize the need to show that a logical connection exists between "unforeseen developments" and the increased imports which a Member is seeking to address through the use of a safeguard measure⁴⁹⁹⁰, they differ on how this can be achieved.

10.114 For the complainants, there must be a "causal link" between "unforeseen developments" and increased imports that cause or threaten to cause serious injury.⁴⁹⁹¹ The investigating authority must explain how these developments are linked to the increased imports that they rely on for the imposition of a safeguard measure.⁴⁹⁹² For the complainants, the USITC's analysis was based on scattered and incomplete facts and resulted in vague suggestions and speculations that severe currency dislocations in the former USSR and Asia led to massive increases of exports, or reductions in steel imports, in these countries, which consequently increased the amounts of steel on the world market and allegedly caused increased imports into the United States. The USITC's assumptions rely on data showing a decline in consumption of steel in the affected markets. The USITC did not, however, address whether production also declined in those markets. According to the United States, the phrase "as a result of" indicates that one thing is the "effect, consequence, issue, or outcome" of another. Therefore, showing that a product is being imported in such quantities and under such conditions as to cause serious injury as a result of unforeseen developments by itself establishes a logical connection between the first and second clauses of Article XIX:1(a). There is no need for a further demonstration or explanation.⁴⁹⁹³

10.115 The Panel agrees with New Zealand that it would be improper to reduce to a nullity the obligation to explain how "unforeseen developments" resulted in increased imports causing or threatening to cause serious injury. In some cases, the explanation may be as simple as bringing two sets of facts together. However, in other situations, it may require much more detailed analysis in order to make clear the relationship that exists between the unforeseen developments and the

⁴⁹⁹⁰ Appellate Body Reports, *Argentina – Footwear (EC)*, para. 92; *Korea – Dairy*, para. 85.

⁴⁹⁹¹ See the written replies of the European Communities, China, and Norway to Panel question No. 2 at the first substantive meeting.

⁴⁹⁹² New Zealand's written reply to Panel question No. 2 at the first substantive meeting.

⁴⁹⁹³ United States' written reply to Panel question No. 2 at the first substantive meeting.

increased imports that are causing or threatening to cause serious injury. The nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation, its extent and its quality are all factors that can affect whether a explanation is reasoned and adequate.

10.116 First, the Panel notes that at no point in the initial USITC Report is the issue of "unforeseen developments" *per se* mentioned, except, as the complainants have pointed out, in a footnote in the separate view of one commissioner explaining that although such a demonstration is required in WTO law, it is not required by US law.⁴⁹⁹⁴ There is otherwise no discussion of the effects of unforeseen developments for the specific safeguard measures at issue. It is true that the dissolution of the USSR and the depreciation of Asian currencies are mentioned with respect to CCFRS.⁴⁹⁹⁵ The relevant paragraph, which pertains to a discussion on causation, refers to the OVERVIEW section of the Appendix to the Report, a 2-3 pages discussion on the Russian crisis, the Asian crisis and exchange rates. There are also additional references in the determinations for hot-rolled bar, cold-finished bar, rebar and stainless steel rod, as listed in paragraphs 10.106-10.108 above. In the OVERVIEW section, the Russian and Asia crises as well as exchange rate fluctuations are identified, and post-USSR changes are even referred to as "developments"⁴⁹⁹⁶, but the identification of these crises and fluctuations is not done within the context of an explanation of whether they constituted unforeseen developments and whether they resulted in increased imports causing injury.

10.117 In addition, in its initial Report, the USITC stated that "[t]he dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries", again without any supporting data.⁴⁹⁹⁷ Moreover, the United States points in its submissions to the increase of imports from Russia, Kazakhstan and Lithuania.⁴⁹⁹⁸ These figures were part of a chart of imports from numerous countries (INV-Y-180), but the chart was cross-referred in the USITC Report only to support statements relating to NAFTA imports⁴⁹⁹⁹ or imports generally without any discussion of whether the imports were as a result of unforeseen developments.⁵⁰⁰⁰ More importantly, they were not cited in support of, or included in, any discussion relating to unforeseen developments. Likewise, therefore, they cannot be used before the Panel to fill gaps in the USITC's reasoning.

10.118 In summary, there are only ad hoc references to the Asian and Russian crises in the initial USITC Report, which did not address the issue of "unforeseen developments" *per se*. Moreover, there is no adequate discussion of the linkage between unforeseen developments and increased

⁴⁹⁹⁴ Switzerland's first oral statement, paras. 8-10, citing USITC Report, Vol. I, separate opinion of Commissioner Bragg, p. 270, footnote 4. (Exhibit CC-6).

⁴⁹⁹⁵ See para. 10.106.

⁴⁹⁹⁶ See para. 10.108.

⁴⁹⁹⁷ USITC Report, p. 58.

⁴⁹⁹⁸ United States' first written submission, paras. 970-971, citing USITC Dataweb tables (US-49), which were not included in the report of the competent authority, and INV-Y-180 :-(US-40), which was cited in the report of the competent authority but for reasons having nothing to do with an explanation of unforeseen developments.

⁴⁹⁹⁹ USITC Report, pp. 167-169, footnotes 1026, 1032, 1044; p. 179, footnote 1109; pp. 213-214, footnotes 1354-1355 and 1357-1361; pp. 222-223, footnotes 1433-1437; similar cross-references can be found among the Commissioners' separate views.

⁵⁰⁰⁰ USITC Report, p. 210, footnote 1328; p.213, footnote 1353; p. 218, footnote 1402; p. 222, footnote 1432; p. 371, footnote 88; pp. 372-373, footnote 98; p. 374, footnote 108; pp. 387-388, footnote 165; p. 396, footnote 203; p. 402, footnote 245; similar cross-references can be found among the Commissioners' separate views.

imports causing serious injury in relation to each of the specific safeguard measures at issues in this dispute.

10.119 We examine now the February Second Supplementary Report which begins with the following statement:

"We provide the following response to USTR's request that we identify any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof. (...)"

10.120 This may be an acknowledgement by the USITC that it was, for the first time, formally identifying "unforeseen developments" that resulted in the relevant steel products being imported into the United States in such increased quantities as to cause serious injury or the threat thereof, within the meaning of Article XIX of GATT 1994. We note in this regard the statement by the USITC that "To the extent that WTO panel decisions have suggested that the concept of 'unforeseen' developments relates to the expectations of negotiators of the relevant tariff concessions, we note that such an assessment is in many respects outside of the purview of this agency, since multilateral trade negotiations are not within its mandate, but are the responsibility of the USTR and relevant Executive Branch agencies."⁵⁰⁰¹

10.121 In the Secondary Supplementary Report, the USITC insists on the *overall effects* of the Asian and Russian financial crisis together with the strong US dollar and economy to displace steel to other markets (and evidenced by what it calls "trade frictions in many markets"). Following the Russian crisis, for instance, anti-dumping investigations or orders had been initiated against imports of Russian steel by 21 trading partners including Argentina, Brazil, Canada, Chile, China, Colombia, the EU, India, Indonesia, Korea, Malaysia, Mexico, Peru, the Philippines, South Africa, Taiwan, Thailand, Turkey, the United States, Venezuela and Vietnam.

10.122 In our view, the weakness of the USITC Report is that, although it describes a plausible set of unforeseen developments that may have resulted in increased imports to the United States from various sources, it falls short of demonstrating that such developments actually resulted in increased imports into the United States causing serious injury to the relevant domestic producers.

10.123 The Panel is of the view that even if "large volumes of foreign steel production were displaced from foreign consumption"⁵⁰⁰² this does not, in itself, imply that imports to the United States increased as a result of unforeseen developments. Article XIX of GATT, however, requires a demonstration that the unforeseen development resulted in *increased imports into* the United States. In our view, the USITC's explanation failed to link these steel market displacements to the specific increased imports *into the United States* at issue.

10.124 The USITC does refer to increased imports: "In particular, as the record data indicate, imports increased over the period of investigation with many product categories at issue experiencing peak import volumes in 1998". However, again such a reference is made without any supporting data. The USITC adds that "as currency depreciations and economic contractions disrupted other markets the share of steel imports to the US market increased sharply and US prices declined" and "[w]idespread currency devaluations made the displaced exports especially attractive to US purchasers on price terms". While this may have been true, and we note in this regard the increased

⁵⁰⁰¹ USITC Second Supplementary Report, Attachment I, pp. 1-4 (Exhibit CC-11).

⁵⁰⁰² See para. 10.110.

imports data contained in the USITC's increased imports findings, there is no reference to any specific supporting discussion or evidence.

10.125 It may very well be that the contractions in consumption to which the USITC referred in some parts of the world resulted in increased imports to the United States, especially if overproduction of steel products generally in the world steel market led to price suppression. Although this may be a plausible explanation, the USITC did not provide any data to support its general assertion that the confluence of unforeseen developments resulted in the *specific* increased imports at issue in this dispute. The Panel is of the view that in light of the complexity of the matter, a more sophisticated and detailed economic analysis was called for.

10.126 As the complainants have rightly pointed out, the USITC's explanation relates to steel production in general and does not describe how the unforeseen developments resulted in increased imports in respect of the *specific* steel products at issue.⁵⁰⁰³

10.127 The Panel finds that while it is not necessary for an unforeseen development to affect only one economic sector, or to affect segments of an economic sector or industry differently, it was necessary for the USITC to explain how the increased imports of the specific steel products subject of the investigation were linked to and resulted from the confluence of unforeseen developments. Presumably, the Asian and Russian crises affected some countries worse than others and certain steel products more than others depending on the countries' respective production of such products. This was certainly the view of producers who stated in USITC questionnaires for example that the Asian financial crisis was having an adverse impact on the operation of the domestic industry with respect to stainless steel wire, but not with respect to stainless steel rod, stainless steel bar or rebar.⁵⁰⁰⁴

10.128 In spite of what it asked the producers to do in the questionnaires, the USITC made no attempt to differentiate between the impact that the alleged unforeseen developments had on the different product sectors to which the various safeguard measures related.

10.129 In a footnote, the USITC stated:

"Most of the increase in *stainless and tool steel imports* occurred late in the period of investigation. The record indicates that the dramatic changes in exchange rates for the US dollar during the period of investigation led to increased imports of stainless and tool steel products during the latter half of the period. Moreover, while the Asian financial crisis and the dissolution of the Soviet Union (and the consequent changes in the Russian and Eastern European markets for steel) *may have played a smaller role than they did on imports of other steel products covered by this investigation*, their continued effect made the US market more attractive to imports of stainless and tool steel products. These unforeseen developments affected the conditions of competition under which stainless and tool steel imports caused serious injury or threatened to cause serious injury to the domestic stainless bar, stainless wire rod, stainless wire, stainless fittings, and tool steel industries. *See INV-Z-013.*"⁵⁰⁰⁵

⁵⁰⁰³ European Communities' first written submission, paras. 136-139; Switzerland's first written submission, para. 122-125; Norway's first written submission, paras. 124-127; China's first written submission, paras. 94-96, New Zealand's first written submission, para. 4.20.

⁵⁰⁰⁴ Table STAINLESS-108, USITC Report, Vol. III, p. STAINLESS-89, and Table LONG-102, USITC Report, Vol. II, p. LONG-100.

⁵⁰⁰⁵ USITC, Second Supplementary Report, at footnote 24, p. 4.

10.130 The USITC did not further develop this point but instead, simply asserted that "unforeseen developments resulted "as the record data indicate, [in] imports increased over the period of investigation with many product categories at issue experiencing peak import volumes in 1998".⁵⁰⁰⁶ The USITC did not back-up such an allegation by pointing to the relevant data for each specific steel safeguard measures at issue.

10.131 The same is true with Commissioner Bragg who provided additional separate views on unforeseen developments in the February Second Supplementary Report. Leaving aside the question of the value of one Commissioner's view in relation to the majority, Commissioner Bragg's asserts clearly "that these increased imports were the result of the unforeseen global financial crises in Asia and Russia...". However, the Commissioner does not back-up her conclusion, stating simply that the conclusion in her cited sentence "is apparent". In a footnote she adds: "(...) *resulted in certain steel products under investigation being imported into the United States in such increased quantities* as to have an adverse impact on the domestic industries during the period January 1996 to June 2001." (emphasis added). Here again, Commissioner Bragg seems to be able to conclude that "certain" steel products increased. However, she did not specify which ones and how increased imports for each of the safeguard measures were connected to the identified confluence of unforeseen developments.

10.132 Although the United States argues that there were data to support the USITC's analysis, which extended beyond consumption data for the most severely affected countries in south east Asia and production and consumption data for the former USSR republics⁵⁰⁰⁷, the Panel is concerned with this evidence which was presented as relevant evidence for the first time before the Panel and was not cited in the USITC Report as part of a reasoned and adequate explanation of unforeseen developments.

10.133 For instance, the United States points in its submission⁵⁰⁰⁸ to parts of the USITC Report, which contain footnote references to tables that show imports by country and by product for the entire period of investigation.⁵⁰⁰⁹ It is undoubtedly true that these tables contained data that could have been used to explain how unforeseen developments resulted in increased imports that caused injury. However, the competent authority did no such thing. In fact, the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came.

10.134 In its submissions, the United States also points to the increase of imports from Indonesia, Korea, Malaysia, the Philippines and Thailand.⁵⁰¹⁰ We find that this *ex post* supporting evidence, which relies on information not found or mentioned in the report of the competent authority, (but available on the USITC website), may be useful to dispel alternative arguments put forth by the complainants, and it may even be the proper explanation of how unforeseen developments resulted in increased imports. However, it raises the issue of whether the United States is, at this later stage of

⁵⁰⁰⁶ See para. 10.111.

⁵⁰⁰⁷ United States' written reply to Panel question No. 7 at the second substantive meeting.

⁵⁰⁰⁸ United States' first written submission, paras. 966 – 970.

⁵⁰⁰⁹ The sections of the USITC Report to which the United States has brought our attention are: pp. 65-66 (CCFRS), 99-100 (hot-rolled bar), 107-108 (cold-finished bar), 115-116 (rebar), 168-170 (certain welded pipe), 178-180 (FFTJ), 213-214 (stainless steel bar), 222-223 (stainless steel rod), 259-260 (stainless steel wire, Commissioner Koplan), 303-305 (carbon flat products and stainless steel wire and wire rope, Commissioner Bragg), 309-310 (tin mill, Commissioner Miller), 347 (stainless steel wire and wire rope, Commissioner Delaney).

⁵⁰¹⁰ United States' first written submission, paras. 962-965, citing China's first written submission, para. 103 and USITC Dataweb tables (US-49).

the WTO dispute settlement process, trying to fill gaps left by the USITC in its explanation provided in its published Report.

10.135 The Panel believes that in light of the complexities deriving from the confluence of unforeseen developments that the USITC referred to, coupled with the complexity of the case at hand, the explanation provided by the USITC how unforeseen developments resulted in increased imports causing serious injury is not reasoned and adequate. Moreover, it is not supported by relevant data and it does not demonstrate, as a matter of fact, that such unforeseen developments resulted in increased imports into the United States of the specific steel products that are the subject of the safeguard measures at issue.

10.136 The complainants also argue, in particular, that there was no demonstration that those unforeseen developments resulted in increased imports from Russia and that the United States was not entitled to take account of increased imports from Russia. We address this issue below.

Logical connection between a Member's tariff concessions and increased imports causing serious injury

Claims and arguments of the parties

10.137 The arguments of the parties can be found in Section VII.C.2.(d) *supra*.

Analysis by the Panel

10.138 The complainants' arguments arise out of the language of Article XIX:1(a), which provides *inter alia* that increased imports causing injury must occur "*as a result of* unforeseen developments *and of the effect of* the obligations incurred by a contracting party under this Agreement, including *tariff concessions*."

10.139 The Appellate Body in *Korea – Dairy* and *Argentina – Footwear (EC)* stated:

"With respect to the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ... ", *we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions*. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994."⁵⁰¹¹ (emphasis added)

10.140 It seems to us that when the Appellate Body wrote "this phrase simply means" it was interpreting "as a result of ... tariff concessions" to mean that the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product.

10.141 However, the complainants have argued that the present dispute raises a different issue. For them, the issue is whether a Member can invoke a safeguard measure in order to protect its industry

⁵⁰¹¹ Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

from increased imports coming from a non-WTO Member – in other words, from a country with which it has no relevant WTO obligations or tariff concession.

10.142 The Panel agrees with the parties that safeguard measures are to be used against imports of products for which WTO tariff concessions have been granted. The issue here, however, is that it is not clear whether the USITC wanted to argue that the confluence of unforeseen developments led to increased imports from Russia or the ex-Soviet Republics *per se*. In its initial Report, the USITC indeed asserts "[t]he dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries."⁵⁰¹² In its Second Supplementary Report, USITC also submits that "unanticipated financial difficulties led to a sharp increase in exports of steel from the former Soviet Union between 1996 and 1999."⁵⁰¹³ Yet, towards the end of its demonstration, the USITC seems to argue rather that unforeseen developments together led generally to world displacement of steel markets that resulted in increased imports of steel products into the United States from various and numerous foreign sources:

"Steel imports historically have played a role in the US market."⁵⁰¹⁴ After the beginning of the Asian and Russian economic crises, however, unusually large volumes of foreign steel production were displaced from foreign consumption. The US market, in which demand remained strong, was the destination for a significant portion of that displaced foreign production. Widespread currency devaluations made the displaced exports especially attractive to US purchasers on price terms. As currency depreciations and economic contractions disrupted other markets, the share of steel imports to the US market increased sharply and US prices declined."^{5015 5016 5017}

10.143 The Panel understands the United States' arguments to be that the displacements of steel on world markets led to increased imports to the United States from all sources, and not only to increased imports from Asia and Russia. We believe the USITC could argue that the geographical location of the birth or origin of unforeseen developments may differ from the origin of increased imports, but this hypothesis calls for a reasoned and adequate explanation of such correlation of events and effects.

10.144 We are of the view that this later USITC's explanation of the effects of such a confluence of unforeseen developments leading to increased imports from numerous sources seems plausible but it is not sufficiently supported and explained. Therefore, in light of our ultimate conclusion in

⁵⁰¹² USITC Report, p. 58 (footnotes omitted).

⁵⁰¹³ Exports increased because reductions in steel production in the former Soviet Union did not keep pace with declines in consumption. Steel consumption fell more than 70 percent from 1991 to 1998. USITC Pub. 3479, Vol. II at Table OVERVIEW-4.

⁵⁰¹⁴ (original footnote) USITC Pub. 3479, Vol. II at Figure OVERVIEW-10.

⁵⁰¹⁵ (original footnote) USITC Pub. 3479, Vol. II at Figures OVERVIEW-10 and OVERVIEW-16.

⁵⁰¹⁶ (original footnote) Most of the increase in stainless and tool steel imports occurred late in the period of investigation. The record indicates that the dramatic changes in exchange rates for the US dollar during the period of investigation led to increased imports of stainless and tool steel products during the latter half of the period. Moreover, while the Asian financial crisis and the dissolution of the Soviet Union (and the consequent changes in the Russian and Eastern European markets for steel) may have played a smaller role than they did on imports of other steel products covered by this investigation, their continued effect made the US market more attractive to imports of stainless and tool steel products. These unforeseen developments affected the conditions of competition under which stainless and tool steel imports caused serious injury or threatened to cause serious injury to the domestic stainless bar, stainless wire rod, stainless wire, stainless fittings, and tool steel industries. See INV-Z-013.

⁵⁰¹⁷ USITC Second Supplementary Report.

paragraphs 10.145-10.150 below, the Panel sees no need to examine the complainants' argument that increased imports (directly) from Russia are not relevant on the grounds that the United States has no tariff concessions with Russia.

4. Conclusion

10.145 In sum, the Panel believes that the complexity of the unforeseen developments pointed to by USITC called for a more elaborate demonstration and supporting data than that provided by the USITC. For instance, although USITC states that "[t]he US market, in which demand remained strong, was the destination for a significant portion of that displaced foreign production"⁵⁰¹⁸, one is left to wonder how much steel was displaced in the first place and from where. If the portion being imported to the United States was thought by the competent authority to be "a significant portion", this would suggest that the USITC was aware of how much was displaced in total, as well as how much was displaced to the United States as opposed to other countries, or at least the proportion.

10.146 We believe that, the USITC should have offered a more comprehensive and coherent explanation as to how the unforeseen developments *resulted in* increased imports into the United States, their origin and their extent. We believe the USITC could argue that the geographical location of the birth or origin of unforeseen developments may differ from the origin of increased imports, but failed to provide a reasoned and adequate explanation to that effect.

10.147 The Panel recalls that since the demonstration of unforeseen developments is a pre-requisite to the imposition of a safeguard measure, such demonstration must be performed for each safeguard measure. Even if unforeseen developments provide the same justification for several safeguard measures, the Panel believes that the USITC was obliged to explain why this is so and why the specific products under examination were affected individually by the confluence of unforeseen developments.

10.148 On the basis of the foregoing, the Panel finds that, in light of the complexity of the allegations made by USITC, including its reliance on a confluence of economic factors, the USITC failed to provide a reasoned and adequate explanation of how the confluence of unforeseen developments it pointed to had resulted in increased imports into the United States of the specific steel products at issue – causing serious injury to the relevant domestic producers. Therefore, there is no need to examine the remainder of the arguments raised by the complainants, including whether the facts supported the USITC's unforeseen developments' findings.

10.149 For all of the above reasons, the Panel finds that the USITC's unforeseen development findings do not provide a reasoned and adequate explanation of how the confluence of the Asian and Russian Crises, together with the strong United States' economy and US dollar, actually resulted in specific increased imports into the United States causing serious injury to the relevant domestic producers.

10.150 Therefore, the Panel finds that all safeguard measures at issue in this dispute are inconsistent with the requirements of Article XIX:1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards with regard to the demonstration of unforeseen developments.

⁵⁰¹⁸ See para. 10.110.

D. CLAIMS RELATING TO INCREASED IMPORTS

1. Claims and arguments of the parties

10.151 The claims and arguments of the parties regarding "increased imports" are set out in Sections VII.F.2-4 *supra*.⁵⁰¹⁹

2. Relevant WTO provisions

10.152 Article 2.1 of the Agreement on Safeguards, which sets forth the conditions for the application of a safeguard measure, reads as follows:

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

10.153 Article 4.2 sets forth the operational requirements for determining whether the conditions identified in Article 2.1 exist. Regarding increased imports, Article 4.2(a) requires in relevant part that:

"[I]n the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate ... the rate and amount of the increase in imports of the product concerned in absolute and relative terms ..."

3. Analysis by the Panel

(a) The requirements of Articles 2.1 of the Agreement on Safeguards

10.154 Article 2.1 of the Agreement on Safeguards requires that before a Member applies a safeguard measure, it determines "that [a] 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 ...".

10.155 All parties agree that Article 2.1 contains three conditions that must be satisfied before a safeguard measure can be imposed and one of these conditions is concerned with "increased imports". Parties disagree on whether Article 2.1 imposes any threshold for this "increased imports" requirement whether quantitative and/or qualitative.

10.156 The complainants refer to *Argentina – Footwear (EC)* where the Appellate Body stated that:

⁵⁰¹⁹ The Panel is aware of the fact that some of the complainants did not invoke Article XIX of GATT 1994 in support of their claims relating to increased imports. Accordingly, the Panel has not examined such claims but, rather, has focused on the claims made under Articles 2 and 4 of the Agreement on Safeguards, which were made by all the complainants. The Panel considers that this approach does not in any way affect the parties' rights in relation to their respective claims and defences relating to increased imports in this dispute.

"[I]ncreased quantities of imports should have been unforeseen or unexpected... In our view the determination of whether the requirements of imports 'in such increased quantities' is met is not merely mathematical or technical requirements. 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'." ⁵⁰²⁰

10.157 The United States takes issue with this interpretation by the Appellate Body of the wording of Article 2.1 of the Agreement on Safeguards. For the United States, the Appellate Body could not have read into Article 2.1 requirements that were not envisaged by the drafters of the treaty. In particular, the United States points to the wording of Article 2.1 which does not include any reference to the terms "recent", "sudden", "significant" and "sharp". Moreover, the United States is of the view that once a competent authority has determined that imports have increased, it is entitled to, and it will, examine whether such increased imports are causing serious injury so that only increased imports that are causing serious injury will authorize WTO compatible safeguard measures. Only once the competent authority has reached such findings relating to the serious injury and causation can it make an overall determination that increased imports are causing serious injury to the producers of domestic like products. In other words, the United States argues that whether the increased imports are recent *enough*, sudden *enough*, sharp *enough*, and significant *enough* to cause or threaten serious injury are questions that are answered as competent authorities proceed with the remainder of their analysis (*i.e.*, with their consideration of serious injury or threat thereof and causation). According to the United States, these analyses need not form a part of the evaluation of the threshold issue of whether the imports have increased either absolutely or relative to the domestic industry. ⁵⁰²¹

10.158 The Panel notes, first, that all parties agree that Article 2.1 requires that imports have increased. A conclusion that imports have increased, would normally call for a comparison between the levels of imports in different periods or at different points in time. Article XIX of GATT 1994 and Article 2.1 of the Agreement on Safeguards are silent on precisely which points in time are to be the basis for the comparison.

10.159 However, Article 2.1 of the Agreement on Safeguards requires that "a product is being imported in ... increased quantities". The Panel believes that the use of the present tense in 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 that the increase in imports was "recent". The Panel notes that neither the Agreement on Safeguards nor Article XIX of GATT 1994 specify expressly the length of the period of investigation for the purpose of increased imports.

10.160 The complainants do not challenge the choice of a five-year period of investigation *per se*. Complainants rather disagree with the fact that, generally, the USITC did not focus sufficiently on the situation of imports in the latest part of the period of investigation.

⁵⁰²⁰ Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

⁵⁰²¹ United States' first written submission, para. 177.

10.161 The Panel believes that whether imports have recently increased, therefore, calls for an identification of the relevant recent period as well as an assessment of the situation of imports during that recent period, on a case-by-case basis. Moreover, the amount of (absolute or relative) increased imports in practice often shows not an unequivocal upward movement, but instead both upward and downward movements which alternate over time with different amplitudes.⁵⁰²² Since there is no defined or prescribed periods within which imports must be compared, a competent authority must conduct a quantitative and qualitative analysis of the features of the development of import numbers over the entire period of investigation and assess whether, overall, imports have increased recently.⁵⁰²³

10.162 As regards the question of *how* recently the imports must have increased, the Panel notes, as the Panel in *US – Line Pipe* did⁵⁰²⁴, that Article 2.1 of the Agreement on Safeguards speaks of a product that "is being imported ... in such increased quantities". Thus, imports need not be increasing at the time of the determination; what is necessary is that imports *have* increased, if the products continue "being imported" in (such) increased quantities. The Panel, therefore, agrees with the *US – Line Pipe* Panel's view that the 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.⁵⁰²⁵ As pointed out by the Panel in *US – Line Pipe*⁵⁰²⁶, the most recent data must be the focus, but should not be considered *in isolation* from the data pertaining to the less recent portion of the period of investigation. However, as indicated by the present continuous "are being", there is an implication that imports, in the present, remain at higher (i.e. increased) levels.

10.163 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 of the Agreement on Safeguards will, therefore, 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.

10.164 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.⁵⁰²⁷

10.165 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

⁵⁰²² In this regard, *see* as illustrative examples, the graphs on absolute and relative imports represented hereafter in this Section on Increased Imports.

⁵⁰²³ *See* also Panel Report, *Argentina – Footwear (EC)*, para. 8.161.

⁵⁰²⁴ Panel Report, *US – Line Pipe*, para. 7.207.

⁵⁰²⁵ Panel Report, *US – Line Pipe*, para. 7.207.

⁵⁰²⁶ Panel Report, *US – Line Pipe*, para. 7.207.

⁵⁰²⁷ 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.

imports over the period of investigation, as suggested by Article 4.2(a).⁵⁰²⁸ 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.

10.166 Moreover, the Panel recalls that the very purpose of a safeguard measure is to address the results of unexpected events (unforeseen developments pursuant to Article XIX of GATT), namely increased imports causing serious injury. This unforeseen and unexpected character of the developments resulting in the increased imports as well as the emergency nature of safeguard measures calls for an assessment of whether imports increased suddenly so that the situation became one of emergency for which safeguard measures became necessary. The Panel believes therefore that increased imports must be "sudden".

10.167 We consider that when the Appellate Body stated "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'"⁵⁰²⁹, it was operating under the mandate of Article 3.2 of the DSU which is to clarify the existing provisions, here the meaning of in "such increased quantities".⁵⁰³⁰ In the Panel's view, 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.

10.168 The Panel agrees with the United States 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. In contrast, from the absence of *absolute* standards one cannot conclude that there are no standards at all and that any increase between any two identified points in time meets the requirements of Article 2.1 of the Agreement on Safeguards. The Panel also agrees with the United States that the inquiry is not whether imports have increased "recently and suddenly" *in the abstract*. A *concrete* evaluation is what is called for. 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.

10.169 The Panel believes that although a competent authority must make a single⁵⁰³¹ determination that increased imports were such as to cause serious injury, the Panel considers that distinct findings are necessary for each of the requirements of Article 2.1 of the Agreement on Safeguards. Before a Member can impose a safeguard measure, it must have demonstrated relevant unforeseen developments (Article XIX of GATT 1994) and it must have made a determination that increased imports were causing serious injury (Article 2.1 of the Agreement on Safeguards) to the relevant domestic producers. The Panel considers that the investigation of the three requirements that compose the determination that increased imports are causing serious injury and the demonstration whether this resulted from unforeseen developments, do not have to be performed or completed in any

⁵⁰²⁸ Appellate Body Report, *Argentina – Footwear (EC)*, para. 129; and Panel Report, *Argentina – Footwear (EC)*, para. 8.276.

⁵⁰²⁹ Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

⁵⁰³⁰ The Panel is also bound by the mandate to clarify the existing provisions, which obviously also implies, as pointed out in Article 19.2 of the DSU that, in their findings and recommendations, a panel and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements."

⁵⁰³¹ See Appellate Body Report, *US – Wheat Gluten* paras. 73-74: "We believe that Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards* must be given a mutually consistent interpretation, particularly in light of the explicit textual connection between these two provisions. According to the opening clause of Article 4.2(b) – "The determination referred to in subparagraph (a) shall not be made unless ..." – *both* provisions lay down rules governing a *single* determination, made under Article 4.2(a)".

specific order. Together these distinct findings must provide a reasoned and adequate explanation (Articles 2, 3.1 and 4 of the Agreement on Safeguards) as to how the relevant pre-requisites to imposing a WTO compatible safeguards measure are satisfied.

10.170 Having said this, the Panel agrees with the United States that in assessing whether the facts justify a conclusion that imports had increased in "such quantities " and "under such conditions" the competent authorities must demonstrate in the first instance that there was an increase in imports, absolute or relative to domestic production. This does not mean that ultimately "any increase will do", as the competent authorities must also determine whether such an increase is sudden and recent within a relevant period of time determined on a case-by-case basis.

10.171 The Panel believes, however, that such 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.

(b) Full-year 2001 data

10.172 The complainants argue that the USITC ignored import trends in the most recent past, i.e. the full-year data for 2001 (including the last six months that followed the end of the period of investigation) insisting that the import data for the full-year of 2001 were available when the USITC updated its Report and completed its determination in February 2002. According to the United States, fundamental legal and practical considerations should lead the Panel to reject the complainants' attempts to expand the period of investigation to encompass full-year 2001 data that are not on the record of the USITC's investigation that began in early July 2001.

10.173 The Panel agrees with the United States that a competent authority cannot be requested to take into account data and evidence that is not available at the time it made its determination.⁵⁰³² In this case, the determination in the sense of Article 2.1 of the Agreement on Safeguards, i.e. the determination on increased imports, causation and serious injury, was made by the USITC in October 2001. At that time, data for the full-year of 2001 could not possibly have been available. Furthermore, such data related to events (at least partially) occurring *after* the determination. The fact that new data becomes public after a determination has been made does not result in an obligation to make a new determination that replaces the one already made. What the President did in 2002 was not a "determination" within the meaning of Article 2 of the Agreement on Safeguards because the President made no determination that increased imports were causing serious injury to the relevant domestic producers. Therefore, data for import volumes for the second half of 2001 was not relevant

⁵⁰³² See Appellate Body Report, *US – Cotton Yarn*, at para. 77: "The exercise of due diligence by a Member cannot imply, however, the examination of evidence that did not exist and that, therefore, could not possibly have been taken into account when the Member made its determination. The demonstration by a Member that a particular product is being imported into its territory in such increased quantities as to cause serious damage (or actual threat thereof) to the domestic industry can be based only on facts and evidence which existed at the time the determination was made. The urgent nature of such an investigation may not permit the Member to delay its determination in order to take into account evidence that might be available only at a future date. Even a determination on the existence of threat of serious injury must be based on projections extrapolating from *existing* data." See also Appellate Body Report, *US – Lamb*, paras. 150 and 172.

for the question whether there were relevant "increased imports" with respect to determinations made by the USITC in October 2001.

10.174 The Panel will, therefore, proceed to evaluate the USITC's findings on increased imports for each product at issue on the basis of the data that was available to the USITC at the end of the entire period of investigation, i.e. by the end of June 2001. The Panel will thus not take into account data relating to the second half of 2001.⁵⁰³³

(c) The recent period in the present investigation

10.175 The Panel notes again that the Agreement on Safeguards does not specify how long the period of investigation in a safeguards investigation should be, or whether or how that period should be segmented for purposes of analysis. In light of the Panel's above conclusion that the competent authority must have determined that imports increased suddenly and recently, the Panel will generally focus its analysis on the situation of imports in the more recent period that preceded the end of the period of investigation, keeping in mind that the situation of imports in the earlier part of the period of investigation may also shed light on the movements of imports.

(d) Standard of review

10.176 Finally, with regard to the assessment of the factual aspects of the USITC's determination of an increase in imports, the Panel recalls that the standard of review to be applied is whether the published report on the investigation contains an adequate and reasoned explanation of how the facts before the USITC support the determination made with respect to increased imports.⁵⁰³⁴

10.177 The Panel now proceeds to examine the USITC findings on increased imports for each of the products at issue.

4. Measure-by-measure analysis

(a) CCFRS

(i) *The USITC's findings*

10.178 As regards increased imports of CCFRS, the USITC determined:

"We find that the statutory criterion of increased imports is met."⁵⁰³⁵ We find that total imports of certain carbon flat-rolled steel, including slabs, plate, hot-rolled, cold-rolled, and coated steel increased in both actual terms and relative to domestic production. In actual terms, total imports increased from 18.4 million short tons in

⁵⁰³³ The Panel recalls that a Member can only impose a safeguard measure to the extent and for the duration necessary to remedy the serious injury caused by increased imports. Delays between the determination that increased imports were causing serious injury and the imposition of the safeguard measure will generally affect the decision pursuant to Articles 5 and 7 of the Agreement on Safeguard. If too long a delay exists between the determination by a competent authority and the actual imposition of the safeguard measure such importing Member may be faced with a situation where the application of a safeguard measure is no longer necessary to remedy serious injury.

⁵⁰³⁴ See Panel Report, *US – Wheat Gluten*, para. 8.5; Panel Report, *US – Line Pipe*, para. 7.194.

⁵⁰³⁵ (original footnote) Commissioner Devaney joins in the analysis of the majority, related to increased imports, as presented here. He further finds that if the analysis is performed over the entire industry as he has defined it, the result is the same, i.e., the statutory criterion of increased imports is met.

1996 to 20.9 million short tons in 2000, an increase of 13.7 percent.⁵⁰³⁶ Total imports declined from 11.5 million short tons in interim 2000 to 6.9 million short tons in interim 2001.⁵⁰³⁷ The ratio of imports to domestic production (including production for captive consumption) also increased during the POI, from 10.0 percent in 1996 to 10.5 percent in 2000.⁵⁰³⁸ Imports also increased relative to domestic commercial shipments. Total imports were equivalent to 32.6 percent of domestic commercial shipments in 2000, up from 31.5 percent in 1996.⁵⁰³⁹ In interim 2001 total imports were equivalent to 22.7 percent of domestic commercial shipments.⁵⁰⁴⁰

We note that in 1998, the midpoint of the full five-year period examined, there was a rapid and dramatic increase in imports, as import volumes both in absolute terms and as a percentage of US production peaked. Imports of certain carbon flat-rolled steel were 25.3 million short tons, an increase of 37.5 percent over 1996 levels. While the volume of imports declined in 1999 and 2000 from this peak, the absolute volume and ratio of imports to US production were still significantly higher in 1999 and 2000 than at the beginning of the period. The significance of this trend in imports to the domestic industry's performance is discussed below under Substantial Cause of Serious Injury."⁵⁰⁴¹

10.179 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:⁵⁰⁴²

⁵⁰³⁶ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵⁰³⁷ (original footnote) INV-Y-209 at Table FLAT-ALT7.

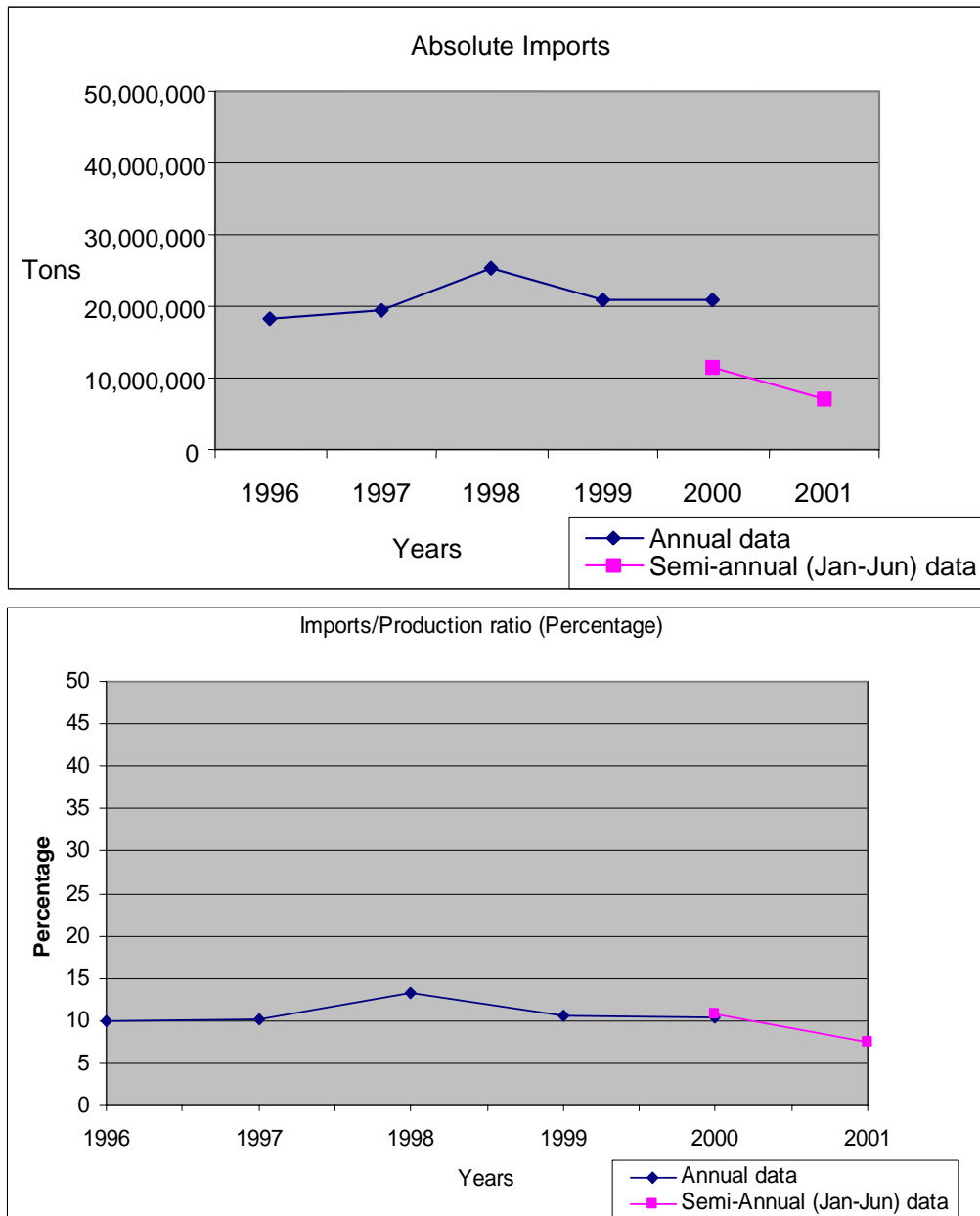
⁵⁰³⁸ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵⁰³⁹ (original footnote) CR and PR at Tables FLAT-12 to FLAT-15, FLAT-17, FLAT-C-2 to FLAT-C-5 and FLAT-C-7.

⁵⁰⁴⁰ (original footnote) CR and PR at Tables FLAT-12 to FLAT-15, FLAT-17, FLAT-C-2 to FLAT-C-5 and FLAT-C-7.

⁵⁰⁴¹ USITC Report, Vol. I, pp. 49-50

⁵⁰⁴² The data represented in the following two graphs are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.



(ii) *Claims and arguments of the parties*

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

(iii) *Analysis by the Panel*

Absolute imports

10.181 The Panel believes that the USITC's determination on increased imports of CCFRS, as published in its report⁵⁰⁴³, does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC recognized that the sharpest increase took place in the period until 1998, and that, since then, imports have decreased, in 1999 and 2000, back to levels nearly as low as the 1996 level. The USITC also noted the significant decrease between interim 2000 and interim 2001 (from 11.5 to 6.9 million short tons)⁵⁰⁴⁴, but it did not seem to focus on, or at least account for, this most recent trend in concluding that imports are "still significantly higher ... than at the beginning of the period".⁵⁰⁴⁵ Given the sharpness and significance of this most recent decrease the Panel does not find that the USITC explanation as published in its report⁵⁰⁴⁶ contains an adequate and reasoned explanation of how the facts support the determination CCFRS "is being imported in ... increased quantities".

10.182 It may well be that the increase occurring until 1998 could have qualified at the time as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards, but the Panel need not express itself on that point because that increase, in itself, was no longer recent enough at the time of the determination. In other words, the increase occurring until 1998, taken by itself and with the decrease thereafter, is not a sufficient factual basis for supporting a determination in October 2001 that CCFRS "is being imported in ... increased quantities".

Relative imports

10.183 The Panel also considers that the USITC's determination on increased imports of CCFRS relative to domestic production⁵⁰⁴⁷ does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC recognized that the sharpest increase took place in the period until 1998, and that, since then, imports have decreased, in 1999 and 2000, to levels nearly as low as the level in 1996. The USITC noted the significant decrease in interim 2001 only in terms of imports relative to domestic commercial shipments⁵⁰⁴⁸, not in terms of imports relative to domestic production, the criterion stipulated in Article 2.1 of the Agreement on Safeguards.

10.184 As in the situation of absolute imports, the USITC did not seem to focus on, or at least account for, this most recent decline to levels below any point of the investigated period, when it concluded that the ratio of imports to domestic production was "still significantly higher ... than at the beginning of the period".⁵⁰⁴⁹ Given the sharpness and significance of this most recent decrease, the Panel does not find the USITC explanation, as published in its Report⁵⁰⁵⁰ to be adequate and reasoned enough to support a conclusion that CCFRS, as a proportion to domestic production, "is being imported in ... increased quantities".

10.185 The Panel also need not express itself on the question whether the increase of imports, relative to domestic production occurring until 1998 could have qualified as an increase satisfying the

⁵⁰⁴³ USITC Report, pp. 49–50.

⁵⁰⁴⁴ USITC Report, p. 49.

⁵⁰⁴⁵ USITC Report, p. 50.

⁵⁰⁴⁶ USITC Report, pp. 49–50.

⁵⁰⁴⁷ USITC Report, pp. 49–50.

⁵⁰⁴⁸ USITC Report, p. 50.

⁵⁰⁴⁹ USITC Report, p. 50.

⁵⁰⁵⁰ USITC Report, pp. 49–50.

criteria of Article 2.1 of the Agreement on Safeguards because, in any event, that increase, in itself, was no longer recent enough at the time of the determination. In other words, the increase occurring until 1998, taken for itself and with the decrease thereafter, is not a sufficient factual basis for supporting a determination in October 2001 that CCFRS "is being imported in ... increased quantities".

Conclusion

10.186 The Panel consequently finds that the USITC Report did not provide an adequate and reasoned explanation of how the facts support the determination that CCFRS was being imported in "increased quantities", contrary to the requirement of Article 2.1 Agreement on Safeguards that the product "is being imported in (such) increased quantities".

10.187 The Panel notes that the parties have also made submissions with regard to the question whether imports of the various products comprised in CCFRS, taken individually, have increased. However, the USITC did not make a determination on individual products within the CCFRS group. The USITC made its determination on increased imports only with regard to a category defined as CCFRS products.⁵⁰⁵¹ This determination, pursuant to which safeguard action has been taken against imports of CCFRS, is subject to review in this dispute. Therefore, in light of the Panel's standard of review, the Panel will not scrutinize individual items comprised in CCFRS.⁵⁰⁵²

(b) Tin mill products

(i) *The USITC's findings*

10.188 As regards increased imports of tin mill, the USITC determined:

"We find that the statutory criterion of increased imports is met. We find that total imports⁵⁰⁵³ of tin mill products have increased both in actual terms and relative to domestic production during the POI.⁵⁰⁵⁴ In actual terms, imports increased from 444,684 short tons in 1996 to a peak level of 698,543 short tons in 1999, and while they declined to 580,196 short tons in 2000, the overall increase from 1996 to 2000 was 30.5 percent.⁵⁰⁵⁵ Imports of tin mill products were 263,091 short tons in interim 2001, 11.1 percent lower than in interim 2000.⁵⁰⁵⁶ The ratio of imports to domestic production increased during the POI, from 12.0 percent to 17.4 percent in 2000.⁵⁰⁵⁷

⁵⁰⁵¹ USITC Report, Vol. I, p. 49. *See also* USITC Report, Vol. I, p. 25.

⁵⁰⁵² We note the complainants' claims that the tariff quota imposed on slabs constitute a distinct measure from that imposed on the rest of CCFRS. The Panel does not examine these claims and arguments here given that the USITC made its determination on the basis of CCFRS as a single product which included slabs.

⁵⁰⁵³ (original footnote) Including imports from NAFTA countries.

⁵⁰⁵⁴ (original footnote) We recognize that the official import data for tin mill products, which is used in our discussion, overstate the imports subject to this investigation to some degree because it includes tin mill products specifically excluded from the request. For example, using Joint Respondents' data, imports of tin mill products increased from 414,013 short tons in 1996 to a peak level of 642,353 short tons in 1999, and declined to 491,836 short tons in 2000. The overall increase from 1996 to 2000 was 18.8 percent. *See* Appendix 2 to Request and Joint Respondents' Tin Mill Prehearing Brief at 5-7.

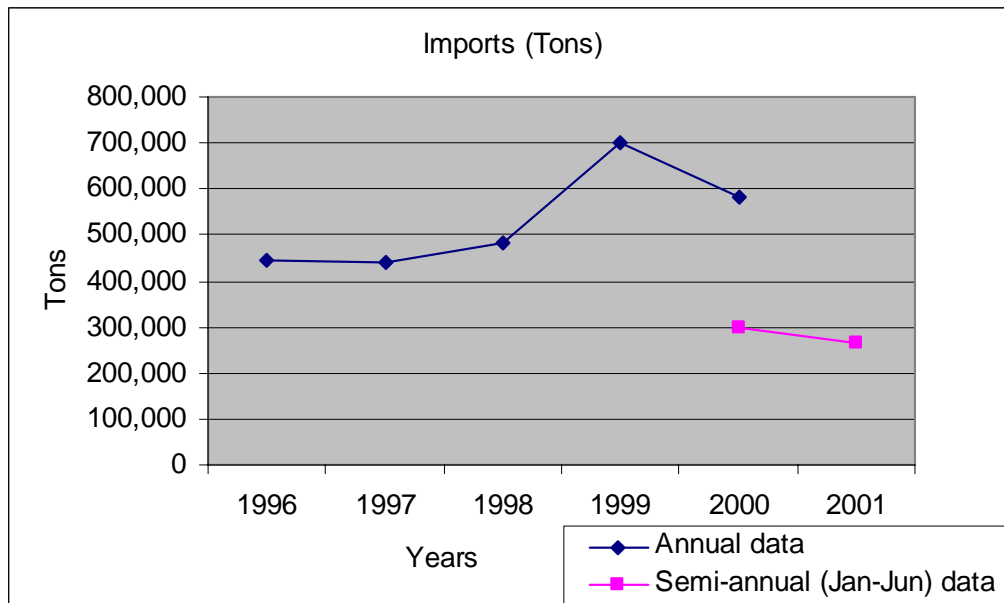
⁵⁰⁵⁵ (original footnote) CR and PR at Tables FLAT-10 and FLAT-C-8.

⁵⁰⁵⁶ (original footnote) CR and PR at Tables FLAT-10 and FLAT-C-8.

⁵⁰⁵⁷ (original footnote) CR and PR at Table FLAT-10. Tin mill product imports were 17.7 percent of domestic production in interim 2001, compared to 17.1 percent in interim 2000. *Id.* Joint Respondents alleged that if the tin mill products excluded from the request were subtracted from the official import data, the ratio of

The ratio of imports to production was 20.1 percent during the import volume peak in 1999.^{5058 5059}

10.189 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:⁵⁰⁶⁰

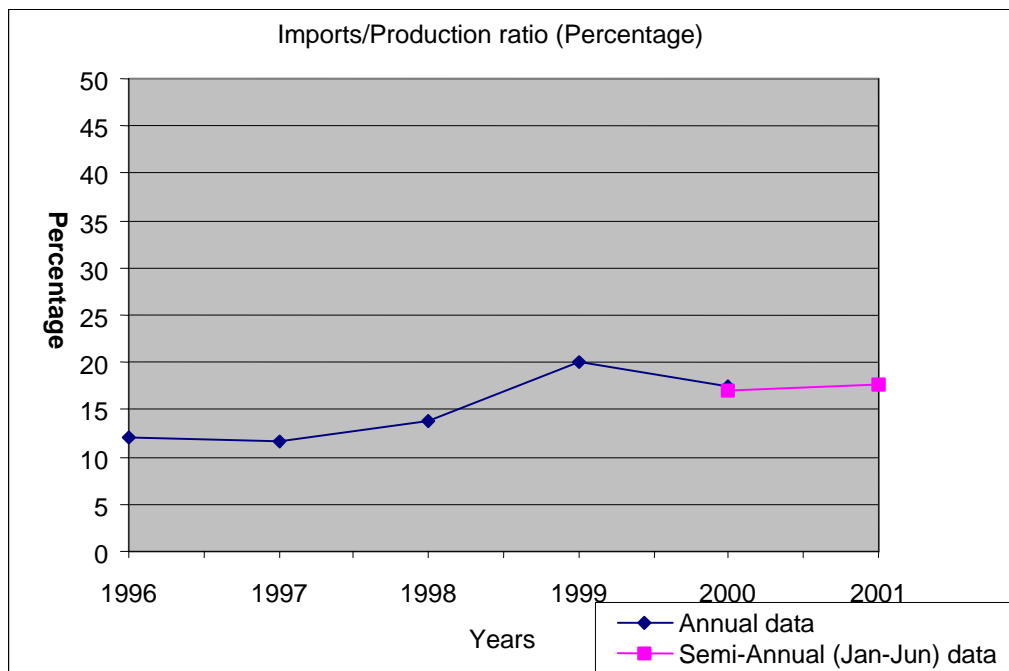


subject imports to domestic production would increase from 11.2 percent in 1996 to a peak of 18.5 percent in 1999 and decline to 14.8 percent in 2000. Joint Respondents' Tin Mill Prehearing Brief at 7.

⁵⁰⁵⁸ (original footnote) CR and PR at Table FLAT-10.

⁵⁰⁵⁹ USITC Report, p. I-71.

⁵⁰⁶⁰ The data represented in the following two graphs are contained in the USITC Report, in particular in Table FLAT-10 at FLAT-14 and Table FLAT C-8. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.



(ii) *Claims and arguments of the parties*

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

(iii) *Analysis by the Panel*

10.191 Before being able to review the USITC's determination on increased imports of tin mill the Panel needs to address the issue of the divergent findings made by individual USITC Commissioners: four of the six Commissioners made findings on tin mill as a separate product⁵⁰⁶¹, but the two other Commissioners (Bragg and Devaney) treated tin mill products as part of the larger CCFRS category.⁵⁰⁶² The four who examined tin mill as a separate product made a common affirmative finding on increased imports and on serious injury, but later diverged on the question of causation, for which only Commissioner Miller made an affirmative determination.⁵⁰⁶³ Ultimately, therefore, only Commissioner Miller reached positive findings regarding tin mill as a separate product. The two Commissioners who treated tin mill as part of CCFRS, reached a positive conclusion on that larger category. Despite the divergent product definitions, the USITC Report concludes that three Commissioners have made "an affirmative determination regarding imports of carbon and alloy tin mill products."⁵⁰⁶⁴

10.192 In the March Proclamation, the President did not select any of the various affirmative determinations on tin mill as the basis of the decision to impose the safeguard measure on tin mill. Rather, pursuant to domestic law, the President "decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to [tin mill products and stainless steel wire] to

⁵⁰⁶¹ USITC Report, pp. I-71 et seq.

⁵⁰⁶² USITC Report, p. I-71, footnote 368 and p. 279.

⁵⁰⁶³ USITC Report, pp. I-307-309.

⁵⁰⁶⁴ USITC Report, p. I-25.

be the determination of the [US]ITC".⁵⁰⁶⁵ Therefore, it is apparent that the President based his determination on the findings of all three Commissioners (Bragg, Devaney and Miller), although those three commissioners did not perform their analysis on the basis of the same like product definition.

10.193 The Panel recalls that a Member can impose a safeguard measure only after it has published a report that demonstrates that the WTO pre-requisites for the imposition of a safeguard are satisfied. The Panel agrees with the United States that there must always be a "connection" between the investigation by a Member's competent authorities and the Member's decision to take a safeguard measure.⁵⁰⁶⁶ In fact, the measure ultimately imposed must be based on a determination and the underlying investigation, as published in the report. This report must thus provide a reasoned and adequate explanation of how the WTO requirements relating to the imposition of safeguard measures are satisfied. In application of its standard of review, a panel must review whether these requirements are satisfied.

10.194 On its face, the USITC (the three Commissioners voting in the affirmative) made divergent findings relating to tin mill and these different findings are impossible to reconcile, given that they are based on differently defined products. Whatever flexibility the Agreement on Safeguards accords to WTO Members as regards the structure of their internal decision-making processes⁵⁰⁶⁷, it is clear from Articles 2.1 and 3.1 of the Agreement on Safeguards, Article 11 of the DSU and our standard of review that the competent authorities must always provide a reasoned and adequate explanation of their determinations and demonstrations. If they do not, a Panel cannot uphold the measure. The Panel fails to see how the USITC Report, as it stands, can provide a logical explanation of the measure imposed on tin mill and of why the conditions for its imposition, here, increased imports, are satisfied. There is no indication of how interested parties (and the Panel for that matter) can identify which of the various and inconsistent findings by various Commissioners is the basis for the imposition of the safeguard measure on tin mill.

10.195 The Panel notes that the issue at hand is not one where a Member publishes dissenting opinions and where these dissents depart from the findings which serve as the basis of a measure. In the instant case, the three various individual findings all served as the basis of the "determination of the [US]ITC".⁵⁰⁶⁸ The Panel believes that a Member is not permitted under Articles 2.1 and 3.1 of the Agreement on Safeguards to base a safeguard measure on a determination supported by a set of explanations each of which is different and impossible to reconcile with the other. Such findings cannot simultaneously form the basis of a determination. For the purposes of the Agreement on Safeguards, with regard to, for instance, the question of whether imports have increased, it makes a difference whether the product at issue is tin mill or a much broader category called CCFRS and containing tin mill products. The difference is that the import numbers for different product definitions will not be the same.

10.196 The Panel believes that this is not the situation that was at issue in *US – Line Pipe* where the Appellate Body held that no violation of the Agreement on Safeguards had occurred. The question in *US – Line Pipe* was whether a *determination* could leave open the question whether there was serious injury or threat of serious injury. From the perspective of the Agreement on Safeguards, the conditions of Article 2.1 are satisfied equally by serious injury and by threat of serious injury.⁵⁰⁶⁹ The

⁵⁰⁶⁵ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.

⁵⁰⁶⁶ United States' First Written Submission, para. 207.

⁵⁰⁶⁷ See Appellate Body Report, *US – Line Pipe*, para. 158.

⁵⁰⁶⁸ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.

⁵⁰⁶⁹ Appellate Body Report, *US – Line Pipe*, para. 170.

challenge was not that the *underlying report* was split and contained different reasonings that could not be reconciled one with another and that, therefore, there was a violation of Articles 2.1 and 3.1 of the Agreement on Safeguards.

10.197 The Panel adheres to the Appellate Body's statements made in *US – Line Pipe* on the Members' discretion regarding their internal decision-making process. Specifically, the Appellate Body found:

"[W]e are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or – as here – six individual decision-makers under the municipal law of that WTO Member. What matters to us is whether the determination, however it is decided domestically, meets the requirements of the *Agreement on Safeguards*."⁵⁰⁷⁰

10.198 Against this background, the Panel is not concerned with the fact that, as in the present case, only the findings of one commissioner making an affirmative determination relate to tin mill as a separate product, while the United States' domestic law requires at least three affirmative determinations. It is for each Member to determine, in their domestic law, how many affirmative decisions are necessary in a collegial decision-making body, be it one, three, four (a majority) or six (unanimity). Obviously, the question of consistency or inconsistency with domestic law is not relevant to the question of WTO consistency. Therefore, the Panel sees no inconsistency with WTO law in the fact itself that only one commissioner reached affirmative findings with regard to tin mill products as a separate product.

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

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

(c) Hot-rolled bar

(i) *The USITC's findings*

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

⁵⁰⁷⁰ Appellate Body Report, *US – Line Pipe*, para. 158.

"We find that the statutory criterion of increased imports is met.

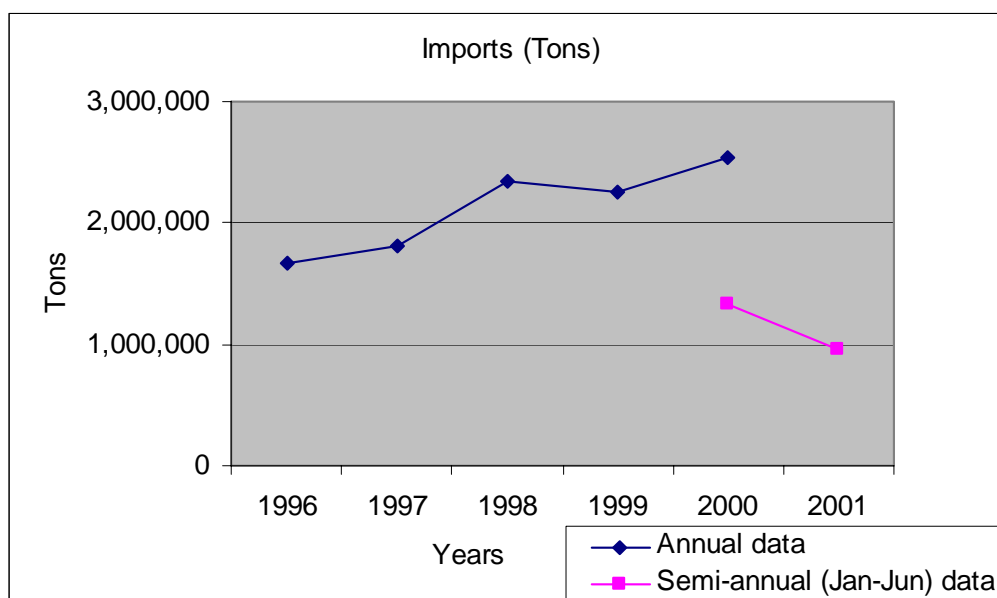
Imports of hot-rolled bar increased from 1.66 million tons in 1996 to 1.81 million tons in 1997 and then to 2.34 million tons in 1998. Imports then declined to 2.26 million tons in 1999 but increased in 2000 to 2.53 million tons. Imports were lower in interim (January-June) 2001, at 952,392 tons, than in interim 2000, when they were 1.34 million tons. Imports increased by 52.5 percent from 1996 to 2000 and by 11.9 percent from 1999 to 2000.⁵⁰⁷¹

As a ratio to US production, imports declined from 19.2 percent in 1996 to 18.4 percent in 1997, but then rose to 23.8 percent in 1998, 24.9 percent in 1999, and 27.5 percent in 2000. The ratio was lower in interim 2001, at 24.6 percent, than in interim 2000, when it was 27.0 percent.⁵⁰⁷²

Imports were higher, both in absolute terms and relative to US production, in 2000 than in any prior year of the period examined and showed a rapid and dramatic increase from the previous year. While imports declined in the interim period comparison, the ratio of imports to US production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level.

In view of the above, we find that imports are in increased quantities and that the first statutory criterion is satisfied."⁵⁰⁷³

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

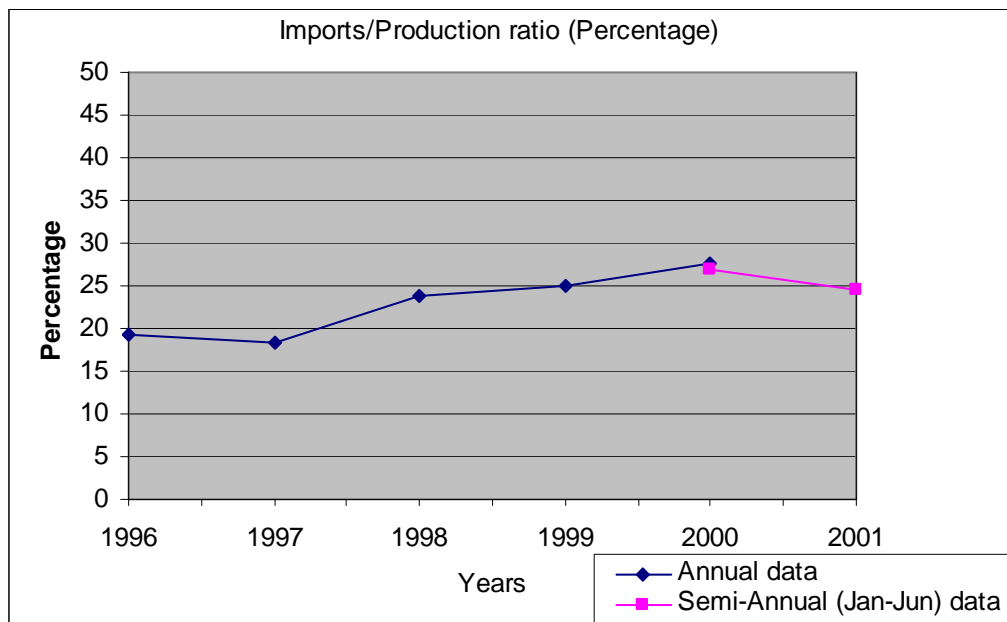


⁵⁰⁷¹ (original footnote) CR and PR, Table LONG-5.

⁵⁰⁷² (original footnote) CR and PR, Table LONG-5.

⁵⁰⁷³ USITC Report, Vol. I, p. 92.

⁵⁰⁷⁴ The data represented in the following two graphs are contained in the USITC Report, in particular in Table LONG-5 at LONG-9. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.



(ii) *Claims and arguments of the parties*

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

(iii) *Analysis by the Panel*

Absolute imports

10.204 The Panel believes that the USITC's determination on increased imports of hot-rolled bar, as published in its report⁵⁰⁷⁵, does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC relied on the higher amount of imports in 2000 than in any previous year of the period examined and on the "rapid and dramatic increase" from 1999 to 2000. The decline between interim 2000 and 2001 was acknowledged, but the USITC did not give an explanation why it, nevertheless, found that there was an increase of imports in absolute numbers. It did so only with regard to imports relative to domestic production⁵⁰⁷⁶, a finding with which the Panel will deal separately.

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

10.206 In the Panel's view, the trend of absolute imports between 1997 and interim 2001 is best described as an alternation of increases and decreases from year to year. Given this up-and-down

⁵⁰⁷⁵ USITC Report, Vol. I, p. 92.

⁵⁰⁷⁶ USITC Report, Vol. I, p. 92.

movement ending with a decrease of 28.9% (in interim 2001), the Panel does not believe that the facts support a conclusion of increased imports, nor has the USITC provided an explanation to that effect. The Panel acknowledges that, until 2000, there was a net increasing trend, in other words, the two increases in 1998 and 2000 were stronger than the decrease in 1999. However, the picture changes again significantly, when one includes the decrease (by 28.9%) in interim 2001, a fact that the USITC acknowledged, but did not evaluate. Taking into account all qualitative and quantitative features of the trends of imports over the period of examination, the Panel, therefore, finds that the USITC's determination on increased imports of hot-rolled bar, as published in its Report⁵⁰⁷⁷, does not contain a reasoned and adequate explanation of how the facts support a conclusion that hot-rolled bar "is being imported in such increased quantities."

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

Relative imports

10.208 The Panel also considers that the USITC's determination on increased imports of hot-rolled bar relative to domestic production⁵⁰⁷⁸ does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC's conclusion relied on the statement that imports relative to domestic production in 2000 were "higher than in any prior year of the period examined and showed a rapid and dramatic increase from the previous year." We note with puzzlement that the attributes "rapid and dramatic" refer to an increase from 24.9% (1999) to 27.5% (2000). The decline in imports in interim 2001 was acknowledged, but according to the USITC "the ratio of imports to US production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level."

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

Conclusion

10.210 The Panel consequently finds that the USITC Report⁵⁰⁷⁹ did not provide an adequate and reasoned explanation of how the facts support the determination that hot-rolled bar was being imported in "increased quantities", contrary to the requirements of Article 2.1 Agreement on Safeguards that the product "is being imported in (such) increased quantities".

⁵⁰⁷⁷ USITC Report, Vol. I, p. 92.

⁵⁰⁷⁸ USITC Report, Vol. I, p. 92.

⁵⁰⁷⁹ USITC Report, Vol. I, p. 92.

(d) Cold-finished bar

(i) *The USITC's findings*

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

"We find that the statutory criterion of increased imports is met.

Imports of cold-finished bar increased from 206,272 tons in 1996 to 238,221 tons in 1997 and then to 272,972 tons in 1998. Imports then declined to 235,693 tons in 1999 but increased in 2000 to 314,958 tons. Imports were lower in interim 2001, at 134,971 tons, than in interim 2000, when they were 169,889 tons. Imports increased by 52.7 percent from 1996 to 2000 and by 33.6 percent from 1999 to 2000.⁵⁰⁸⁰

As a ratio to US production, imports declined from 17.6 percent in 1996 to 17.3 percent in 1997, rose to 19.5 percent in 1998, declined to 17.0 percent in 1999, and then rose to 23.7 percent in 2000. The ratio was higher in interim 2001, at 23.9 percent, than in interim 2000, when it was 23.6 percent.⁵⁰⁸¹

Imports were higher, both in absolute terms and relative to US production, in 2000 than in any prior year of the period examined and showed a rapid and dramatic increase. Although import volumes declined in the interim period comparison, the ratio of imports to US production in interim 2001 was higher than in any full-year during the period examined.

In view of the above, we find that imports are in increased quantities and that the first statutory criterion is satisfied."⁵⁰⁸²

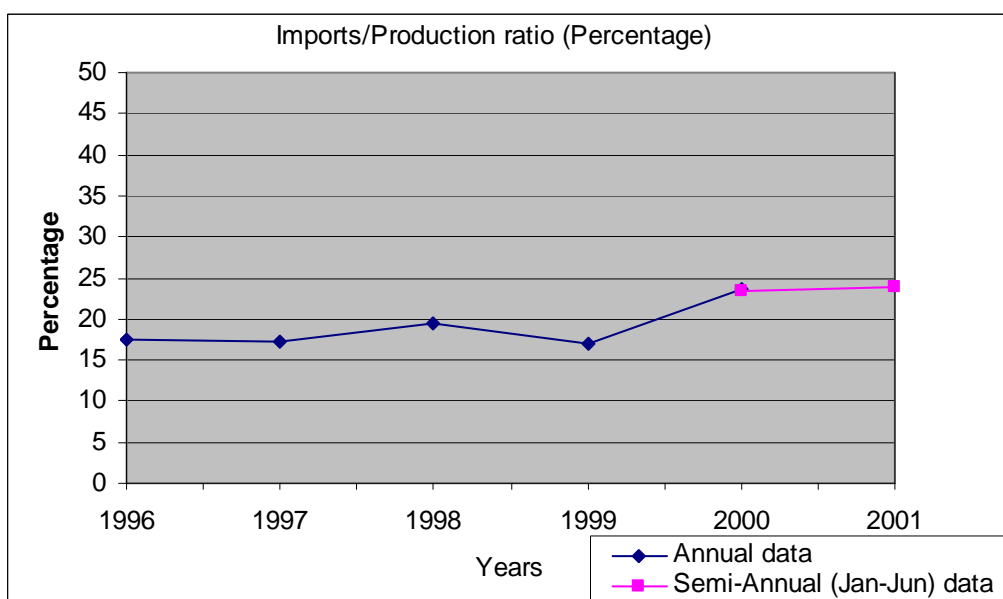
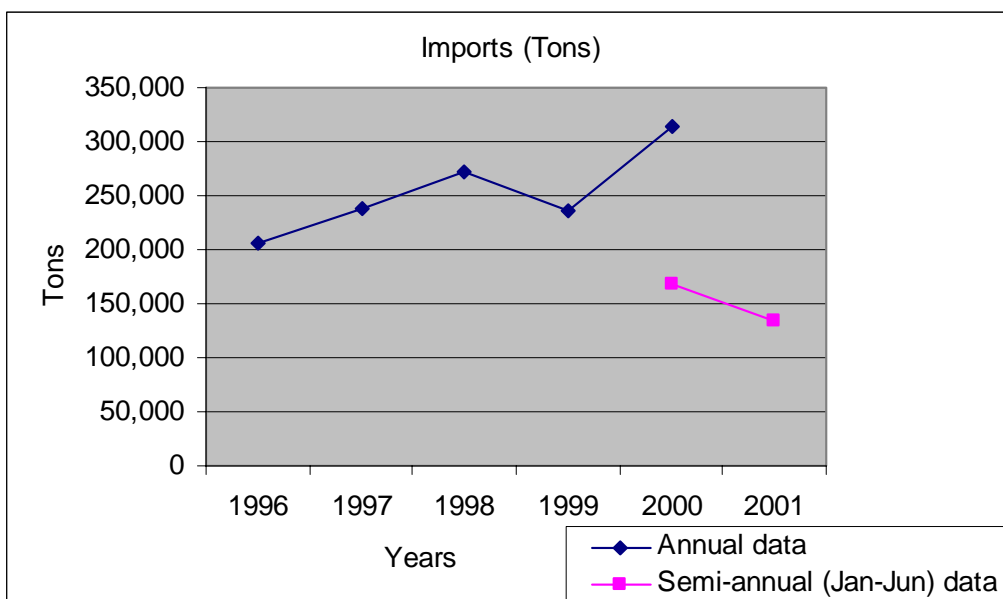
10.212 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:⁵⁰⁸³

⁵⁰⁸⁰ (original footnote) CR and PR, Table LONG-6.

⁵⁰⁸¹ (original footnote) CR and PR, Table LONG-6.

⁵⁰⁸² USITC Report, Vol. I, pp. 101-102.

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



(ii) *Claims and arguments by the parties*

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

(iii) *Analysis by the Panel*

Relative imports

10.214 The Panel believes that the USITC's determination on increased imports of cold-finished bar, relative to domestic production⁵⁰⁸⁴, contains an adequate and reasoned explanation of how the facts support the determination. After an up-and-down movement between 1996 and 1999 (starting with 17.6% and ending with 17.0%) without any significant overall net trend, imports increased to 23.7% in 2000 and 23.9% in interim 2001. Comparing the two ratios, this represents 40.6% increase and is a development in the recent past. Given the overall neutral trends in the period until 1999, the Panel sees no development in the period preceding the very recent past that would cast doubt on its evaluation of the most recent trends.⁵⁰⁸⁵

10.215 Therefore, the Panel considers that the USITC's determination on increased imports of cold-finished bar, relative to domestic production⁵⁰⁸⁶, contains an adequate and reasoned explanation of how the facts support the determination.

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

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

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

⁵⁰⁸⁴ USITC Report, Vol. I, pp. 101-102.

⁵⁰⁸⁵ European Communities' first written submission, para. 321.

⁵⁰⁸⁶ USITC Report, Vol. I, pp. 101-102.

⁵⁰⁸⁷ European Communities' first written submission, para. 321.

⁵⁰⁸⁸ European Communities' first written submission, para. 321.

Absolute imports

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

Conclusion

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

(e) Rebar

(i) *The USITC's findings*

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

"We find that the statutory criterion of increased imports is met.

Imports of rebar increased from 581,731 tons in 1996 to 701,303 tons in 1997 and then to 1.2 million tons in 1998. Imports further increased to 1.8 million tons in 1999 and then declined to 1.7 million tons in 2000. Imports were lower in interim 2001, at 852,488 tons, than in interim 2000, when they were 985,991 tons.⁵⁰⁸⁹

As a ratio to US production, imports rose from 11.7 percent in 1996 to 12.8 percent in 1997, 19.9 percent in 1998, and 29.1 percent in 1999. This ratio then declined to 25.2 percent in 2000. The ratio was lower in interim 2001, at 24.3 percent, than in interim 2000, when it was 30.9 percent.⁵⁰⁹⁰

Notwithstanding the decline from 1999 levels, imports in 2000 were substantially higher than they were during earlier portions of the period examined, reflecting the rapid and dramatic increase in the prior two years. The quantity of imports in 2000 was 187.0 percent above the 1996 quantity and 35.8 percent over the 1998 quantity, and the ratio of imports to US production in 2000 was more than double the ratio in 1996. By the same token, import quantities for the first six months of 2001 were higher than the quantities for the full-years of either 1996 or 1997, and the ratio of imports to US production in interim 2001 was higher than that for any year from 1996 to 1998.

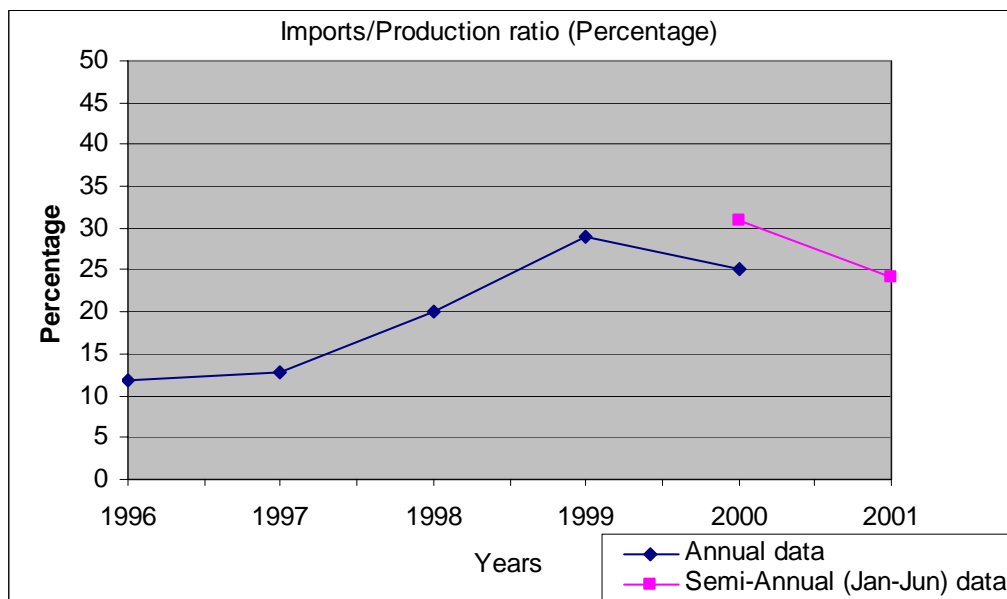
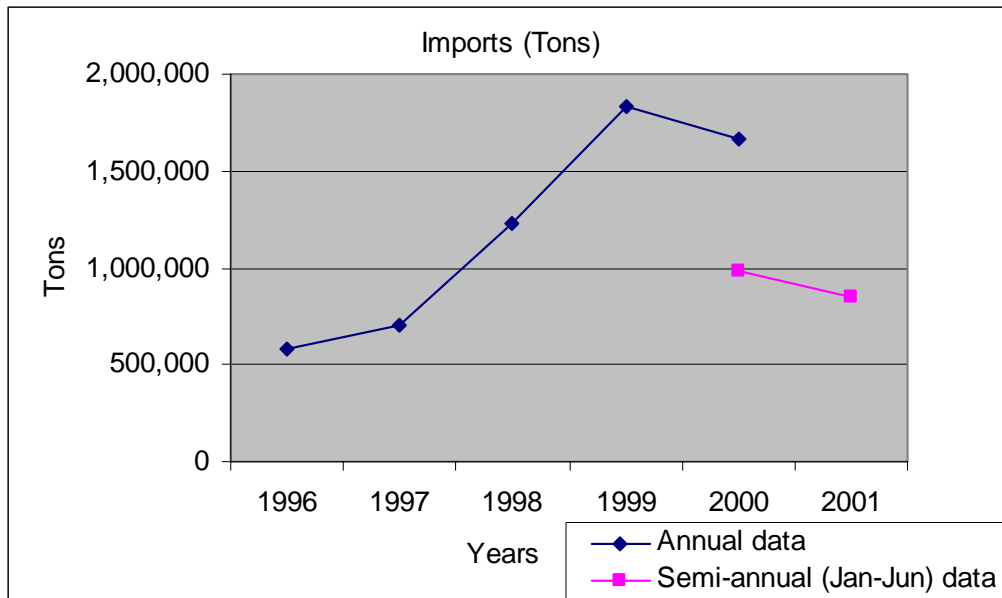
In view of the above, we find that imports are in increased quantities and that the first statutory criterion is satisfied."⁵⁰⁹¹

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

⁵⁰⁸⁹ (original footnote) CR and PR, Table LONG-7.

⁵⁰⁹⁰ (original footnote) CR and PR, Table LONG-7.

⁵⁰⁹¹ USITC Report, Vol. I, p. 109.



(ii) *Claims and arguments of the parties*

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

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

(iii) *Analysis by the Panel*

Absolute imports

10.224 The Panel believes that the USITC's determination on increased imports of rebar in absolute terms⁵⁰⁹³, contains an adequate and reasoned explanation of how the facts support the determination. In particular, the Panel considers that it amounts to such an adequate and reasoned explanation given that imports more than tripled from 1996 to 1999 (from 581,731 tons to 1.8 million tons) and then declined relatively insignificantly in 2000 (to 1.7 million tons, or by 5.6%) and in interim 2001 (by 13.5%).

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

10.226 As regards the question raised by the complainants whether the increase was sudden enough, sharp enough, recent enough and significant enough *to cause serious injury*, that is a question more appropriately addressed in the context of *causation of serious injury*, not in the context of the requirement of the increase, where no well-founded judgment in this regard can be made. The Panel's finding on increased imports must be read together with its subsequent findings on the other conditions of Article 2.1 of the Agreement on Safeguards. Therefore, the Panel considers that the USITC's determination on increased imports of rebar⁵⁰⁹⁴ contains an adequate and reasoned explanation of how the facts support the determination.

Relative imports

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

Conclusion

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

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

(f) Welded pipe

(i) *The USITC's findings*

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

"We find that the statutory criterion of increased imports is met. Imports of welded pipe other than OCTG increased steadily throughout most of the period examined in both absolute terms and relative to domestic production, with the largest increase occurring in 2000. Imports increased from 1.57 million short tons in 1996 to 1.86 million short tons in 1997 and 2.26 million short tons in 1998, declined slightly to 2.12 million short tons in 1999, and then surged to 2.63 million short tons in 2000. Imports increased by 24.2 percent in quantity between 1999 and 2000, which was the largest annual percentage increase of the period examined, and in 2000 were at their highest level of the period examined. Imports continued at a very high level in interim 2001, only slightly (1.7 percent) below the level of the same period of 2000. Imports were 1.41 million short tons in interim 2001, compared to 1.44 million short tons in the same period of 2000.⁵⁰⁹⁵ Thus, imports of welded (non-OCTG) pipe have increased in absolute terms.⁵⁰⁹⁶

Imports of welded (non-OCTG) pipe also increased relative to domestic production, with the largest increase in the ratio occurring at the end of the period examined, between 1999 and 2000, and into 2001.⁵⁰⁹⁷ Thus, imports have increased relative to domestic production as well as in absolute terms."⁵⁰⁹⁸

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

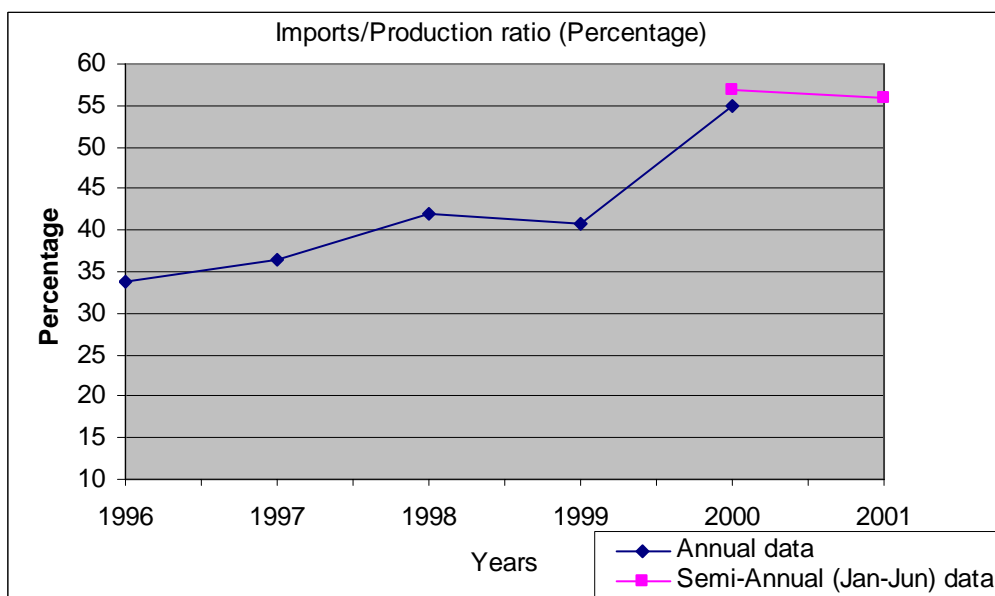
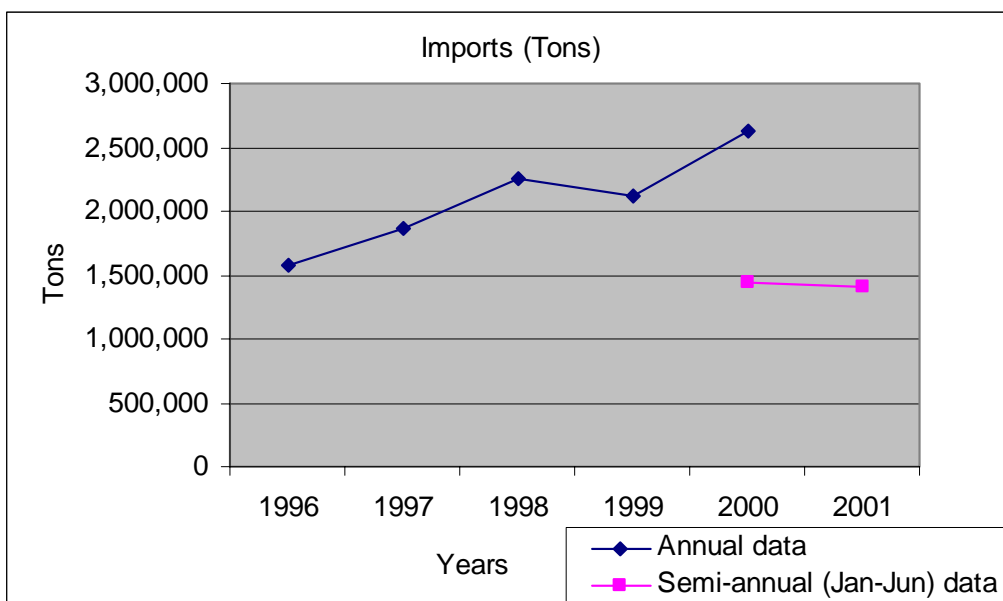
⁵⁰⁹⁵ (original footnote) CR and PR at TUBULAR-C-4.

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

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

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

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



(ii) *Claims and arguments of the parties*

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

(iii) *Analysis by the Panel*

Absolute imports

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

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

10.233 The Panel believes that the USITC's determination on increased imports of welded pipe in absolute terms⁵¹⁰² contains an adequate and reasoned explanation of how the facts support the determination. The USITC took into account the import data for each of the years of the period of investigation and conducted a satisfactory analysis of the developments of imports. As the USITC noted, imports declined only from 1998 to 1999 (from 2.26 to 2.12 million short tons, i.e. by 6.2%) and from interim 2000 to 2001 (by 1.7%)⁵¹⁰³, whereas all other years showed increases. Each of these increases was more significant than the two mentioned decreases, so that the overall evaluation is that of a clearly discernible increase. Against the background of the total increase from 1996 to 2000 (from 1.57 million short tons to 2.63 million short tons, i.e. by 67.5%), the subsequent decrease in interim 2001 (by 1.7%) means that imports remained at increased levels even in the most recent past. These facts that were listed and evaluated in the USITC Report, in the view of the Panel, do support a conclusion that welded pipe "is being imported in (such) increased quantities".

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

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

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

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

⁵¹⁰² USITC Report, Vol. I, p. 157.

⁵¹⁰³ *Ibid.*

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

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

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

Relative imports

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

Conclusion

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

(g) FFTJ

(i) *The USITC's findings*

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

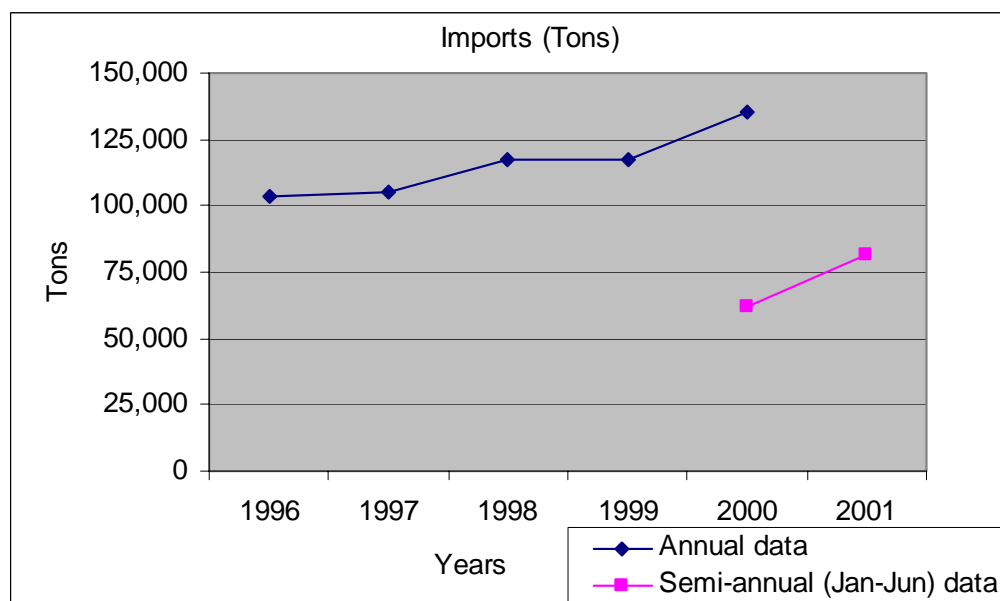
"We find that the statutory criterion of increased imports is met. Imports of fittings and flanges steadily increased in both absolute terms and relative to domestic production during the period examined, with the largest increase occurring at the end of the period. Imports increased by 30.8 percent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

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

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

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

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

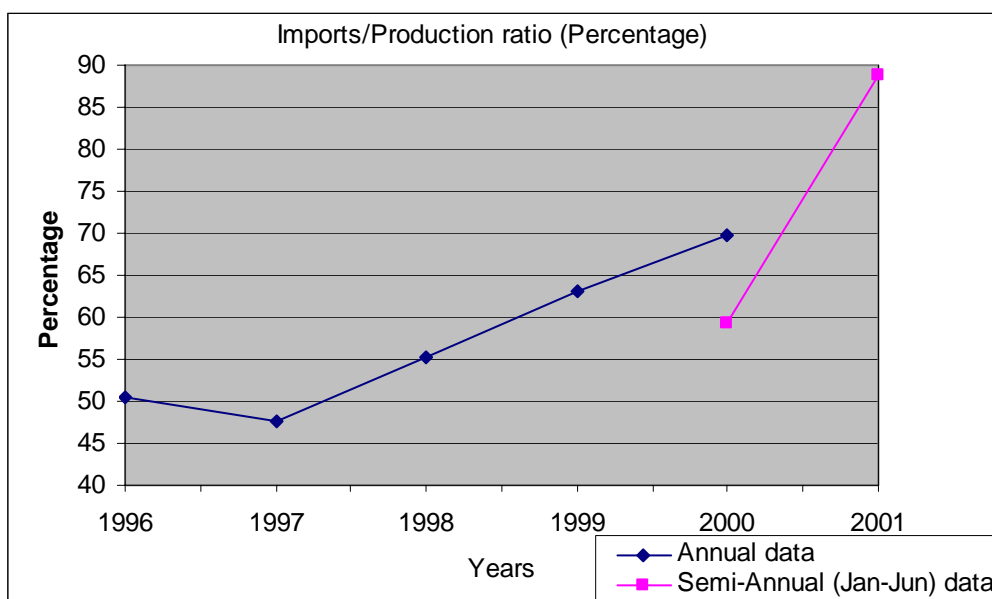


tons). The value of total imports also increased substantially during the period examined (45.9 percent), and between 1999 and 2000 (19.3 percent), and was at its highest full-year level in 2000 (\$307.9 million). The value of imports was significantly higher in interim 2001 (\$182.3 million) than in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

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

⁵¹⁰⁷ USITC Report, Vol. I, p. 171.

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



(ii) *Claims and arguments of the parties*

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

(iii) *Analysis by the Panel*

Relative imports

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

10.244 The Panel believes that the USITC's determination on increased imports of FFTJ in relative terms⁵¹¹¹ contains an adequate and reasoned explanation of how the facts support the determination. The USITC noted how much imports, relative to domestic production, had increased during the entire period of investigation and assessed the significance of that increase. The USITC also noted that the end of the period of examination showed the most significant increases (from 50.5% to 69.7% in 2000 and from 59.4% to 88.8% from interim 2000 to interim 2001. Also, in the light of the fact that only

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

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

⁵¹¹¹ USITC Report, Vol. I, p. 171.

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

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

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

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

Absolute imports

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

Conclusion

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

(h) Stainless steel bar

(i) *The USITC's findings*

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

"We find that the statutory criterion of increased imports is met.

In terms of quantity, imports of stainless bar and light shapes increased by 53.8 percent during the five full-years of the period of investigation, growing from 97.9

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

thousand short tons in 1996 to 150.6 thousand short tons in 2000.⁵¹¹³ Although the quantity of imports fluctuated somewhat (declining slightly in 1998 and 1999 from its level in 1997), a rapid and dramatic increase in import quantity occurred during the last full-year of the period of investigation, when imports of stainless bar grew by 44 thousand short tons.⁵¹¹⁴ The quantity of imports declined between interim 2000 and interim 2001, dropping from 83.4 thousand short tons to 69.2 thousand short tons.⁵¹¹⁵

The ratio of imports of stainless steel bar to domestic production also increased significantly during the period, growing from 51.8 percent in 1996 to 84.1 percent in 2000, with the largest single percentage increase in the ratio (19.3 percentage points) occurring in 2000.⁵¹¹⁶ The ratio of imports to domestic production decreased from 87.9 percent in interim 2000 to 84.6 percent in interim 2001.⁵¹¹⁷

In sum, imports of bar and light shapes increased significantly, both in quantity terms and as a ratio to domestic production, between 1996 and 2000, with the largest single increase in imports occurring during the last full-year of the period. Although there was a decline in imports in terms of quantity and as a ratio to domestic production between interim 2000 and interim 2001, we find that the first statutory criterion is satisfied."⁵¹¹⁸

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

⁵¹¹³ (original footnote) CR and PR at Tables STAINLESS-6 & STAINLESS-C-4.

⁵¹¹⁴ (original footnote) CR and PR at Tables STAINLESS-6 & STAINLESS-C-4.

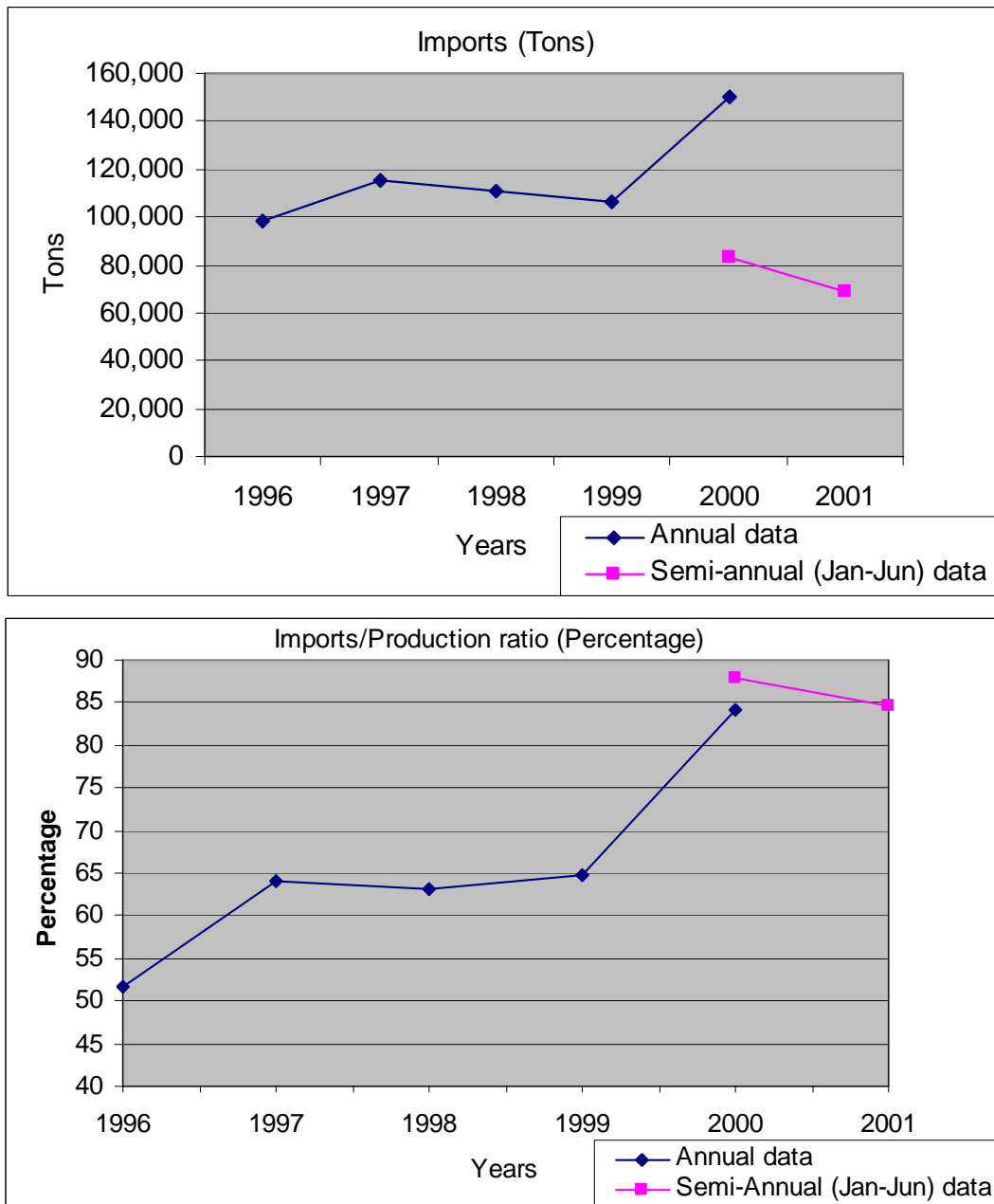
⁵¹¹⁵ (original footnote) CR and PR at Tables STAINLESS-6 & STAINLESS-C-4.

⁵¹¹⁶ (original footnote) CR and PR at Table STAINLESS-6.

⁵¹¹⁷ (original footnote) CR and PR at Table STAINLESS-6.

⁵¹¹⁸ USITC Report, Vol. I, pp. 205-206.

⁵¹¹⁹ The data represented in the following two graphs are contained in the USITC Report, in particular in Table STAINLESS-6 at STAINLESS-11 and Table STAINLESS-C-4. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.



(ii) *Claims and arguments of the parties*

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

(iii) *Analysis by the Panel*

Relative imports

10.253 The Panel believes that the USITC's determination on increased imports of stainless steel bar, relative to domestic production⁵¹²⁰, contains an adequate and reasoned explanation of how the facts support the determination. The USITC found that the "ratio of imports of stainless steel bar to domestic production increased significantly during the period, growing from 51.8 percent in 1996 to 84.1 percent in 2000". The USITC also noted that "the largest single percentage increase in the ratio (19.3 percentage points)" occurred in 2000. According to the USITC, the slight decrease in the most recent past (from 87.9% in interim 2000 to 84.6% in interim 2001) was not an obstacle for finding that the requirement of increased imports was satisfied.⁵¹²¹

10.254 The Panel considers this to be a satisfactory explanation of how the facts support the determination. In particular, in the light of the significant increase from 1999 to 2000 (19.3 percentage points), the decline by 3.3 percentage points from interim 2000 to interim 2001 is, contrary to what the European Communities has stated⁵¹²², insignificant. It simultaneously does not detract from a finding that imports, relative to domestic production, remain at high levels so that stainless steel bar "is being imported in (such) increased quantities".

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

Absolute imports

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

Conclusion

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

⁵¹²⁰ USITC Report, Vol. I, pp. 101-102.

⁵¹²¹ USITC Report, Vol. I, p. 206.

⁵¹²² European Communities' first written submission, para. 350.

- (i) Stainless steel wire
- (i) *The USITC's findings*

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

"We find that the statutory criterion of increased imports is met.

In quantity terms, imports of stainless wire increased from 27.3 thousand short tons in 1996 to 31.3 thousand short tons in 2000.⁵¹²³ The quantity of stainless wire imports fluctuated somewhat during the period, increasing from 27.3 thousand short tons in 1996 to 29.9 thousand short tons in 1997 and then to 30.7 thousand short tons in 1998.⁵¹²⁴ The quantity of imports then declined by 19.4 percent, to 24.7 thousand short tons, in 1999. However, the single largest increase in import quantity occurred between 1999 and 2000, when imports increased by 26.5 percent, from 24.8 thousand short tons to 31.3 thousand short tons.⁵¹²⁵ The quantity of stainless wire imports increased between interim 2000 and 2001, as import volumes grew from 16.0 thousand short tons to 16.5 thousand short tons.⁵¹²⁶

The ratio of stainless steel wire imports to domestic production exhibited a similar trend during the period of investigation. The ratio remained relatively stable (between 31 and 32 percent) during the first three years of the period but then declined to 23.9 percent in 1999.⁵¹²⁷ The ratio of stainless wire imports to domestic production then increased by 5.5 percentage points, to 29.4 percent, in 2000.⁵¹²⁸ The ratio of imports to domestic production increased to its highest level during the period, 38 percent, in interim 2001.⁵¹²⁹

In sum, the record indicates that imports of stainless wire increased in quantity terms and as a ratio to domestic production during the period of investigation. Accordingly, we find that the first statutory criterion is satisfied."^{5130 5131}

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

⁵¹²³ (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.

⁵¹²⁴ (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.

⁵¹²⁵ (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.

⁵¹²⁶ (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.

⁵¹²⁷ (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.

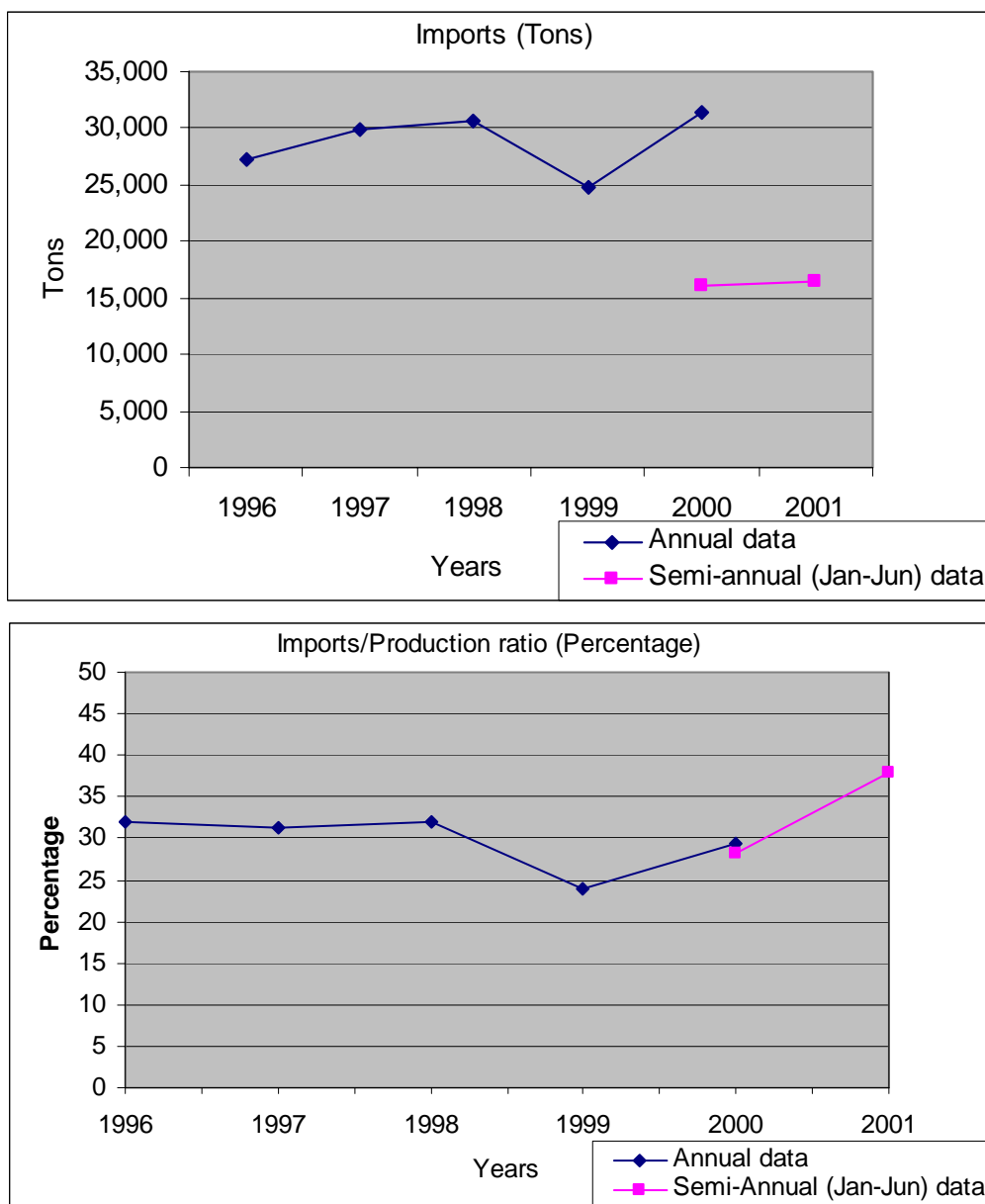
⁵¹²⁸ (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.

⁵¹²⁹ (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.

⁵¹³⁰ (original footnote) Chairman Koplan does not join the remainder of this section of the opinion.

⁵¹³¹ USITC Report, Vol. I, pp. 234-235.

⁵¹³² The data represented in the following two graphs are contained in the USITC Report, in particular in Table STAINLESS-9 at STAINLESS-14 and Table STAINLESS-C-7. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.



(ii) *Claims and arguments of the parties*

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

(iii) *Analysis by the Panel*

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

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

10.262 For the reasons set out above in relation to the USITC's determination(s) on tin mill⁵¹³⁴, the Panel believes that the Agreement on Safeguards does not permit the combination of findings as supporting a determination, if these findings were reached on the basis of differently defined products. If such findings cannot be reconciled one with another (as a matter of substance), they cannot simultaneously form the basis of a determination. The Panel therefore believes that there is a violation of the obligation under Articles 2.1 and 3.1 of the Agreement on Safeguards to provide a reasoned and adequate explanation of how the facts support the determination, if that explanation consists of alternative explanations departing from each other and which, given the different product basis, cannot be reconciled as a matter of substance.

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

(j) Stainless steel rod

(i) *The USITC's findings*

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

"We find that the statutory criterion of increased imports is met.

In quantity terms, imports of stainless rod increased by 36.1 percent during the period of investigation, growing from 60.5 thousand short tons in 1996 to 82.3 thousand short tons in 2000.⁵¹³⁵ Although the quantity of imports fluctuated somewhat during the period of investigation, the largest increase in terms of quantity occurred in 2000, the last full-year of the period of investigation, when import quantities increased by more than 25 percent, growing from 65.9 thousand short tons to 82.3 thousand short tons.⁵¹³⁶ The quantity of stainless rod imports declined by 31.3 percent between interim 2000 and 2001, falling from 45.6 thousand short tons to 31.4 thousand short tons.⁵¹³⁷ We note, however, that the market share of imports remained essentially stable in interim 2001, declining slightly from *** percent interim 2000 to *** percent in interim 2001.⁵¹³⁸

⁵¹³³ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.

⁵¹³⁴ See *supra* paras. 10.191-10.200.

⁵¹³⁵ (original footnote) CR and PR at Table STAINLESS-7 & STAINLESS-C-5.

⁵¹³⁶ (original footnote) CR and PR at Table STAINLESS-7 & STAINLESS-C-5.

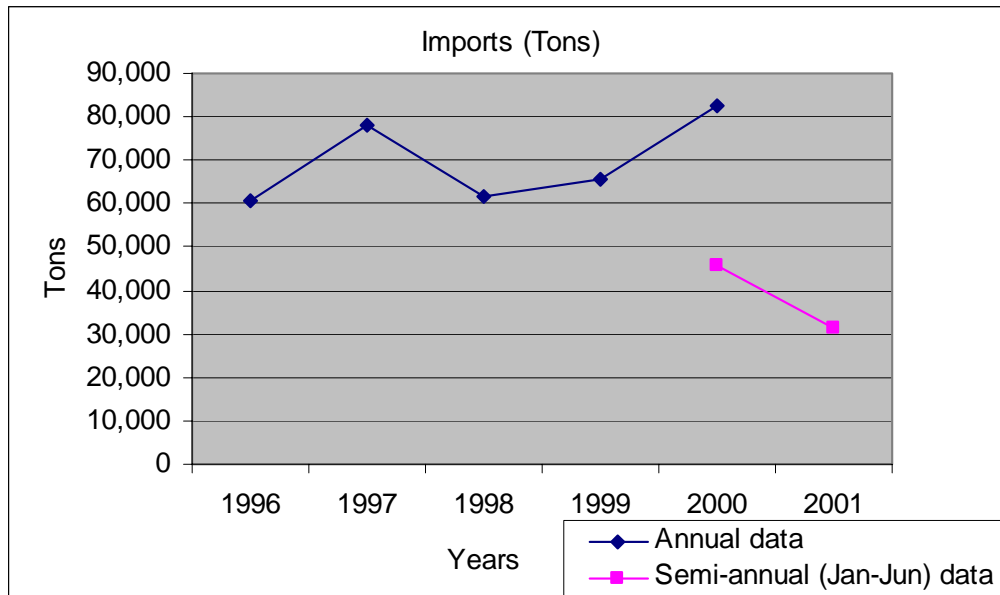
⁵¹³⁷ (original footnote) CR and PR at Table STAINLESS-7 & STAINLESS-C-5.

⁵¹³⁸ (original footnote) CR and PR at Table STAINLESS-7 & STAINLESS-C-5.

The ratio of imports of stainless steel rod to domestic production also increased significantly during the period, increasing from *** percent in 1996 to *** percent in 2000. While the ratio fluctuated somewhat during the period of investigation, the largest single increase in the ratio (*** percentage points) occurred in 2000, the last full-year of the period of investigation.⁵¹³⁹ The ratio of imports to domestic production decreased from *** percent of domestic production in interim 2000 to *** percent in interim 2001.⁵¹⁴⁰

In sum, imports of stainless rod increased significantly, both in quantity terms and as a ratio of domestic production, between 1996 and 2000, with a rapid and dramatic increase in imports occurring during the last full-year of the period of investigation. Accordingly, we find that the first statutory criterion is satisfied.⁵¹⁴¹

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



(ii) *Claims and arguments of the parties*

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

⁵¹³⁹ (original footnote) CR and PR at Table STAINLESS-7.

⁵¹⁴⁰ (original footnote) CR at Table STAINLESS-7.

⁵¹⁴¹ USITC Report, Vol. I, pp. 214-215.

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

(iii) *Analysis by the Panel*

Absolute imports

10.267 The Panel believes that the USITC's determination on increased imports of stainless steel rod, as published in its Report⁵¹⁴³, does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC relied on the increase occurring between 1996 and 2000, with the largest increase from 1999 to 2000 (25%). The decline between interim 2000 and interim 2001 was acknowledged, but the USITC did not give an explanation why it nevertheless found that there was an increase of imports in absolute numbers. This failure is particularly serious since this decrease (by 31.3%) was sharper than the preceding increase, and, as a matter of proportion, offset the increase of the two preceding years.

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

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

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

Relative imports

10.271 The Panel also considers that the USITC's determination on increased imports of stainless steel rod relative to domestic production⁵¹⁴⁵ does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC performed an analysis which is similar to that rejected by the Panel in the context of absolute imports. What is more, the USITC did not provide any of the data on which it relied. All such numbers were replaced by asterisks. Therefore, there is no explanation of how the facts support a conclusion of increased imports because there are no facts supporting any conclusion.

⁵¹⁴³ USITC Report, Vol. I, pp. 214-215.

⁵¹⁴⁴ United States' first written submission, paras. 295-296 and 300.

⁵¹⁴⁵ USITC Report, Vol. I, p. 215.

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

10.273 However, Article 3.1 of the Agreement on Safeguards contains the obligation that competent authorities "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Article 4.2(c) adds the obligation that competent authorities "publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined". On the basis of these obligations and the obligation under Article 2.1, to make a determination, *inter alia*, that imports of the product in question have increased, competent authorities must provide a reasoned and adequate explanation of how the facts support the conclusion. In the view of the Panel, this requirement can, in an individual case, be limited by the obligation of Article 3.2 to protect confidential data.

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

10.275 The Panel believes that even if competent authorities are permitted not to disclose the data yet, nevertheless, rely on it, they are still required to provide through means other than full disclosure of that data, a reasoned and adequate explanation. This obligation could be complied with through the kind of explanation that the USITC has provided on page 215 of its report⁵¹⁴⁸, i.e. an explanation in words and without numbers. However, this obligation also includes an explanation by the competent authority of why there was no possibility of presenting *any* facts in a manner consistent with the obligation of protecting confidential information. That explanation was not provided in the instant case.

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

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

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

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

10.276 The Panel also believes that, irrespective of the confidentialization of the numbers, the USITC's determination on increased imports of stainless steel rod relative to domestic production, as published in its Report⁵¹⁴⁹, does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC relied on a "significant" increase occurring between 1996 and 2000, with the largest increase from 1999 to 2000, the last full-year investigated. The decline between interim 2000 and interim 2001 was acknowledged, as was the fact that the ratio fluctuated over the period of investigation. Given these fluctuations and the most recent decline, the Panel does not believe that the USITC gave a reasoned and adequate explanation supporting that stainless steel rod, relative to domestic production "is being imported in increased quantities". This would at least have required some indication that relative imports, at the end of the period of investigation, remain at increased levels, for example, because the decline in the interim period was small in comparison with the increase until 2000. Such indication does not exist in the present case where the USITC, much as in the context of absolute imports, failed to place the existing, intervening increases in the context of previous and subsequent decreases. The only indication that remains is the stated increase from 1996 to 2000, but 2000 is not the end of the period investigated, so that the mentioned statement cannot provide a basis for the conclusion that stainless steel rod "is being imported" in increased quantities, relative to domestic production.

Conclusion

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

E. CLAIMS RELATING TO CAUSATION

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

1. Claims and arguments of the parties

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

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

2. Relevant WTO provisions⁵¹⁵⁰

10.280 Article 2.1 of the Agreement on Safeguards provides that:

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

10.281 Article 4.2(a) provides that:

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

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

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

3. Standard of review

10.283 We recall that, as the Appellate Body has stated, the precise nature of the examination to be conducted by a panel in reviewing a claim under Article 4.2 of the Agreement on Safeguards stems in part from the panel's obligation to make an "objective assessment of the matter" under Article 11 of the DSU and, in part, from the obligations imposed by Article 4.2.⁵¹⁵¹ Article 11 requires us to make an objective assessment of the facts and the applicability and conformity of the measures in question in this dispute with the Agreement on Safeguards.⁵¹⁵²

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

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

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

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

10.285 We have further guidance as to how to apply the standard of review in relation to the competent authorities' causation analysis. In particular, in *Argentina – Footwear (EC)*, the panel⁵¹⁵⁶ stated:

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

4. Analysis by the Panel

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

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

⁵¹⁵³ Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.

⁵¹⁵⁴ Appellate Body Report, *US – Lamb*, para. 106.

⁵¹⁵⁵ Appellate Body Report, *US – Line Pipe*, para. 220.

⁵¹⁵⁶ While the Appellate Body in *Argentina – Footwear (EC)* did not specifically comment on these causation findings, it did state that it saw "no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the *Agreement on Safeguards*": Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.

⁵¹⁵⁷ Panel Report, *Argentina – Footwear (EC)*, para. 8.229.

⁵¹⁵⁸ Appellate Body Report, *US – Wheat Gluten*, para. 69.

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

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

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

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

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

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

⁵¹⁵⁹ (original footnote) *The New Shorter Oxford English Dictionary*, *supra*, footnote 43, Vol. I, pp. 355 and 356.

⁵¹⁶⁰ (original footnote) *Ibid.*, p. 1598.

⁵¹⁶¹ Appellate Body Report, *US – Wheat Gluten*, para. 67.

⁵¹⁶² Appellate Body Report, *US – Lamb*, paras. 165-170.

⁵¹⁶³ Appellate Body Report, *US – Wheat Gluten*, paras. 67-68.

causing serious injury.⁵¹⁶⁴ Rather, if a number of factors have caused serious injury, a causal link may be demonstrated if the increased imports have, in some way, contributed to "bringing about", "producing" or "inducing" the serious injury. In this regard, the Appellate Body in *US – Wheat Gluten* concluded that the contribution must be sufficiently clear as to establish the existence of "the causal link" required⁵¹⁶⁵ but rejected the panel's conclusion that the serious injury must be caused by the increased imports alone and that the increased imports had to be sufficient to cause "serious" injury.⁵¹⁶⁶

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

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

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

(b) Demonstration of a causal link

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

⁵¹⁶⁴ Appellate Body Report, *US – Wheat Gluten*, para. 70.

⁵¹⁶⁵ Appellate Body Report, *US – Wheat Gluten*, paras. 66 and 69.

⁵¹⁶⁶ Appellate Body Report, *US – Wheat Gluten*, para. 61 ff and 79.

⁵¹⁶⁷ United States' first written submission, paras. 442 and 443.

⁵¹⁶⁸ United States' first written submission, paras. 442 and 443.

⁵¹⁶⁹ Panel Report, *Korea – Dairy*, para. 7.96.

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

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

(i) *Coincidence*

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

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

10.298 The Appellate Body agreed with the panel and observed:

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

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

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

10.300 Secondly, the above indicates that the Appellate Body considers that "coincidence" between movements or trends in imports and movements or trends in the relevant injury factors plays a "central" role in determining whether or not a causal link exists. Indeed, both the panel and the Appellate Body in *Argentina – Footwear (EC)* stated that the relationship between the movements in imports and the movements in injury factors *must* be central to a causation analysis. We also note that the same panel, supported by the Appellate Body⁵¹⁷³ went on to state that "[I]n practical terms, we believe therefore that [Article 4.2(a)] means that if causation is present, an increase in imports *normally* should coincide with a decline in the relevant injury factors."⁵¹⁷⁴

10.301 The Panel is of the view that since coincidence is "central" to a causation analysis, a competent authority should "normally" undertake a coincidence analysis when determining the existence of a causal link. We believe that in situations where the effects of injurious factors other than increased imports have not been attributed to increased imports⁵¹⁷⁵, overall clear coincidence between movements in imports and movements in injury factors will provide a competent authority with an adequate basis upon which to conclude that a genuine and substantial relationship of cause and effect between increased imports and serious injury exists.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10.311 We find support for this view from the panel's decision in *Egypt – Steel Rebar*. There, the panel rejected Turkey's contention that there must be a strict temporal connection between the dumped imports and any injury being suffered by the industry⁵¹⁸⁴, noting that this argument:

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

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

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

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

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

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

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

(ii) *Conditions of competition*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"'Price' is not expressly listed in Article 4.2(a) [of the Agreement on Safeguards ('SA')] as a 'relevant factor' having a bearing on the situation of the domestic industry. However, this is not to say that 'price' may not be a relevant factor in a given case. An imported product can compete with a domestic product in various ways in the market of the importing country. Clearly, the relative price of the imported product is one of these ways, but it is certainly not the only way, and it may be irrelevant or only marginally relevant in a given case.

Therefore, in the context of safeguards measures, the relevance of 'price' will vary from case to case, in light of the particular circumstances and the nature of the particular product and domestic industry involved. Given that this is the nature of the 'price' factor under the Agreement on Safeguards, we consider that the phrase 'under such conditions' does not necessarily, in every case, require a price analysis."⁵¹⁹⁵

10.322 With respect to the argument made by the European Communities that if imports are sold at a higher price than domestic products, it is unlikely that such imports are responsible for any serious injury⁵¹⁹⁶, the Panel considers that the existence or absence of underselling by imports cannot, on its own, lead to a definitive conclusion regarding the presence or otherwise of a causal link between the increased imports and the serious injury. In our view, pricing trends must always be considered in context. It is only after this contextual consideration that conclusions can be drawn regarding the existence or otherwise of the causal link.

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

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

⁵¹⁹⁴ Panel Report, *Argentina – Footwear (EC)*, para. 8.251.

⁵¹⁹⁵ Panel Report, *US – Wheat Gluten*, paras. 8.109-8.110.

⁵¹⁹⁶ European Communities' written reply to Panel's question No. 29 at the second substantive meeting.

⁵¹⁹⁷ Panel Report, *Argentina – Footwear (EC)*, para. 8.261, footnote 557.

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

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

(iii) *Non-attribution*

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

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

10.326 The above makes it clear that in cases where factors other than increased imports have caused injury to the domestic industry, a "non-attribution" exercise must be undertaken pursuant to the second sentence of Article 4.2(b). As noted by the Appellate Body⁵¹⁹⁹, it is precisely because there may be several factors, besides increased imports, contributing simultaneously to the situation of the domestic industry that the last sentence of Article 4.2(b) states that competent authorities "shall not ... attribute" to increased imports injury caused by other factors.

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

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

⁵¹⁹⁸ Panel Report, *Argentina – Footwear (EC)*, para. 8.261, footnote 557.

⁵¹⁹⁹ Appellate Body Report, *US – Wheat Gluten*, para. 68.

caused by factors other than increased imports is not 'attributed' to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*.⁵²⁰⁰

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

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

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

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

⁵²⁰⁰ Appellate Body Report, *US – Wheat Gluten*, para. 69.

⁵²⁰¹ Appellate Body Report, *US – Lamb*, para. 178.

⁵²⁰² Appellate Body Report, *US – Lamb*, para. 179.

⁵²⁰³ Appellate Body Report, *US – Wheat Gluten*, para. 70.

⁵²⁰⁴ Appellate Body Report, *US – Lamb*, para. 179.

⁵²⁰⁵ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 222, 223, 230 and 214.

⁵²⁰⁶ (original footnote) Appellate Body Report, *US – Wheat Gluten*, , para. 70; Appellate Body Report, *US – Lamb*, para. 179. In the context of the *Anti-Dumping Agreement*, see, Appellate Body Report, *US – Hot-Rolled Steel*, para. 222.

⁵²⁰⁷ Appellate Body Report, *US – Line Pipe*, para. 215.

⁵²⁰⁸ Appellate Body Report, *US – Line Pipe*, para. 217.

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

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

10.333 With regard to arguments made by complainants regarding the consistency of the "substantial cause" test *applied* by the USITC⁵²⁰⁹ and the Agreement on Safeguards, the Panel notes that the Appellate Body in *US – Lamb* stated that:

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

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

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

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

(iv) *Quantification*

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

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

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

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

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

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

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

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

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

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

(v) *Sequence of assessment*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Measure-by-measure analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) CCFRS

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

(i) *Coincidence and conditions of competition*

USITC findings

10.361 The USITC findings read as follows:

"We find that the increased imports of certain carbon flat-rolled steel are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry.⁵²²¹ In making this finding, we have considered carefully evidence in the record relating to the enumerated statutory factors, as well as evidence relating to domestic production, capacity, capacity utilization, shipments, market share, profit and loss data, plant closings, wages and other employment-related data, productivity, capital expenditures, and research and development expenditures. Accordingly, we find that increased imports are a substantial cause of serious injury to the domestic industry producing certain carbon flat-rolled steel.

a. Conditions of Competition

We take into account a number of factors that affect the competitiveness of domestic and imported certain carbon flat-rolled steel in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, and market conditions. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestic or imported articles.

Producers generally agree that there are few or no substitutes for certain carbon flat-rolled steel.⁵²²² Certain carbon flat-rolled steel may represent a relatively high share of the cost of downstream certain carbon flat-rolled steel, but typically represents a relatively small share of the value of finished products.⁵²²³

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

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

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

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

By any measure, the period of investigation saw significant growth in US demand for certain carbon flat-rolled steel.⁵²²⁹ Apparent domestic consumption of certain carbon flat-rolled steel, including internally consumed production, climbed steadily during the period, from 203.2 million short tons in 1996 to 219.0 million short tons in 2000, an increase of 7.8 percent.⁵²³⁰ Apparent domestic consumption of certain carbon flat-rolled steel, including internally consumed production, declined 14.9 percent from interim 2000 to interim 2001.⁵²³¹ Net sales of certain carbon flat-rolled steel increased from 58.8 million short tons in 1996 to 65.2 million short tons in 2000, an increase of 10.9 percent.⁵²³² Net sales of certain carbon flat-rolled steel declined 11.7 percent between interim 2000 and interim 2001.⁵²³³ A decline in demand, however, can be seen at the end of the period examined, as apparent domestic consumption of certain carbon flat-rolled steel was 14.9 percent lower in interim 2001 than in interim 2000.

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

⁵²²⁴ (original footnote) CR at FLAT-66 and PR at FLAT-51.

⁵²²⁵ (original footnote) CR and PR at OVERVIEW-10 and Table OVERVIEW-2.

⁵²²⁶ (original footnote) CR and PR at Tables FLAT-14 and FLAT-15.

⁵²²⁷ (original footnote) CR and PR at Tables FLAT-13 and FLAT-16.

⁵²²⁸ (original footnote) CR and PR at Table OVERVIEW-2.

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

⁵²³⁰ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵²³¹ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵²³² (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵²³³ (original footnote) INV-Y-209 at Table FLAT-ALT7.

consumption of slabs in 2000 was the highest level registered in the POI.⁵²³⁴ Apparent domestic consumption of slabs declined 15.6 percent between interim 2000 and interim 2001.⁵²³⁵ Apparent domestic consumption of hot-rolled steel increased from 68.5 million short tons in 1996 to 75.1 million short tons in 2000; apparent domestic consumption of hot-rolled steel in 2000 was the highest level registered in the POI.⁵²³⁶ Apparent domestic consumption of hot-rolled steel declined 17.1 percent between interim 2000 and interim 2001.⁵²³⁷ Apparent domestic consumption of cold-rolled steel actually peaked in 1999 at 40.6 million short tons. Nonetheless, apparent domestic consumption of cold-rolled steel in 2000, at 40.0 million short tons, was 9.8 percent higher than the 1996 level of 36.4 million short tons.⁵²³⁸ Apparent domestic consumption of cold-rolled steel declined 12.3 percent between interim 2000 and interim 2001.⁵²³⁹ Similarly, apparent domestic consumption of coated steel peaked in 1999 at 22.8 million tons, but apparent domestic consumption in 2000, at 22.3 million short tons, was 16.9 percent higher than the 1996 level of 19.1 million short tons.⁵²⁴⁰ Apparent domestic consumption of coated steel was 13.0 percent lower in interim 2001 than in interim 2000.⁵²⁴¹ Only plate consumption exhibited a significantly different trend, with apparent consumption in 2000, at 7.1 million short tons, below the 1996 level of 7.8 million short tons.⁵²⁴² Apparent domestic consumption of plate was 3.6 percent lower in interim 2001 than in interim 2000.⁵²⁴³

With regard to supply of certain carbon flat-rolled steel, as discussed above, domestic capacity increased steadily from 1996 to 2000. Foreign production capacity also increased from 1996 to 2000.⁵²⁴⁴ As measured by production capacity for plate and hot-rolled steel only, foreign production capacity rose from 290.9 million short tons in 1996 to 335.2 million short tons in 2000, an increase of 15.2 percent.⁵²⁴⁵ Foreign production capacity for each of the product categories increased during the POI. Foreign production capacity for slabs rose 8.0 percent between 1996 and 2000, while production capacity for plate rose 9.5 percent.⁵²⁴⁶ Foreign production capacity for further processed flat-rolled steel rose much more significantly between 1996 and 2000, with production capacity for hot-rolled steel rising by 16.3 percent, for cold-rolled steel by 13.9 percent, and for coated steel by 29.4 percent.⁵²⁴⁷

⁵²³⁴ (original footnote) CR and PR at Table FLAT-C-2.

⁵²³⁵ (original footnote) CR and PR at Table FLAT-C-2.

⁵²³⁶ (original footnote) CR and PR at Table FLAT-C-4.

⁵²³⁷ (original footnote) CR and PR at Table FLAT-C-4.

⁵²³⁸ (original footnote) CR and PR at Table FLAT-C-5.

⁵²³⁹ (original footnote) CR and PR at Table FLAT-C-5.

⁵²⁴⁰ (original footnote) CR and PR at Table FLAT-C-7.

⁵²⁴¹ (original footnote) CR and PR at Table FLAT-C-7.

⁵²⁴² (original footnote) CR and PR at Table FLAT-C-3.

⁵²⁴³ (original footnote) CR and PR at Table FLAT-C-3.

⁵²⁴⁴ (original footnote) We note that domestic producers criticized the quality of data from our questionnaires regarding foreign capacity. Prehearing Brief of Bethlehem Steel Corporation, LTV Steel Company, Inc., National Steel Corporation and United States Steel LLC at 70 n.217 and Appendix A. We have followed our long-standing practice of relying on questionnaire data in reaching our determination, although we have considered the alternative data provided by domestic producers and other parties.

⁵²⁴⁵ (original footnote) INV-Y-215 at Table VII-ALT1.

⁵²⁴⁶ (original footnote) CR and PR at Tables FLAT-30 and FLAT-33.

⁵²⁴⁷ (original footnote) CR and PR at Tables FLAT-36, FLAT-39, and FLAT-43.

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

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

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

b. Analysis

...

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

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

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

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

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

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

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

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

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

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

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

This import surge occurred in most types of certain carbon flat-rolled steel. Imports of plate increased by 53.4 percent between 1997 and 1998; imports of hot-rolled steel increased by 76.4 percent; and imports of cold-rolled steel increased 13.0 percent, after already increasing 38.2 percent between 1996 and 1997.⁵²⁶¹ For coated steel, the surge came a year later, as imports increased by 15.8 percent between 1998 and 1999.⁵²⁶² After these primary surges, imports of hot-rolled steel increased by another 14.4 percent between 1999 and 2000, and cold-rolled steel imports by 11.2 percent between interim 2000 and interim 2001, despite a sharp decrease in demand.⁵²⁶³

The impact of the 1998 surge in imports on the domestic industry is undeniable. In 1996 and 1997, before the rapid escalation in import volume, the domestic industry performed moderately well. In 1997, with net merchant sales of 61.1 million short tons, the domestic industry had an operating income of 6.1 percent of sales and a net income of 4.5 percent.⁵²⁶⁴ In 1998, despite an increase in net sales to 61.3 million short tons and a modest decrease in unit costs, the industry's operating margin declined to 4.0 percent. In 1999, net sales increased to 63.5 million short tons and cost of goods sold were the lowest during the POI, but the industry experienced operating losses of 0.7 percent of sales. In 2000, net sales again increased to 65.2 million short tons and the total cost of goods sold increased a modest one percent, yet operating losses fell further, to 1.4 percent of sales. The industry experienced net operating losses in both 1999 and 2000.⁵²⁶⁵ The industry's operating margin continued to slide in the first half of 2001, to a loss of 11.5 percent of sales.

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

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

⁵²⁵⁷ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵²⁵⁸ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵²⁵⁹ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵²⁶⁰ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵²⁶¹ (original footnote) CR and PR at Tables FLAT-C-3-FLAT-C-5.

⁵²⁶² (original footnote) CR and PR at Table FLAT-C-7.

⁵²⁶³ (original footnote) CR and PR at Tables FLAT-C-4 and FLAT-C-5.

⁵²⁶⁴ (original footnote) INV-Y-212 at STL201FT.WK4.

⁵²⁶⁵ (original footnote) INV-Y-212 at STL201FT.WK4.

⁵²⁶⁶ (original footnote) CR and PR at Table FLAT-49; Dewey/Skadden Prehearing Brief at Exhs. 55 and 56 (we note that the data in the latter exhibits do not distinguish between domestic and imported product).

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

Import Average Unit Values⁵²⁶⁷

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

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

Average Unit Values of Commercial Shipments for Domestically Produced Steel⁵²⁶⁹

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

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

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

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

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

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

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

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

The domestic industry includes a number of producers who rely on imported certain carbon flat-rolled steel—especially slab—for use as raw materials in the production of further processed certain carbon flat-rolled steel. Some of these producers may have benefitted from the decline in import prices during the POI.⁵²⁷³ Despite these possible isolated individual benefits⁵²⁷⁴, the record indicates that the domestic industry as a whole suffered serious injury from increased imports.

Respondents have argued that, since imports generally peaked in 1998, any injury resulting from increased imports has long since passed, or been repaired by the imposition of subsequent Title VII duties. Between the surge in 1998 and the last full-year of the POI, 2000, domestic producers filed Title VII complaints on carbon steel plate, hot-rolled steel, and cold-rolled steel.⁵²⁷⁵ Additionally, outstanding orders on coated steel were reviewed and retained during this same time period.⁵²⁷⁶ Existing orders on cold-rolled steel were revoked only late in 2000.⁵²⁷⁷ We find it reasonable to conclude that the filing of these Title VII actions to some extent staunched the flow of imports after 1998; indeed, respondents admit that the filing of a Title VII action temporarily repressed cold-rolled imports.⁵²⁷⁸ We note, however, that import levels remained high through 1999 and 2000, and that the corrosive effects of low-priced

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

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

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

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

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

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

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

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

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

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

Claims and arguments of the parties

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

Analysis by the Panel

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

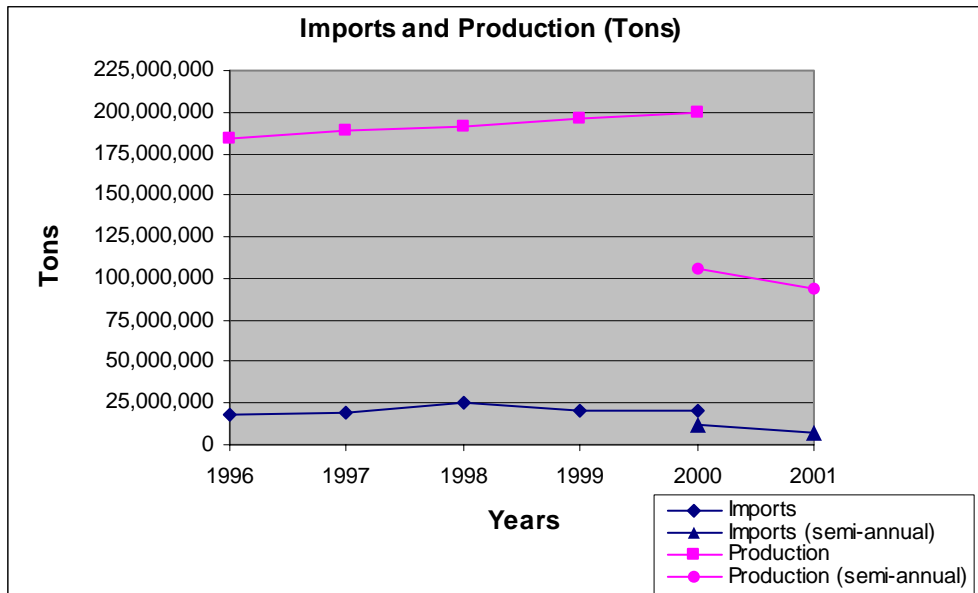
10.364 The Panel recalls that, when examined by a competent authority, coincidence must be demonstrated between the movements in imports and the movements in injury factors. The injury factors are listed in Article 4.2(a) of the Agreement on Safeguards. Specifically, they are: the rate and amount of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

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

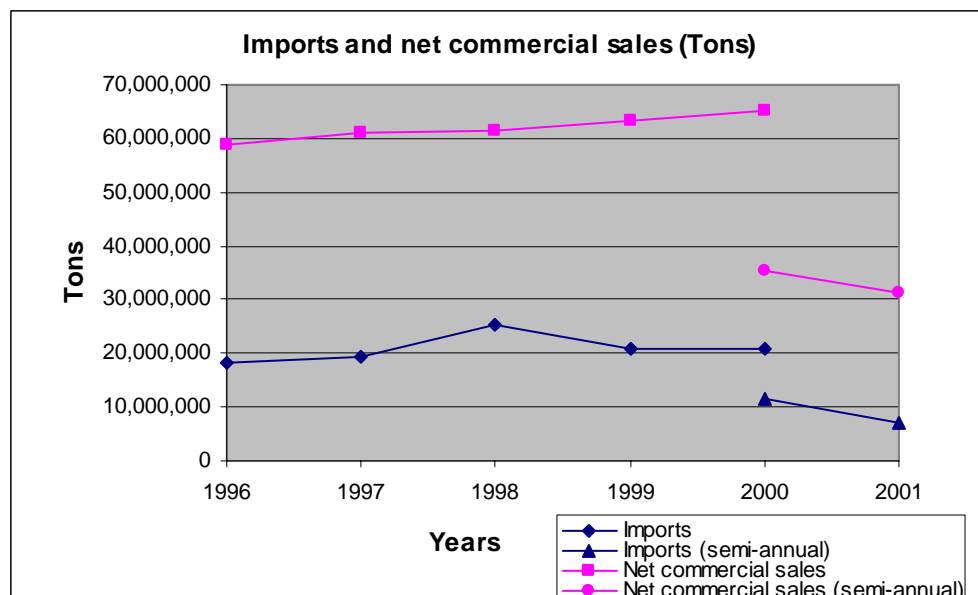
10.366 The Panel has first considered the relationship between imports and production. In the Panel's view, there does not appear to be any coincidence between import trends and production trends. In fact, production seems to have increased (albeit gradually) throughout most of the period of

⁵²⁷⁹ USITC Report, Vol. I, pp. 55-63.

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



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

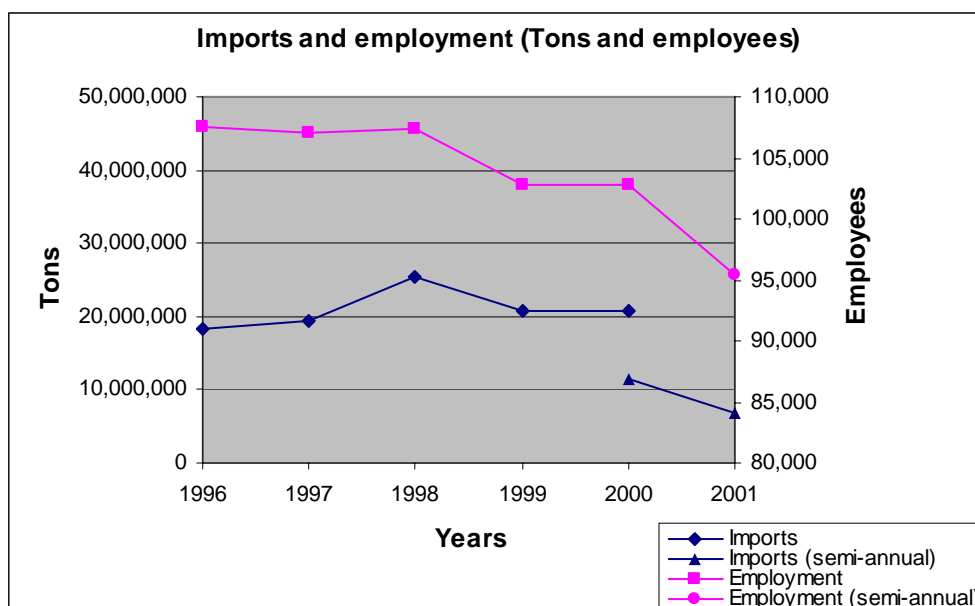


⁵²⁸⁰ The data represented in the graph below are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7.

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

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

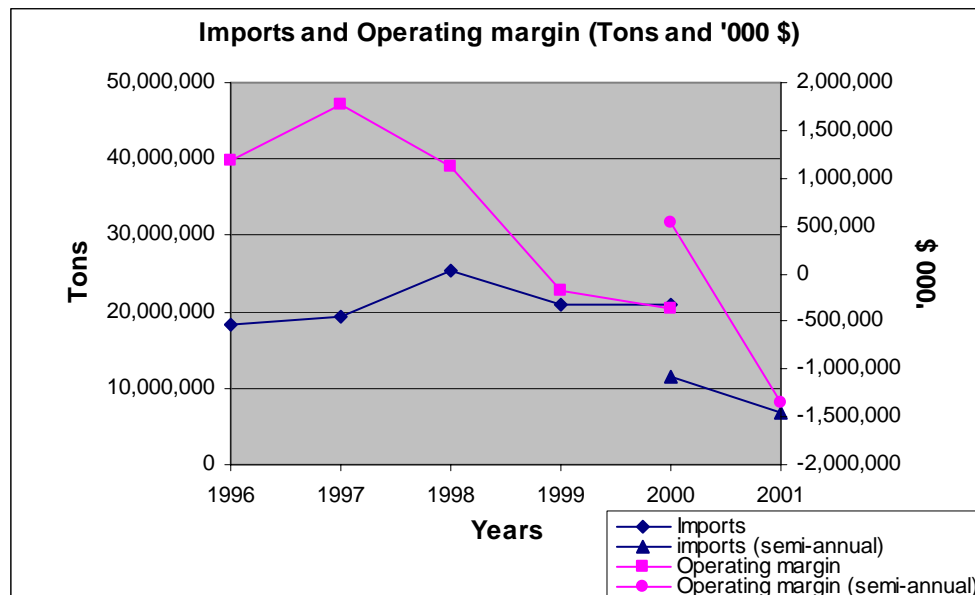
10.369 In our view, it is not inconceivable that a lag could be expected with respect to employment. We tend to agree with the argument made by the United States that companies may, in the face of adverse market conditions, defer taking employment decisions in the hope that the market situation will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



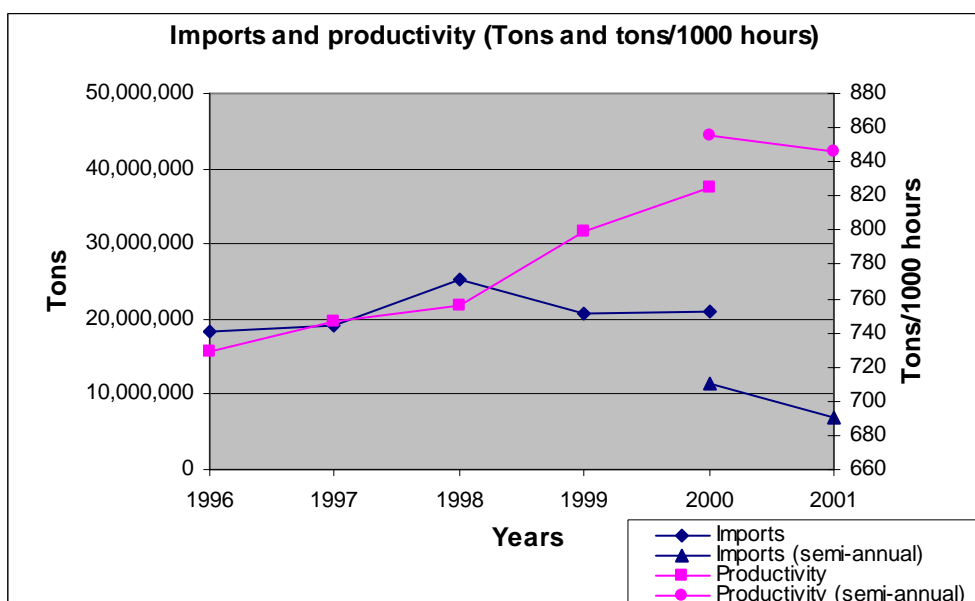
10.370 With respect to operating margin, which was apparently used by the USITC as a proxy for profit and losses and is, consequently, used for the same purpose here by the Panel, there appears to be some coincidence between a rise in imports from 1997 until 1998 and a sharp decline in the level of operating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

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

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



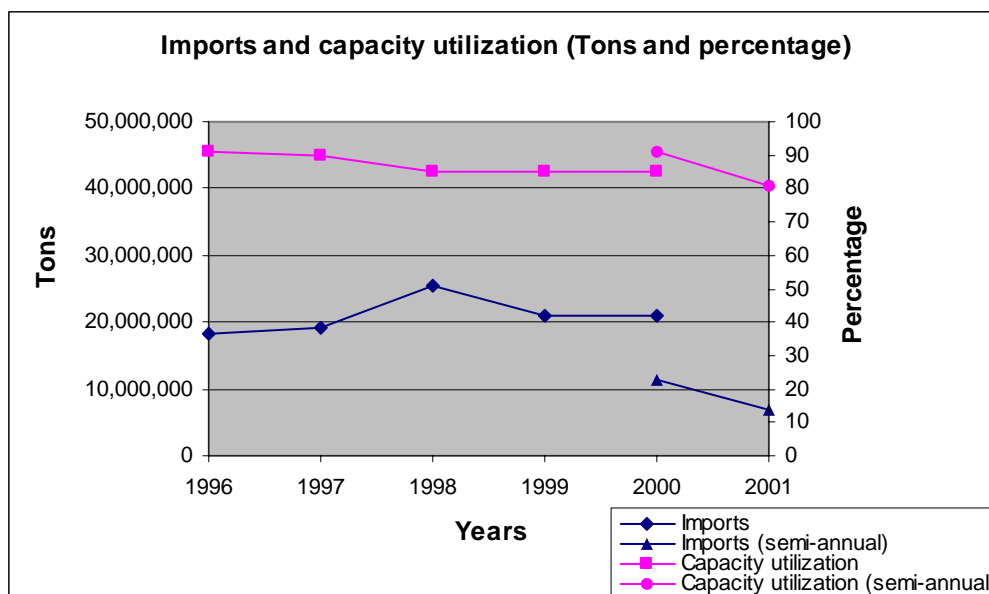
10.371 There does not appear to be coincidence between the import trends and trends in productivity. Indeed, even following the alleged surge in imports in 1998, productivity levels increased from 1998 onwards. Further, at the very end of the period of investigation, productivity decreased even though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



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

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

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



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

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

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

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

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

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

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

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

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

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

⁵²⁸⁶ USITC Report Vol I, p. 51, note 193.

⁵²⁸⁷ Panel Report, *Argentina – Footwear (EC)*, para. 8. 261, footnote 557.

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

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

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

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

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

"In such a market, the increased volume of imports, at prices that undercut and depressed and suppressed domestic prices, had an injurious impact on the domestic industry, particularly when the domestic industry aggressively cut prices to meet the continued influx of import volumes.

...

However, the surge in imports in 1998, at prices below domestic prices, led to a decline in the industry's financial and other indicators."

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

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

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

(ii) *Non-attribution*

USITC findings

10.382 The USITC's findings read as follows:

"Respondents have suggested several alternate sources of injury to the domestic industry, including declining domestic demand, intra-industry competition, domestic capacity increases, buyer consolidation, excess leverage of domestic producers, and legacy costs. We consider each of these in turn.

Respondents argue that the domestic industry has been injured by declining US demand. But all evidence suggests that the decline occurred very late in the POI, as late as the fourth quarter of 2000. Demand for certain carbon flat-rolled steel was lower in the first six months of 2001 than in the first six months of 2000.⁵²⁹⁰ Apparent domestic demand in 2000 was higher than in 1996 for slabs, hot-rolled, cold-rolled, and coated steel, and apparent domestic demand for all certain carbon flat-rolled steel was higher in 2000 than in 1999.⁵²⁹¹ The domestic industry showed the signs of injury described above well before the latter portion of 2000, when demand began to drop off. The domestic industry first saw its operating income decline in 1998, at a time when demand was increasing and would continue to increase for another two years.⁵²⁹² The period of increasing demand was also when imports surged. We thus find that the domestic industry was already injured by increased imports when demand began to decline, and declining demand, while not the cause of the injury found here, contributed to the industry's continued deterioration at the end of the period. Indeed, the losses experienced by the industry in 1999 and 2000 as a result of imports left the industry in a much weakened position to face the slowdown in demand.

Respondents argue that the domestic industry has been injured by increases in domestic capacity well in excess of the increase in domestic demand. As noted above, domestic capacity for certain carbon flat-rolled steel in total and each certain carbon flat-rolled steel category increased between 1996 and 2000. These capacity increases occurred at a time when domestic demand rose consistently. Thus, increases in domestic capacity in general were justified in light of market conditions.

It is true, as alleged by respondents, that capacity increases did exceed the increases in domestic consumption. From 1996 to 2000, apparent consumption of certain carbon flat-rolled steel increased by 7.8 percent for both internal transfers and commercial shipments, and increased by 10.9 percent for commercial shipments

⁵²⁹⁰ (original footnote) INV-Y-209 at Table FLAT-ALT7.

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

⁵²⁹² (original footnote) INV-Y-209 at Table FLAT-ALT7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Factors considered by the USITC

Declining domestic demand

Claims and arguments of the parties

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

Analysis by the Panel

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

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

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

⁵³⁰⁴ (original footnote) CR and PR at OVERVIEW-53-54.

⁵³⁰⁵ USITC Report, Vol. I, pp. 63-65.

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

carbon flat-rolled steel, including internally consumed production, climbed steadily during the period, from 203.2 million short tons in 1996 to 219.0 million short tons in 2000, an increase of 7.8 percent.⁵³⁰⁷ Apparent domestic consumption of certain carbon flat-rolled steel, including internally consumed production, declined 14.9 percent from interim 2000 to interim 2001.⁵³⁰⁸ Net sales of certain carbon flat-rolled steel increased from 58.8 million short tons in 1996 to 65.2 million short tons in 2000, an increase of 10.9 percent.⁵³⁰⁹ Net sales of certain carbon flat-rolled steel declined 11.7 percent between interim 2000 and interim 2001.⁵³¹⁰ A decline in demand, however, can be seen at the end of the period examined, as apparent domestic consumption of certain carbon flat-rolled steel was 14.9 percent lower in interim 2001 than in interim 2000.

Similar, though not identical, increases occurred in the consumption of each type of flat-rolled steel. Apparent domestic consumption of slabs rose from 71.4 million short tons in 1996 to 74.4 million short tons in 2000; apparent domestic consumption of slabs in 2000 was the highest level registered in the POI.⁵³¹¹ Apparent domestic consumption of slabs declined 15.6 percent between interim 2000 and interim 2001.⁵³¹² Apparent domestic consumption of hot-rolled steel increased from 68.5 million short tons in 1996 to 75.1 million short tons in 2000; apparent domestic consumption of hot-rolled steel in 2000 was the highest level registered in the POI.⁵³¹³ Apparent domestic consumption of hot-rolled steel declined 17.1 percent between interim 2000 and interim 2001.⁵³¹⁴ Apparent domestic consumption of cold-rolled steel actually peaked in 1999 at 40.6 million short tons. Nonetheless, apparent domestic consumption of cold-rolled steel in 2000, at 40.0 million short tons, was 9.8 percent higher than the 1996 level of 36.4 million short tons.⁵³¹⁵ Apparent domestic consumption of cold-rolled steel declined 12.3 percent between interim 2000 and interim 2001.⁵³¹⁶ Similarly, apparent domestic consumption of coated steel peaked in 1999 at 22.8 million tons, but apparent domestic consumption in 2000, at 22.3 million short tons, was 16.9 percent higher than the 1996 level of 19.1 million short tons.⁵³¹⁷ Apparent domestic consumption of coated steel was 13.0 percent lower in interim 2001 than in interim 2000.⁵³¹⁸ Only plate consumption exhibited a significantly different trend, with apparent consumption in 2000, at 7.1 million short tons, below

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

⁵³⁰⁷ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵³⁰⁸ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵³⁰⁹ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵³¹⁰ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵³¹¹ (original footnote) CR and PR at Table FLAT-C-2.

⁵³¹² (original footnote) CR and PR at Table FLAT-C-2.

⁵³¹³ (original footnote) CR and PR at Table FLAT-C-4.

⁵³¹⁴ (original footnote) CR and PR at Table FLAT-C-4.

⁵³¹⁵ (original footnote) CR and PR at Table FLAT-C-5.

⁵³¹⁶ (original footnote) CR and PR at Table FLAT-C-5.

⁵³¹⁷ (original footnote) CR and PR at Table FLAT-C-7.

⁵³¹⁸ (original footnote) CR and PR at Table FLAT-C-7.

the 1996 level of 7.8 million short tons.⁵³¹⁹ Apparent domestic consumption of plate was 3.6 percent lower in interim 2001 than in interim 2000.⁵³²⁰,⁵³²¹

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

"But all evidence suggests that the decline occurred very late in the POI, as late as the fourth quarter of 2000. Demand for certain carbon flat-rolled steel was lower in the first six months of 2001 than in the first six months of 2000.⁵³²² Apparent domestic demand in 2000 was higher than in 1996 for slabs, hot-rolled, cold-rolled, and coated steel, and apparent domestic demand for all certain carbon flat-rolled steel was higher in 2000 than in 1999.⁵³²³ The domestic industry showed the signs of injury described above well before the latter portion of 2000, when demand began to drop off. The domestic industry first saw its operating income decline in 1998, at a time when demand was increasing and would continue to increase for another two years.⁵³²⁴,⁵³²⁵

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

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

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

Domestic capacity increases

Claims and arguments of the parties

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

⁵³¹⁹ (original footnote) CR and PR at Table FLAT-C-3.

⁵³²⁰ (original footnote) CR and PR at Table FLAT-C-3.

⁵³²¹ USITC Report, Vol. I, pp. 56-57.

⁵³²² (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵³²³ (original footnote) INV-Y-209 at Table FLAT-ALT7 and CR and PR at Tables FLAT-C-2, FLAT-C4-FLAT-C-5, and FLAT-C-7.

⁵³²⁴ (original footnote) INV-Y-209 at Table FLAT-ALT7.

⁵³²⁵ USITC Report, Vol. I, p. 63.

Analysis by the Panel

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

"Because domestic production did not increase by an amount as great as the increase in capacity but did increase commensurate with increased consumption, the increase in capacity appears to explain, in significant part, the decline in the rate of domestic capacity utilization that occurred over the period examined.

...

Therefore, we find that increased production capacity, while likely playing a role in the price declines that helped cause injury, was not an important cause of serious injury to the domestic industry equal to or greater than the injury caused by increased imports."⁵³²⁶

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

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

"We recognize that the industry's production and capacity both increased from 1996 to 2000 ... The sum of all productive capacity for slab, plate, hot-rolled, cold-rolled, and coated steel increased by 15.9 percent between 1996 and 2000.⁵³²⁷ The sum of all productive capacity for slab, plate, hot-rolled, cold-rolled, and coated steel fell by 0.8 percent between interim 2000 and interim 2001.^{5328, 5329}

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

⁵³²⁶ USITC Report, Vol. I, pp. 63-67.

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

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

⁵³²⁹ USITC Report, Vol. I, p. 52.

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

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

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

Intra-industry competition

Claims and arguments of the parties

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

Analysis by the Panel

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

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

⁵³³⁰ See para. 10.382.

⁵³³¹ See para. 10.382.

⁵³³² See para. 10.382.

⁵³³³ See para. 10.382.

10.400 In addition, the USITC appears to have dismissed this factor in its non-attribution analysis merely on the basis that "the cost advantage enjoyed by minimills existed throughout the period of investigation." In the Panel's view, the fact that a factor existed throughout the period of investigation does not necessarily mean that it cannot play a role in causing serious injury. Moreover, changing circumstances in a market may result in a number of factors, that previously seemed harmless, playing a significant role in causing serious injury.

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

Legacy costs

Claims and arguments of the parties

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

Analysis by the Panel

10.403 It seems to the Panel from the USITC's Report that the USITC considered that legacy costs played a role in causing the injury that was being suffered by the domestic industry. To us, this is apparent from the following comment made by the USITC: "The funding of legacy costs is a vexing problem for the domestic industry, and evidence on the record indicates that legacy costs have prevented needed consolidation within the domestic industry from taking place".⁵³³⁴ We note in this regard that this statement is made in the present tense, indicating that legacy costs are currently a vexing problem and not only a problem of the past.

10.404 The Panel notes that the USITC did consider the effect on the market of legacy costs. Specifically, in pages OVERVIEW 31 – OVERVIEW 35, the USITC describes pensions and other post-employment benefits for steel company retirees. In Table OVERVIEW-9, the USITC sets out post-employment benefit data of selected steelmakers for the fiscal years 1996 – 2000.

10.405 However, even though it effectively acknowledged the role played by legacy costs in causing injury, the USITC appeared to dismiss this factor in its non-attribution analysis merely on the basis that this factor existed prior to the period of investigation. In particular, the USITC stated that "the issue of 'legacy costs' is not a new one to this industry".⁵³³⁵ In the Panel's view, that a factor pre-dated the period of investigation does not necessarily mean that it cannot play a role in causing serious injury during the period of investigation itself. Nor does the Panel consider that a reduction in the level of legacy costs during the period of investigation will necessarily mean that such costs could not and did not cause injury to the relevant domestic producers.

10.406 The Panel also notes that the USITC stated in its Report that "[t]he difficulties in meeting these [legacy cost] obligations were recognized before the POI, and the domestic industry was able to earn a reasonable rate of return in 1996 and 1997 despite these costs. Respondents have offered no reason why the industry's longstanding problem would cause no injury in 1996 or 1997 but then begin to depress prices and strangle revenue in 1998-2000. Legacy costs may have left certain members of the domestic industry less able to compete with low-priced imports, but are not responsible for the

⁵³³⁴ See para. 10.382.

⁵³³⁵ See para. 10.382.

low prices that have injured the industry."⁵³³⁶ In our view, the foregoing amounts to an acknowledgement that legacy costs compromised the competitive position of certain domestic producers. However, this effect was dismissed on the basis of the rather cursory and unsubstantiated assertion that "legacy costs are not responsible for the low prices that have injured the industry." The Panel considers that given the apparent significance of legacy costs to the situation of the domestic industry, it was incumbent upon the USITC to further examine this issue.

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

Conclusions

10.408 The Panel considers that, with respect to CCFRS, the USITC failed to comply with its non-attribution obligation contained in the second sentence of Article 4.2(b). In particular, we consider that the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of factors other than increased imports that were causing injury to the relevant domestic industry. This, to us, is clear from the fact that the USITC dismissed a number of factors (namely, declining domestic demand, domestic capacity increases, intra-industry competition and legacy costs) in its non-attribution analysis even though it acknowledged that those factors were causing injury to the industry.

10.409 The Panel also recalls that the USITC disregarded the effect of increases in domestic capacity, intra-industry competition and legacy costs because "they were not a cause of serious injury that was equal to or greater than the injury caused by increased imports".⁵³³⁷ The Panel considers that such an approach is problematic if the cumulative effects of individual factors are not analysed or assessed in cases where, individually, each of them are acknowledged to have caused some injury to the relevant domestic industry. In the case of CCFRS, by discarding factors that individually caused injury to the industry, we consider that the USITC failed to distinguish and assess the nature and extent of the effects of these other factors taken together, as distinct from those injurious effects caused by increased imports.

10.410 Therefore, the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by other factors, such as declines in demand, domestic capacity increases, intra-industry competition and legacy costs, together with other factors, was not attributed to increased imports of CCFRS.

(iii) Relevance of the product definition for CCFRS

10.411 The Panel would like to address some of the arguments made by the parties regarding the product definition for CCFRS, particularly relating to the USITC's causation analysis.

Claims and arguments of the parties

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

⁵³³⁶ USITC Report, Vol. I, p.64.

⁵³³⁷ See para. 10.382.

Analysis by the Panel

10.413 The Panel notes that we are not, in this section, evaluating arguments made by complainants that the USITC's grouping of the items of CCFRS is inconsistent with Article 2.1 because it violates the obligation to identify a specific imported product. Nor is the Panel dealing here with the argument that the USITC acted inconsistently with Articles 2.1 and 4.1(c) of the Agreement on Safeguards in its definition of the domestic industry that produces products that are like CCFRS. The Panel will confine its attention in this section to arguments made that the product defined as CCFRS was such that it *could not be subjected to the application of the causation requirements contained in Article 4.2(b)*.

10.414 The Panel recalls the text of Article 4.2(b) of the Agreement on Safeguards as the starting-point for its analysis in this respect:

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

10.415 We note that, according to Article 4.2(b), the causal link must exist "between increased imports of the product concerned and serious injury or threat thereof". Serious injury is defined in Article 4.1(a) as "a significant overall impairment in the position of a domestic industry." "Domestic industry" is defined, in turn, in Article 4.1(c) as "the producers as a whole of the like or directly competitive products operating within the territory of a Member or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products."

10.416 Reading these provisions together, it is clear that, under Article 4.2(b), a causal link must be established between, on the one hand, increased imports of the product concerned and, on the other hand, serious injury or threat thereof suffered by producers of the like or directly competitive products. In our view, the imported product and the like or directly competitive products must be defined in such a way that the causal link analysis required by Article 4.2(b) can be undertaken. More particularly, they must be defined in such a way that, for example, a coincidence or a conditions of competition analysis may be undertaken. They must also be defined in such a way that it can be established that injury suffered by producers of the like or directly competitive products caused by factors other than increased imports is not attributed to the increased imports. In our view, if the imported products or the like or directly competitive products are defined in such a way that prevents the proper application of the causation requirements contained in Article 4.2(b), the causation determination will necessarily be inconsistent with the prescriptions of Article 4.2(b).

10.417 In our view, CCFRS was defined in such a way that prevented the proper application of the causation requirements contained in Article 4.2(b). We consider that the USITC itself effectively admitted that CCFRS could not be subjected to the application of the causation requirements given the fact that, on a number of occasions, it relied upon data for the items that constituted CCFRS rather than for CCFRS as a whole without explaining why and how such specific data on such items related to the determination concerning CCFRS as a whole. In addition, the USITC itself admitted that the reliance on combined data for "the five types of certain carbon flat-rolled steel ... may involve

double-counting."⁵³³⁸ Finally, as noted above, we do not consider that the grouping of the various products that constituted CCFRS renders it amenable to conditions of competition analysis because it becomes difficult, if not impossible, for the competent authority to identify the proper locus of competition while undertaking a conditions of competition analysis for the purposes of establishing a causal link for CCFRS.

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

10.418 As indicated above, the Panel found that the USITC did not provide a reasoned and adequate explanation of how the facts supported its finding that coincidence existed in this case. Nor did the USITC provide a compelling explanation that demonstrated the existence of a causal link between increased imports and serious injury suffered by domestic producers of CCFRS in the absence of coincidence. Further, the USITC's non-attribution analysis failed to separate, distinguish and assess the nature and extent of the injurious effects of declines in demand, domestic capacity increases, intra-industry competition and legacy costs so that the injury caused by these factors, together with other factors, was not attributed to increased imports. Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

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

(b) *Tin mill products*

10.420 As we did in relation to our findings on increased imports for tin mill products (paragraphs 10.191-10.200 above), the Panel needs to address the issue of the divergent findings made by individual USITC Commissioners: four of the six Commissioners made findings on tin mill as a separate product⁵³³⁹, but the two other Commissioners (Bragg and Devaney) treated tin mill products as part of the larger CCFRS category.⁵³⁴⁰ The four who examined tin mill as a separate product made a common affirmative finding on increased imports and on serious injury, but later diverged on the question of causation, for which only Commissioner Miller made an affirmative determination.⁵³⁴¹ Ultimately, therefore, only Commissioner Miller reached positive findings regarding tin mill as a separate product. The two Commissioners who treated tin mill as part of the CCFRS category, reached a positive conclusion on that larger category. Despite the divergent product definitions, the USITC Report concluded that three Commissioners made "an affirmative determination regarding imports of carbon and alloy tin mill products."⁵³⁴²

10.421 In the March Proclamation, the President did not select any of the various affirmative determinations on tin mill as the basis of the decision to impose the safeguard measure on tin mill. Rather, pursuant to domestic law, the President "decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to [tin mill products and stainless steel wire] to be the determination of the [US]ITC".⁵³⁴³ It, therefore, is apparent that the President based his determination on the findings of all three Commissioners (Bragg, Devaney and Miller), although

⁵³³⁸ USITC Report, Vol. I, p. 51, note 193.

⁵³³⁹ USITC Report, Vol. I, pp. 71 et seq.

⁵³⁴⁰ USITC Report, Vol. I, p. 71, footnote 368 and p. 279.

⁵³⁴¹ USITC Report, Vol. I, pp. 307-309.

⁵³⁴² USITC Report, Vol. I, p. 25.

⁵³⁴³ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.

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

10.422 In this regard, the Panel refers to its discussion in the context of its review of the USITC's increased import determination in paragraphs 10.191-10.200 above. In sum, the Panel finds that a Member is not permitted to base its safeguard measures on an explanation that consists of alternative explanations which, given the different products upon which such explanations are based, cannot be reconciled as a matter of substance. Therefore, it is our view that the USITC Report does not contain a reasoned and adequate explanation of how the facts support the determination that increased imports of tin mill products *caused* serious injury to the relevant domestic industry, as required by Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards.

(c) Hot-rolled bar

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

(i) *Coincidence and conditions of competition*

USITC findings

10.424 The USITC's findings read as follows:

"We find that the increased imports of hot-rolled bar are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of hot-rolled bar are a substantial cause of serious injury to the domestic hot-rolled bar industry.

a. Conditions of Competition

We have taken into account a number of factors that affect the competitiveness of domestic and imported hot-rolled bar in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, and market conditions. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestically-produced or imported articles.

Market participants generally agree that there are few or no substitutes for long products such as hot-rolled bar.⁵³⁴⁴ As discussed in section V.A.1. above, hot-rolled bar is used in construction, automotive equipment, and industrial applications. Hot-rolled bar encompasses a wide range of products including merchant bar, special bar quality steel bars, and light shapes.⁵³⁴⁵

⁵³⁴⁴ (original footnote) CR and PR at LONG- 78.

⁵³⁴⁵ (original footnote) See CR and PR at LONG-1.

The record indicates strong demand during the period examined, with apparent US consumption of hot-rolled bar increasing during every full-year but one of the period. Apparent consumption rose during the first three years of the period, increasing from 10.0 million tons in 1996 to 11.7 million tons in 1998. It then declined to 11.0 million tons in 1999 but increased to 11.2 million tons in 2000. Apparent consumption was lower in interim 2001, at 4.9 million tons, than in interim 2000, when it was 6.0 million tons.⁵³⁴⁶

With regard to supply of hot-rolled bar, US capacity reported in questionnaires increased slightly from 1996 to 2000, but overall industry capacity declined during the period examined. The domestic industry's capacity utilization fluctuated over the period examined. Capacity utilization for full-year periods ranged between 67.2 percent in 1996 to 74.3 percent in 1998. Foreign capacity reported in questionnaires increased from 26.7 million tons in 1996 to 29.8 million tons in 2000, and was higher in interim 2001 than in interim 2000. Foreign capacity utilization for full-year periods ranged from 74.3 percent in 1999 to 79.4 percent in 2000.⁵³⁴⁷

Price is a moderately important factor in purchasing decisions for hot-rolled bar. Price was listed as the top factor in purchasing decisions by 27.8 percent of hot-rolled purchasers in their questionnaire responses. While more purchasers listed quality than price as their top factor in purchasing decisions, they generally deemed domestically-produced hot bar and imports to be comparable with respect to the particular quality considerations most important in their purchasing decisions.⁵³⁴⁸

b. Analysis⁵³⁴⁹

Through price-based competition, the increased imports caused domestic hot-rolled bar producers to lose market share at the same time prices were falling. The resulting loss in revenues led to the poor operating results and plant closures discussed above.

The timing of domestic producers' price declines do not correspond precisely to the timing of the import surges. The record, however, indicates that imports had a negative effect on prices and that the domestic industry used different strategies over the course of the period examined to compete with the imports. The largest increase in hot-rolled bar imports occurred in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries. Import volumes increased by 29.5 percent from 1997 to 1998.⁵³⁵⁰ During 1998, the imports consistently undersold the domestically-produced product. Underselling margins for

⁵³⁴⁶ (original footnote) CR and PR, Table LONG-70.

⁵³⁴⁷ (original footnote) CR and PR, Table LONG-42. We have relied upon the questionnaires for foreign capacity and capacity utilization data, although such data are not complete. We acknowledge that the domestic producers contended that the questionnaire data understated foreign capacity and overstated foreign capacity utilization.

⁵³⁴⁸ (original footnote) INV-Y-212 at 45.

⁵³⁴⁹ (original footnote) The Minimill 201 Coalition produced an economic model that attempted to measure the relationship between imports and the domestic industry's prices and profits. We considered this model in making our determination but note its limitations. In particular, there were defects in the manner the model measured import competition, and the model did not adequately address changes in domestic competition.

⁵³⁵⁰ (original footnote) CR and PR, Table LONG-5.

the hot-rolled bar product on which the Commission collected pricing data, which hovered around 5.0 percent during the first three quarters of 1998, increased to 7.0 percent in the fourth quarter.⁵³⁵¹

Domestic producers generally maintained their prices in 1998, but at the cost of market share. The average unit values of US shipments increased by a very slight 0.3 percent from 1997 to 1998.⁵³⁵² Prices for the domestically-produced hot-rolled bar product on which the Commission collected data remained generally stable during the first three quarters of 1998. Indeed, prices for the domestically-produced product during these three quarters exceeded prices during any other portion of the period examined. Prices for the domestically-produced product did fall slightly – by 3 percent – between the third and fourth quarters of 1998.⁵³⁵³

As a result of maintaining prices, the domestic industry maintained its operating margins, which declined by only three-tenths of a percentage point from 1997 to 1998. However, total operating income declined by 9.3 percent during this period.⁵³⁵⁴ The industry also lost 4.1 percentage points of market share to the imports. This was the largest drop in domestic producers' market share over the period examined.⁵³⁵⁵

In 1999 the domestic industry responded to the import competition by reducing prices in an attempt to maintain market share. Import volumes remained high, with import market share rising slightly from 20.1 percent in 1998 to 20.4 percent in 1999.⁵³⁵⁶ Moreover, inventories held by US importers had increased sharply in 1998.⁵³⁵⁷ Thus, imports continued to be a significant competitive factor in 1999 although the quantity of imports that year was below the level of 1998. Prices for the domestically-produced hot-rolled bar product on which the Commission collected data declined by 7.8 percent from the fourth quarter of 1998 to the first quarter of 1999, and fluctuated within a narrow range during the remaining three quarters of 1999. During this period, the domestic producers' prices were below those of the imports.⁵³⁵⁸ Domestic producers' average unit values showed comparable declines.⁵³⁵⁹ As a result, in 1999 domestic producers held their loss of market share to three-tenths of a percentage point.⁵³⁶⁰ Nevertheless, because declines in the domestic industry's average unit sales values exceeded declines in the average unit costs of goods sold, its operating margin fell.⁵³⁶¹

In 2000, the domestic industry initially increased prices. Prices for the domestically-produced hot-rolled bar product for which the Commission collected data rose during the first quarter of 2000, although pricing levels remained below those of 1998. In the first half of the year, however, underselling by the imports

⁵³⁵¹ (original footnote) INV-Y-212, Table LONG-ALT-90.

⁵³⁵² (original footnote) CR and PR, Table LONG-16.

⁵³⁵³ (original footnote) INV-Y-212, Table LONG-ALT-90.

⁵³⁵⁴ (original footnote) CR and PR, Table LONG-27.

⁵³⁵⁵ (original footnote) CR and PR, Table LONG-70.

⁵³⁵⁶ (original footnote) CR and PR, Table LONG-70.

⁵³⁵⁷ (original footnote) CR and PR, Table LONG-C-3.

⁵³⁵⁸ (original footnote) INV-Y-212, Table LONG-ALT-90.

⁵³⁵⁹ (original footnote) CR and PR, Table LONG-27.

⁵³⁶⁰ (original footnote) CR and PR, Table LONG-70.

⁵³⁶¹ (original footnote) CR and PR, Table LONG-27.

resumed.⁵³⁶² The imports consequently gained 1.7 percentage points of market share from the conclusion of 1999 to June 2000. In response, the domestic producers again cut prices during the second half of 2000. Prices declined by 6.1 percent between the second and third quarters of 2000, and by another 2.3 percent between the third and fourth quarters.⁵³⁶³

These price declines mitigated, but did not eliminate, further erosion in the domestic industry's market share.⁵³⁶⁴ Indeed, the domestic industry sold less tonnage in 2000 than in 1999, although total US consumption was greater in 2000.⁵³⁶⁵ Also, price declines during the second half of the year negated the price increases during the first half of the year – average unit sales values were unchanged in 2000 from 1999.⁵³⁶⁶ The combination of lost market share, lower sales volumes, and lower prices during 2000 -- all of which were linked to the increased imports -- led to the industry's poor operating performance and closure of productive facilities. We consequently conclude that the increased imports were an important cause of the serious injury sustained by the domestic hot-rolled bar industry."⁵³⁶⁷

Claims and arguments of the parties

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

Analysis by the Panel

10.426 The Panel has examined the relevant section of the USITC Report for hot-rolled bar and notes that, in determining causal link, the USITC did not conduct a coincidence analysis. As mentioned previously, the Panel considers that if a competent authority has not examined coincidence of trends, it must, in proving causation, provide a reasoned and adequate explanation as to why such an analysis was not undertaken as well as a compelling explanation establishing the existence of a causal link. We note that for hot-rolled bar, the USITC analysed the conditions of competition in the hot-rolled bar market. Accordingly, we will now proceed to review the conditions of competition analysis undertaken by the USITC for this measure, with a view to determining whether the USITC provided such a compelling explanation.

10.427 As a starting point, we note that the essential premise for the USITC's determination of a causal link between increased imports and serious injury was the existence of price-based competition between imported and domestic products. The USITC conceded that: "The timing of domestic producers' price declines do not correspond precisely to the timing of the import surges". However, it went on to state that: "The record, however, indicates that imports had a negative effect on prices and that the domestic industry used different strategies over the course of the period examined to compete with the imports". Further, the USITC concluded that: "The combination of lost market share, lower sales volumes, and lower prices during 2000 – all of which were linked to the increased imports – led to the industry's poor operating performance and closure of productive facilities. We consequently

⁵³⁶² (original footnote) INV-Y-212, Table LONG-ALT-90.

⁵³⁶³ (original footnote) INV-Y-212, Table LONG-ALT-90. Price declines continued through the first two quarters of 2001. Ibid.

⁵³⁶⁴ (original footnote) The domestic industry's market share was 77.0 percent in the second half of 2000, as opposed to 77.9 in the first half of the year. CR and PR, Table LONG-70.

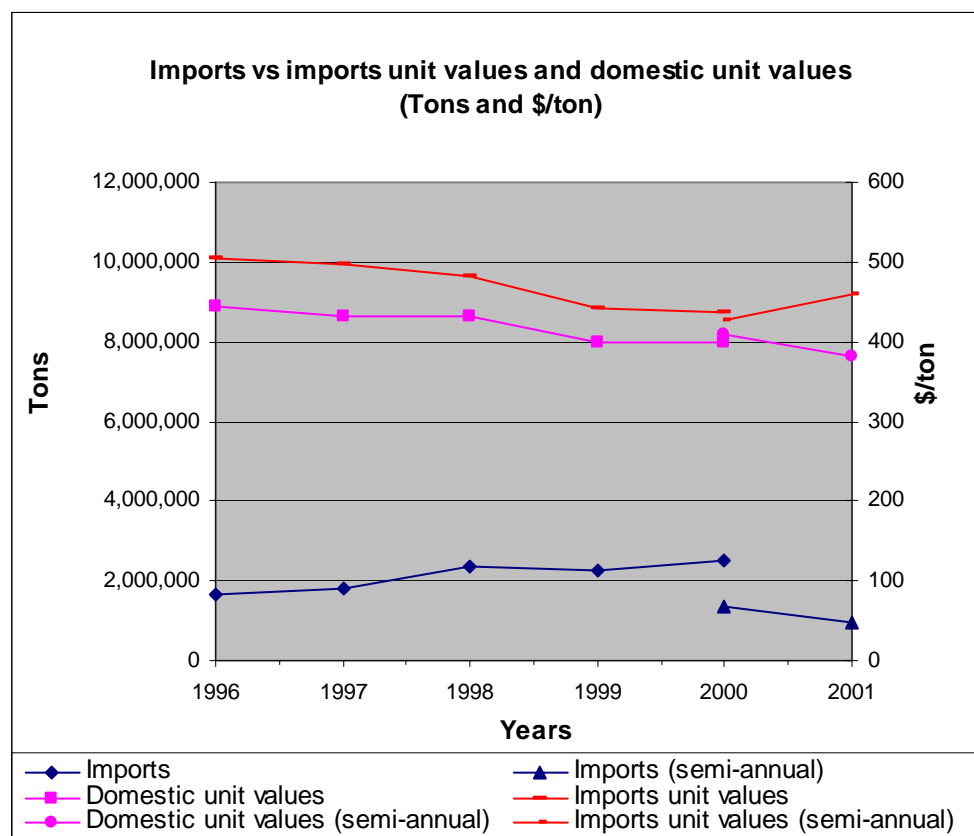
⁵³⁶⁵ (original footnote) CR and PR, Table LONG-C-3.

⁵³⁶⁶ (original footnote) CR and PR, Table LONG-27.

⁵³⁶⁷ USITC Report, Vol. I, pp. 95-97.

conclude that the increased imports were an important cause of the serious injury sustained by the domestic hot-rolled bar industry".⁵³⁶⁸

10.428 Set out below is a graphical representation of import and domestic pricing trends during the period of investigation. This graph has been generated using USITC data. We note that at every point of the period of investigation, import prices exceeded domestic prices. This is not inconsistent with the overall observations made by the USITC regarding the relative prices for import and domestic products.⁵³⁶⁹

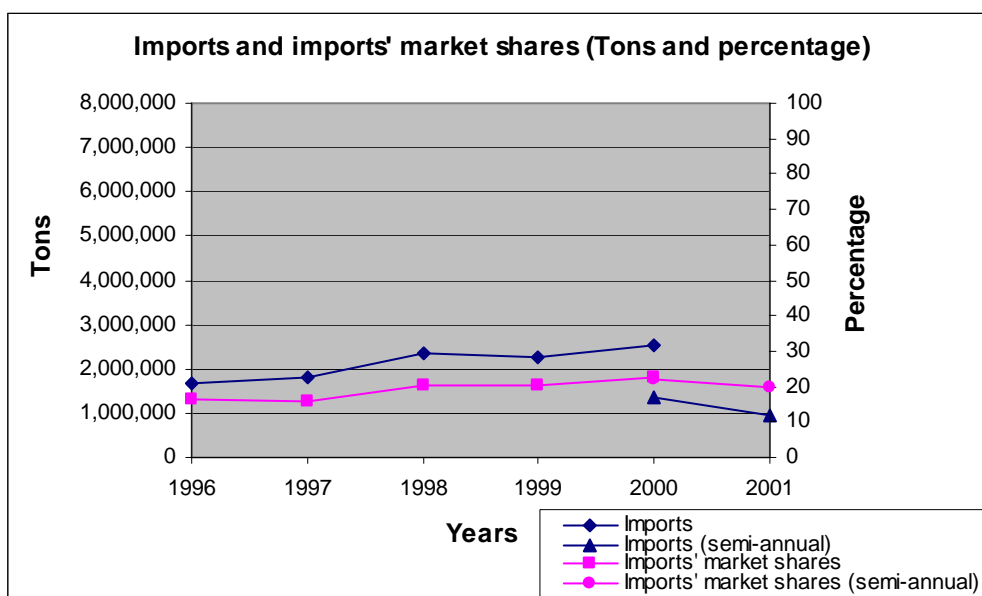


10.429 The USITC explained that domestic prices declined in an effort to mitigate the erosion of market share. Set out below is another graph, again generated using USITC data, indicating the import market share during the course of the period of investigation, which tends to support the USITC's conclusion that the domestic industry lost market share in favour of imports.⁵³⁷⁰

⁵³⁶⁸ See para. 10.424.

⁵³⁶⁹ The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-5 at LONG-9; Table LONG-16 at LONG-21.

⁵³⁷⁰ The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-5 at LONG-9; Table LONG-70 at LONG-67; Table LONG-C-3.



10.430 On the basis of the foregoing, overall, we find that the USITC's conditions of competition analysis was compelling in providing indications of the existence of a causal link between increased imports of hot-rolled bar and serious injury, subject, of course, to fulfilment of the non-attribution requirement.

(ii) *Non-attribution*

USITC findings

10.431 The USITC's findings read as follows:

"We next consider whether there is any other cause of injury to the domestic hot-rolled bar industry as substantial as the increased imports. Respondents initially contend that competition among domestic producers is at least as great a cause of injury to the domestic industry as increased imports. In particular, they assert that domestic producer Nucor is a market leader that drives down prices. They contend that, through its price leadership, Nucor has increased its market share and made its domestic competitors less profitable.⁵³⁷¹

We observe initially that competition among domestic producers cannot provide any explanation for certain indicia of serious injury. While competition among domestic producers might explain why some individual producers gained market share during the period examined while others lost market share, it cannot explain why the domestic industry as a whole lost market share over the period examined to the imports. The imports' share of the quantity of US apparent consumption rose from 16.5 percent in 1996 to 22.5 percent in 2000, and was higher in 2000 than at any other point during the period examined.⁵³⁷² As previously discussed, this loss in market share is a critical component in our causation analysis; the price declines that

⁵³⁷¹ (original footnote) See Hot-Rolled Bar Respondents Prehearing Brief at 58-60.

⁵³⁷² (original footnote) CR and PR, Table LONG-70.

occurred during the period examined were a function of the industry's efforts to preclude or mitigate losses in market share in the face of increased import volumes.

We additionally examined data concerning Nucor to ascertain the extent to which it was a "price leader" and whether its pricing policies served to increase its market share vis a vis other domestic producers, as respondents contend. The data do not support the notion that Nucor was a primary source of pricing declines. While Nucor's average unit values were ***.⁵³⁷³ ***.⁵³⁷⁴

The data additionally do not establish that Nucor ***.⁵³⁷⁵ We consequently conclude that Nucor's pricing practices cannot provide any explanation for the serious injury experienced by the domestic industry. Moreover, neither Nucor's practices nor internal industry competition in general can explain why the domestic industry as a whole lost market share to the imports.

Respondents next contend that inefficient producers are a larger cause of any serious injury to the domestic industry than increased imports. They contend that domestic producers *** have much higher costs than industry averages and lost money throughout the period examined regardless of market conditions.⁵³⁷⁶

Respondents' theory fails on two accounts. First, if the difficulties of *** were due to their inefficiency relative to other domestic producers, one might expect that they would lose market share to other domestic producers that are more efficient and could therefore offer lower prices for their products. This, however, was not the case. Jointly, *** accounted for a higher proportion of the quantity of US producers' commercial sales in 2000 – at *** percent -- than they did in 1996, when they jointly accounted for *** percent of such sales.⁵³⁷⁷ Consequently, the so-called "inefficiency" of *** was not causing them to lose market to their domestic competitors. Second, if *** were aberrational performers, as respondents contend, one would expect their performance trends to differ from the other domestic producers. This was also not the case. Declines in operating performance were pervasive among hot-rolled bar producers. While *** were the only domestic producers to experience operating losses in 1997, four additional firms experienced operating losses in 1998, and four more producers beyond that experienced operating losses in 2000.⁵³⁷⁸ Thus, at most *** consistent operating losses served to make overall domestic industry operating performance consistently worse than it would have been had these two firms not been in the domestic industry. These firms' performance, however, cannot explain the overall declines in operating performance among domestic hot-rolled bar producers, the increasing incidence of operating losses, or the industry's overall loss of market share to the imports. Because neither structural problems nor the poor performance of *** can explain the domestic

⁵³⁷³ (original footnote) Nucor's average unit values were ***. Questionnaire Data, INV-Y-212.

⁵³⁷⁴ (original footnote) See Producer's Questionnaires.

⁵³⁷⁵ (original footnote) Nucor's share of the quantity of domestic hot-rolled bar producers' commercial sales was *** in 1996, *** in 1997, *** in 1998, *** in 1999, and *** in 2000. Questionnaire Data, INV-Y-212.

⁵³⁷⁶ (original footnote) See Hot-Rolled Bar Respondents Prehearing Brief at 80-81.

⁵³⁷⁷ (original footnote) Questionnaire Data, INV-Y-212.

⁵³⁷⁸ (original footnote) Questionnaire Data, INV-Y-212. Moreover, as previously stated, three producers that did not respond to the questionnaires declared bankruptcy and shut down production operations altogether in interim 2001.

industry's serious injury, we conclude that the alleged inefficiency of these two firms cannot be a more important cause of injury than increased imports.

We have also examined the role of changes in demand in explaining the serious injury of the domestic industry. We observe that US apparent consumption, measured by quantity, increased by 11.7 percent from 1996 to 2000. The increase was not evenly distributed throughout the period examined, and apparent consumption peaked in 1998. We observe, however, that during this period apparent consumption declined only from 1998 to 1999, when the domestic industry maintained profitable operating performance. From 1999 to 2000, however, apparent consumption rose – yet the domestic industry became unprofitable. That domestic performance reached injurious levels in 2000, a time of rising apparent consumption, indicates to us that changes in demand cannot be a cause of the serious injury evident at that time.⁵³⁷⁹

Finally, we have examined changes in input costs as a possible source of serious injury to the domestic industry. We note that costs declined during the period and observe that declines in input costs, in and of themselves, cannot be an alternative "cause" of injury. At most, a decline in input costs may indicate that a factor other than imports may be responsible for price declines.

For hot-rolled bar, unit cost of goods sold (COGS) declined from \$399 in 1996 to \$362 in 1999, and then increased to \$380 in 2000; unit raw material costs declined throughout the period examined.⁵³⁸⁰ As previously stated, demand for hot-rolled bar was higher in 1999 than in 1996 and was higher in 2000 than in 1999. In times of increasing demand, producers normally need not cut their prices to reflect fully declines in cost of goods sold. Yet from 1996 to 1999, the domestic industry's declines in average unit sales values outpaced the decline in unit COGS. From 1999 to 2000, when unit COGS increased, unit average sales values remained the same. If the domestic industry could have increased its average unit sales values in 2000 to reflect increasing COGS – a reasonable expectation during a year of increasing demand – the industry could have maintained positive operating margins of at least the levels of 1999. As explained above, however, the industry could not sustain whatever price increases it initiated in 2000 because of that year's import surge. Because we cannot attribute the domestic industry's declines in operating performance in 2000 to increases in COGS, we conclude that changes in input costs cannot be as important a cause of serious injury as increased imports.

We consequently conclude that alternative causes cannot individually or collectively explain the serious injury to the domestic industry, particularly the declining market share over the course of the period examined, and the deteriorating operating performance leading to negative operating margins for the domestic industry in 2000.

⁵³⁷⁹ (original footnote) CR and PR, Table LONG-C-3. We observe that, during interim 2001, when apparent consumption fell significantly, the domestic industry experienced further declines in operating performance. The interim 2001 data merely indicate that declines in apparent consumption can lead to further deterioration to an industry that was already seriously injured.

⁵³⁸⁰ (original footnote) CR and PR, Table LONG-27.

Accordingly, we find that increased imports are a substantial cause of serious injury to the domestic hot-rolled bar industry that is not less than any other cause."⁵³⁸¹

Factors considered by the USITC

Competition among domestic producers

Claims and arguments of the parties

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

Analysis by the Panel

10.433 The Panel agrees with the United States insofar as it stated that the USITC dismissed this factor as a possible cause of injury to the industry. In particular, the USITC stated that: "We observe initially that competition among domestic producers cannot provide any explanation for certain indicia of serious injury". In addition, it stated that: "We consequently conclude that Nucor's pricing practices cannot provide any explanation for the serious injury experienced by the domestic industry. Moreover, neither Nucor's practices nor internal industry competition in general can explain why the domestic industry as a whole lost market share to the imports".⁵³⁸²

10.434 We note that the complainants arguments with respect to this factor are premised on the assumption that the USITC acknowledged that competition among domestic producers was a cause of injury. However, as noted above, this assumption is not valid. Further, in our view, the complainants have not put forward an alternative plausible explanation that, in fact, competition among domestic producers was a cause of serious injury.

Inefficient producers

Claims and arguments of the parties

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

Analysis by the Panel

10.436 The Panel notes at the outset that the USITC stated that "the alleged inefficiency of these two firms cannot be a more important cause of injury than increased imports." It could be concluded from this statement, taken in isolation, that the USITC considered that inefficient producers were a cause of injury, albeit not a cause that was more important than increased imports. However, in the Panel's view, in light of the remainder of the USITC's analysis, it would seem that the USITC made this statement merely in keeping with domestic law requirements. On the contrary, the substance of the USITC's analysis indicates that the USITC dismissed this factor as a possible cause of injury to the industry. In particular, the USITC stated that: "Respondents next contend that inefficient producers are a larger cause of any serious injury to the domestic industry than increased imports...Respondents' theory fails on two accounts..." In addition, the USITC stated that: "These firms' performance, however, cannot explain the overall declines in operating performance among domestic hot-rolled bar producers, the increasing incidence of operating losses, or the industry's overall loss of market share to the imports. Because neither structural problems nor the poor performance of *** can explain the

⁵³⁸¹ USITC Report, Vol. I, pp. 97-99.

⁵³⁸² See para. 10.431.

domestic industry's serious injury, we conclude that the alleged inefficiency of these two firms cannot be a more important cause of injury than increased imports."

10.437 We note that the complainants' arguments with respect to this factor are premised on the assumption that the USITC acknowledged that inefficient producers were a cause of injury. However, as noted above, this assumption is not valid. Further, in our view, the complainants have not put forward an alternative plausible explanation that, in fact, inefficient producers were a cause of serious injury.

Changes in input costs

Claims and arguments of the parties

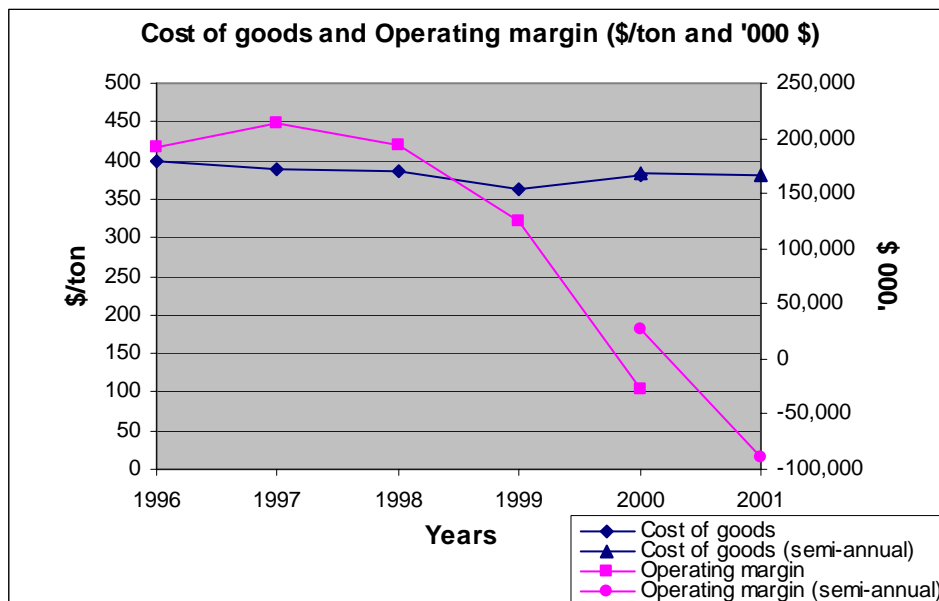
10.438 The arguments of the parties are set out in Section VII.H.3(b)(iii) *supra*.

Analysis by the Panel

10.439 The Panel notes that although the USITC did not expressly state that increases in COGS played a role in the decline in the domestic operating margin, it did explicitly state that COGS increased for hot-rolled bar from 1999 to 2000. In particular, the USITC stated that: "For hot-rolled bar, unit cost of goods sold (COGS) declined from \$399 in 1996 to \$362 in 1999, and then increased to \$380 in 2000". In addition, the USITC stated that: "If the domestic industry could have increased its average unit sales values in 2000 to reflect increasing COGS – a reasonable expectation during a year of increasing demand – the industry could have maintained positive operating margins of at least the levels of 1999. As explained above, however, the industry could not sustain whatever price increases it initiated in 2000 because of that year's import surge. Because we cannot attribute the domestic industry's declines in operating performance in 2000 to increases in COGS, we conclude that changes in input costs cannot be as important a cause of serious injury as increased imports".

10.440 In the Panel's view, the USITC's dismissal of the effect of increases in COGS in its non-attribution analysis was not adequately reasoned. In particular, the USITC merely stated that the only reason why the domestic industry did not increase prices to recoup growing COGS was the import surge that occurred in the year 2000. This, in the Panel's view, did not amount to a reasoned and adequate explanation. Nevertheless, the Panel does consider that the USITC was probably correct in concluding that changes in input costs were not a cause of serious injury. If, indeed, COGS was playing a significant role in situation of the domestic industry, one would have expected operating margins to increase while COGS was decreasing, in particular, from 1996 until 1999 inclusive. However, as can be seen from the graph below, which has been generated using USITC data, the trends in operating margin appear to be independent of trends in COGS. While it is true that there appears to be coincidence between, on the one hand, increases in COGS from 1999 until 2000 and, on the other hand, declines in the operating margin during that period, the Panel considers that coincidence during one brief window in the period of investigation cannot detract from a lack of coincidence during the rest of the period of investigation.⁵³⁸³

⁵³⁸³ The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-27 at LONG-33.



Declines in demand

Claims and arguments of the parties

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

Analysis by the Panel

10.442 The Panel notes that the USITC did not give any indication in its Report that it considered that demand played any role in causing serious injury to the industry. Rather, the USITC explained adequately that US apparent consumption of hot-rolled bar increased by 11.7% from 1996 to 2000, and that it increased on a year-to-year basis for every available comparison except that for 1998 to 1999. The USITC added that apparent US consumption increased from 1999 to 2000, the year that domestic industry performance reached injurious levels. Consequently, it concluded that changes in demand could not explain the industry's condition in 2000.⁵³⁸⁴ In the Panel's view the USITC examined the nature and effects of declines in demand when assessing whether increased imports of hot-rolled were causing serious injury to the relevant domestic producers. Accordingly, the Panel rejects the complainants' claims in relation to this factor.

Conclusions

10.443 In the Panel's view, the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by increases in COGS, together with other factors, was not attributed to increased imports contrary to the requirements of Article 4.2(b) of the Agreement on Safeguards. Having said this, the Panel notes that the facts do appear to support the USITC's conclusion regarding increases in COGS.

⁵³⁸⁴ United States' first written submission, para. 578.

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

10.444 We conclude that with respect to hot-rolled bar, although the USITC did not conduct any coincidence analysis, its conditions of competition's analysis provided a compelling explanation that indicated the existence of a causal link, subject to fulfilment of the non-attribution requirement. In this regard, we found that the USITC's non-attribution analysis failed to separate, distinguish and assess the nature and extent of the injurious effects of increases in COGS so that the injury caused by these factors, together with other factors, was not attributed to increased imports. Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

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

(d) *Cold-finished bar*

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

(i) *Coincidence and conditions of competition*

USITC findings

10.447 The USITC's findings read as follows:

"We find that the increased imports of cold-finished bar are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of cold-finished bar are a substantial cause of serious injury to the domestic cold-finished bar industry.

a. *Conditions of Competition*

We have taken into account a number of factors that affect the competitiveness of domestic and imported cold-finished bar in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, and market conditions. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestically-produced or imported articles.

Market participants generally agree that there are few or no substitutes for long products such as cold-finished bar.⁵³⁸⁵ As discussed in section V.A.2. above, the principal use of cold-finished bar is in automotive applications.

⁵³⁸⁵ (original footnote) CR and PR at LONG-78.

The record indicates strong demand during most of the period examined with US apparent consumption of cold-finished bar increasing during every full-year but one. Apparent consumption rose from 1.41 million tons in 1996 to 1.60 million tons in 1997 and then to 1.67 million tons in 1998. Apparent consumption then declined to 1.61 million tons in 1999 but increased to 1.64 million tons in 2000. Apparent consumption was lower in interim 2001, at 700,202 tons, than in interim 2000, when it was 905,184 tons.⁵³⁸⁶

With regard to supply of cold-finished bar, US capacity increased from 1996 to 2000 despite declines since 1998. Domestic industry capacity utilization fluctuated during the period examined. Notwithstanding that the capacity utilization data reported in the questionnaires appear to be understated, it is clear that there was additional productive capacity available to the domestic industry throughout the period examined. Foreign capacity reported in questionnaires increased from 1.6 million tons in 1996 to 2.0 million tons in 2000, and was higher in interim 2001 than in interim 2000. Foreign capacity utilization for full-year periods ranged from 75.2 percent in 1999 to 84.3 percent in 2000.⁵³⁸⁷

The record indicates that price is an important factor in purchasing decisions for cold-finished bar. Purchasers listed price second most-frequently, after quality, as the top factor in purchasing decisions, and listed price most frequently as the number two factor. Most purchasers evaluated the imports and domestically-produced cold-finished bar as comparable with respect to product consistency and product quality.⁵³⁸⁸

b. Analysis⁵³⁸⁹

Aggressive pricing by the imports during the latter portion of the period examined caused the domestic industry to lose market share and revenues. This resulted in the poor operating performance and serious injury discussed above.

Average unit values of the imports trended downward from 1996 to 1998, and the decline accelerated in 1999. Import average unit values declined by 1.3 percent from 1996 to 1997 and by 0.1 percent from 1997 to 1998. They then fell by 7.7 percent from 1998 to 1999.⁵³⁹⁰ Additional evidence that import prices declined dramatically in 1999 is provided by data for one-inch round C12L14, the cold-finished bar product for which the Commission obtained significant pricing data concerning imports.⁵³⁹¹ Between the fourth quarter of 1998 and the first quarter of

⁵³⁸⁶ (original footnote) CR and PR, Table LONG-71.

⁵³⁸⁷ (original footnote) CR and PR, Table LONG-45. We have relied upon the questionnaires for foreign capacity and capacity utilization data, although such data are not complete. We acknowledge that the domestic producers contended that the questionnaire data understated foreign capacity and overstated foreign capacity utilization.

⁵³⁸⁸ (original footnote) INV-Y-212 at 46.

⁵³⁸⁹ (original footnote) The Minimill 201 Coalition produced an economic model that attempted to measure the relationship between imports and the domestic industry's prices and profits. In particular, there were defects in the manner the model measured import competition, and the model did not adequately address changes in domestic competition.

⁵³⁹⁰ (original footnote) CR and PR, Table LONG-6.

⁵³⁹¹ (original footnote) The Commission collected pricing data concerning two cold-finished bar products. For one of the products, however, the reported data covered very small import volumes: less than 500

1999, import prices for this product declined by *** percent. They fell an additional *** percent between the first and second quarters of 1999, the largest quarterly decline to that point in the period examined. Although prices rose during the next two quarters, the fourth quarter 1999 price remained 8.2 percent below the fourth quarter 1998 price.⁵³⁹²

Prices for domestically-produced C12L14 declined by 3.9 percent between the fourth quarter of 1998 and the first quarter of 1999 but fluctuated in a narrow range during the remainder of 1999. As a result, underselling margins were higher in the last three quarters of 1999 than in earlier periods. Between the first quarter of 1996 and the first quarter of 1999, the margin of underselling or overselling by the imports was no greater than 1.8 percent in any quarter. The underselling margin increased to 8.1 percent in the second quarter of 1999, however, and remained above 5.8 percent for the remaining quarters of that year.⁵³⁹³

The market did not react immediately to the price reductions by the imports. Indeed, neither the absolute volume of the imports nor their market share increased in 1999.⁵³⁹⁴ The lack of immediate reaction by the market may reflect extensive contract sales: over 40 percent of cold-finished bar purchasers made over 90 percent of their purchases on a contract basis, with contracts commonly six months to over one year in length.⁵³⁹⁵ However, the aggressive pricing by the imports continued in 2000. Compared to 1999, average unit values for all imports declined by 5.1 percent.⁵³⁹⁶ Prices for imported C12L14 declined during all but one quarter in 2000, and the price for the fourth quarter of 2000 was 14.0 percent below the price for the fourth quarter of 1999.⁵³⁹⁷

Domestic prices also declined in 2000. Average unit values for US shipments of all cold-finished bar products were lower in 2000 than in 1999.⁵³⁹⁸ Prices for domestically-produced C12L14 were 4.2 percent lower in the fourth quarter of 2000 than in the fourth quarter of 1999. Nevertheless, underselling by the

tons of imports in each quarter, and less than 100 tons of imports for each of the last six quarters for which data were collected. INV-Y-212, Table LONG-91. By contrast, reported import volume for one-inch round CL12L14 was at least 1,166 tons in every quarter during the entire period examined, and at least 2,636 tons for every quarter during 1999 and interim 2000. INV-Y-212, Table LONG-ALT92. Consequently, in our analysis of pricing we have focused on the latter, more complete data set. We also observe that, in an analysis of whether there is overselling or underselling, pricing data for a specific product can provide more probative information than average unit value data, where comparisons between values for imports and domestically-produced products can reflect variations in product mix. This is particularly true for a product such as cold-finished bar which covers a broad range of product types and values.

⁵³⁹² (original footnote) INV-Y-212, Table LONG-ALT92.

⁵³⁹³ (original footnote) INV-Y-212, Table LONG-ALT92.

⁵³⁹⁴ (original footnote) See CR and PR, Tables LONG-6, LONG-71. A substantial increase in cold-finished bar imports occurred in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries.

⁵³⁹⁵ (original footnote) Purchaser Questionnaire Responses.

⁵³⁹⁶ (original footnote) CR and PR, Table LONG-6.

⁵³⁹⁷ (original footnote) INV-Y-212, Table LONG-ALT92.

⁵³⁹⁸ (original footnote) CR and PR, Table LONG-17.

imports persisted, with quarterly underselling margins in 2000 ranging from 3.9 percent to 15.5 percent.⁵³⁹⁹

In 2000, the continued underselling by the imports led to significant increases in both import volume and market share. As previously stated, import quantities were 33.6 percent higher in 2000 than in 1999.⁵⁴⁰⁰ The imports' share of US apparent consumption, measured by quantity, increased from 14.7 percent in 1999 to 19.2 percent in 2000.⁵⁴⁰¹

Because the imports succeeded in increasing their share of the US market in 2000, the domestic industry's production and shipments declined from 1999 levels notwithstanding the increase in US apparent consumption.⁵⁴⁰² The decline in output, together with the decline in prices, led to declining revenues and poor operating performance, with an operating margin in 2000 of only 2.8 percent.⁵⁴⁰³, ⁵⁴⁰⁴

Claims and arguments of the parties

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

Analysis by the Panel

10.449 The Panel has considered the relevant section of the USITC Report for cold-finished bar and notes that, in determining whether a causal link existed between increased imports and serious injury, the USITC did not conduct a coincidence analysis. As mentioned previously, the Panel considers that if a competent authority has not examined coincidence of trends, it must, in proving causation, provide a reasoned and adequate explanation as to why such an analysis was not undertaken as well as a compelling explanation establishing the existence of a causal link. We note that the USITC analysed the conditions of competition. Accordingly, we will now proceed to review the conditions of competition analysis undertaken by the USITC for this measure, with a view to determining whether the USITC provided such a compelling explanation.

10.450 We note as a preliminary point that the USITC considered that "[a]ggressive pricing by the imports during the latter portion of the period examined caused the domestic industry to lose market share and revenues. This resulted in the poor operating performance and serious injury discussed above." The USITC ultimately concluded that "[t]he decline in output, together with the decline in prices, led to declining revenues and poor operating performance, with an operating margin in 2000 of only 2.8 percent."

10.451 It is apparent from the USITC's analysis that the essential premise for its conclusion that "increased imports of cold-finished bar are a substantial cause of serious injury to the domestic cold-finished bar industry" was that "aggressive" pricing by imports caused the domestic industry to lose market share and revenues. In assessing whether the USITC has provided a reasoned and adequate explanation of how the facts support such a finding, the Panel will first consider whether import pricing can be labelled as "aggressive".

⁵³⁹⁹ (original footnote) INV-Y-212, Table LONG-ALT92.

⁵⁴⁰⁰ (original footnote) CR and PR, Table LONG-6.

⁵⁴⁰¹ (original footnote) CR and PR, Table LONG-71.

⁵⁴⁰² (original footnote) CR and PR, Tables LONG-17, LONG-71.

⁵⁴⁰³ (original footnote) CR and PR, Table LONG-28.

⁵⁴⁰⁴ USITC Report, Vol. I, pp. 104-106.

10.452 As a starting point, the Panel notes that the USITC pointed to underselling during the period, presumably in justification of its assertion that import pricing had been aggressive. Specifically, it stated that: "[U]nderselling by the imports persisted, with quarterly underselling margins in 2000 ranging from 3.9 percent to 15.5 percent.⁵⁴⁰⁵ In 2000, the continued underselling by the imports led to significant increases in both import volume and market share. As previously stated, import quantities were 33.6 percent higher in 2000 than in 1999.⁵⁴⁰⁶" The Panel notes firstly that the USITC, without any explanation as to why it did so, relied upon *quarterly* data for individual cold-bar products⁵⁴⁰⁷ when *annual* average data was available and such annual data had been used by the USITC in relation to other products, when available.⁵⁴⁰⁸ Unlike the quarterly data, the annual data indicated that imports did not undersell domestic products at any point in the period of investigation. For us, the lack of explanation regarding the data relied upon by the USITC calls into question whether "underselling" actually existed and, therefore, whether import pricing was, in fact, "aggressive" at all.

10.453 Further, we note that at no point during the period of investigation did average unit values for imports undersell average unit values for domestic products. In other words, import prices exceeded domestic prices throughout the period of investigation. This is evident from the graph below, which represents in graphical form USITC data. In the Panel's view, the fact that import prices exceeded domestic prices throughout the period of investigation tends to detract from the conclusion that import pricing was "aggressive". This is not to say, however, that the absence of underselling by imports means that pricing cannot be labelled as "aggressive". On the contrary, we concede that import overselling may, in certain circumstances, drive domestic prices downwards. However, in this case, the USITC relied upon the existence of import underselling as the basis for its assertion that import pricing was "aggressive". As noted, in fact, average unit values were always higher than domestic prices.⁵⁴⁰⁹

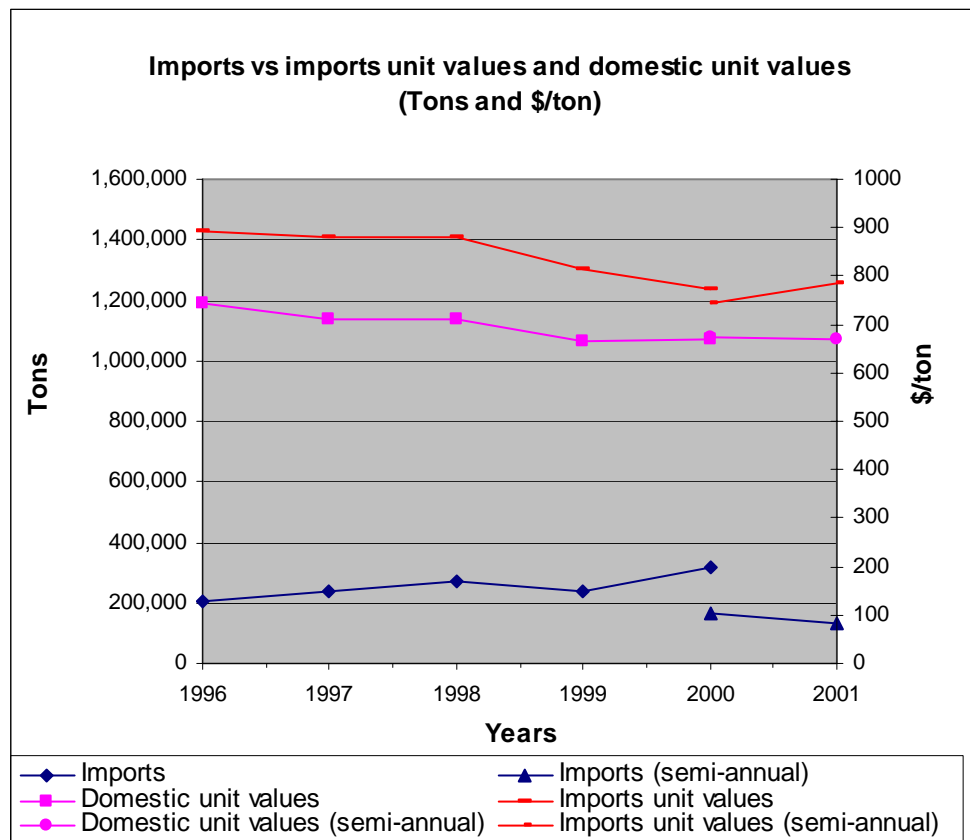
⁵⁴⁰⁵ (original footnote) INV-Y-212, Table LONG-ALT92.

⁵⁴⁰⁶ (original footnote) CR and PR, Table LONG-6.

⁵⁴⁰⁷ Table LONG-91 and Table LONG-ALT92.

⁵⁴⁰⁸ Table LONG-C-4.

⁵⁴⁰⁹ The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-6 at LONG-10; Table LONG-17 at LONG-22.



10.454 Putting aside the difficulties with the data relied upon by the USITC, the Panel notes the conclusions drawn by the USITC in its conditions of competition analysis:

"Because the imports succeeded in increasing their share of the US market in 2000, the domestic industry's production and shipments declined from 1999 levels notwithstanding the increase in US apparent consumption.⁵⁴¹⁰ The decline in output, together with the decline in prices, led to declining revenues and poor operating performance, with an operating margin in 2000 of only 2.8 percent.^{5411, 5412}

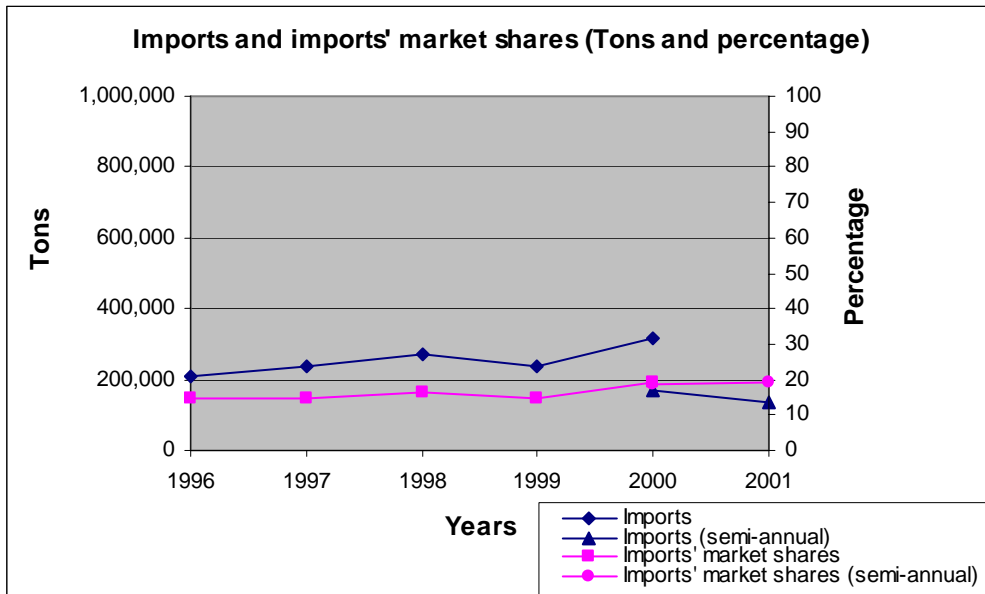
10.455 The facts do appear to bear out the conclusion that "the imports succeeded in increasing their share of the United States' market in 2000," as is evident from the graph below generated using USITC data.⁵⁴¹³

⁵⁴¹⁰ (original footnote) CR and PR, Tables LONG-17, LONG-71.

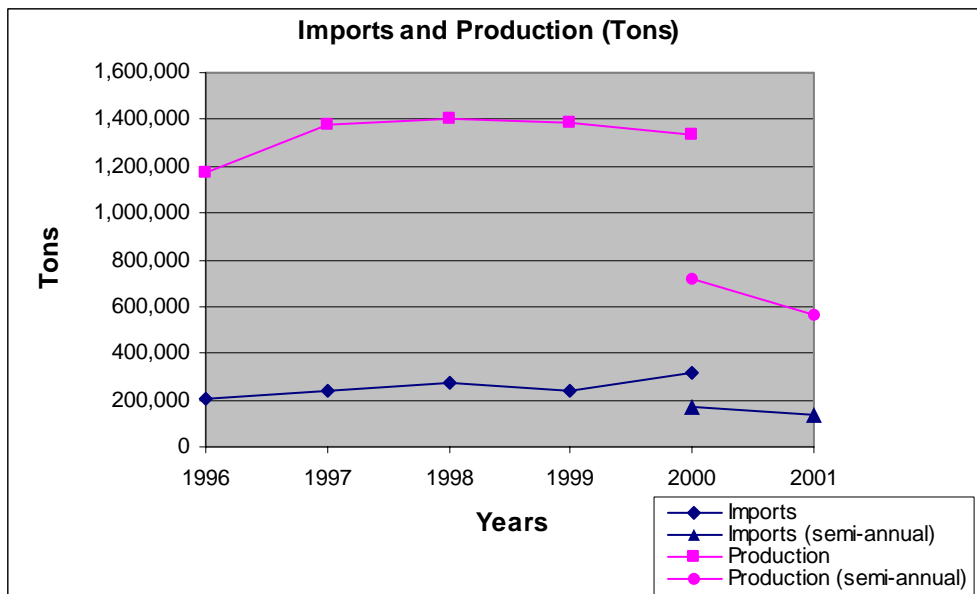
⁵⁴¹¹ (original footnote) CR and PR, Table LONG-28.

⁵⁴¹² See para. 10.447.

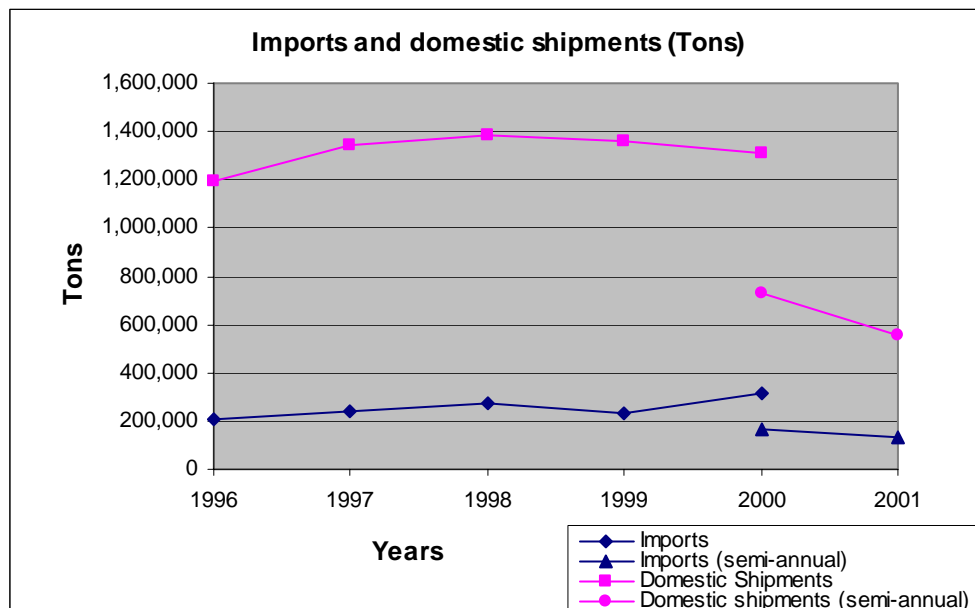
⁵⁴¹³ The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-6 at LONG-10; Table LONG-71 at LONG-68; Table LONG-C-4.



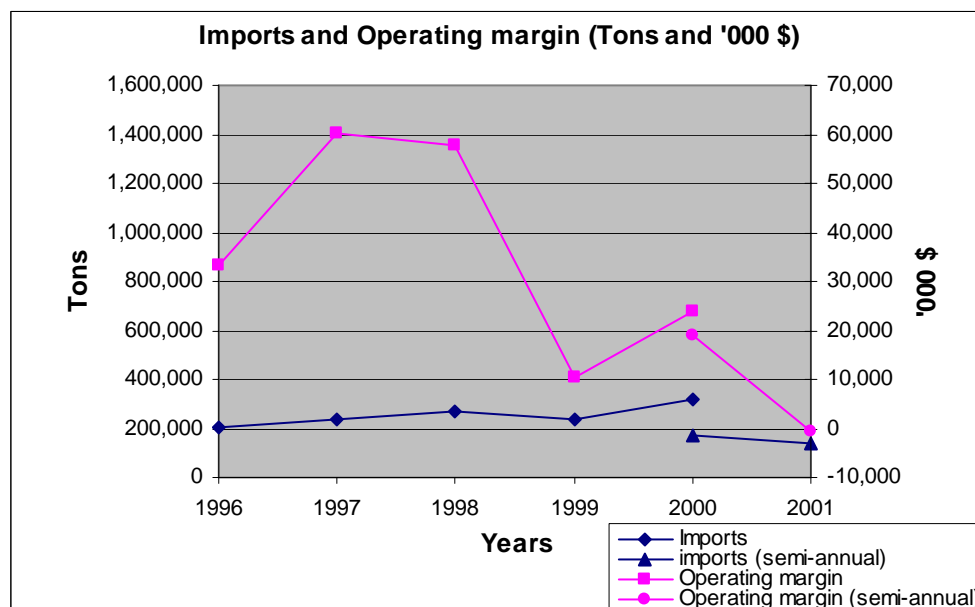
10.456 The facts also appear to bear out the conclusion that production and shipments declined from 1999 levels as is evident from the graphs below, also generated using USITC data.⁵⁴¹⁴



⁵⁴¹⁴ The data represented in the two graphs below are contained in the USITC Report, in particular in Table LONG-6 at LONG-10; Table LONG-17 at LONG-22; Table LONG-C-4.



10.457 Despite the foregoing, we find limited support for the conclusion that "[t]he decline in output, together with the decline in prices, led to declining revenues and poor operating performance, with an operating margin in 2000 of only 2.8 percent." Indeed, we note that significant declines in revenues and operating margin began well in advance of 2000, the year when, according to the USITC "the continued underselling by the imports led to significant increases in both import volume and market share." This is evident from the graph below, based on USITC data, which illustrates the trends in operating margin together with import trends.⁵⁴¹⁵



⁵⁴¹⁵ The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-6 at LONG-10; Table LONG-28 at LONG-34; Table LONG-C-4.

10.458 In light of the foregoing, the Panel finds that the USITC has not provided a compelling explanation that a causal link existed between increased imports of cold-finished bar and injury suffered by the relevant domestic industry. In particular, aside from the difficulties we have identified in relation to the data upon which the USITC relied in undertaking its conditions of competition analysis, we consider that the USITC has not provided a reasoned and adequate explanation of how the facts supported its conclusion that "[t]he decline in output, together with the decline in prices, led to declining revenues and poor operating performance, with an operating margin in 2000 of only 2.8 percent".

(ii) *Non-attribution*

USITC findings

10.459 The USITC's findings read as follows:

"The domestic industry's experience in 2000 serves to rebut one of the principal arguments of respondents – that declines in demand were a greater cause of the substantial injury to the domestic industry than increased imports. The domestic industry acknowledges that prices for cold-finished bar have historically tracked demand conditions.⁵⁴¹⁶ Indeed, the domestic industry's decline in operating performance in 1999, a year when import volume and market penetration declined, appears to a large extent attributable to the declines in demand during that year.

However, in 2000 demand increased above the level of 1999. Nevertheless, as previously discussed, prices for US-produced product did not recover with demand, but instead declined further in the face of the import surge. The per unit difference between average unit values and COGS, although slightly higher in 2000 than in 1999, was well below the levels of any of the prior years of the period examined. Similarly, the industry's operating margin, while slightly above the level of 1999, was only 2.8 percent, less than half the levels of 1997 and 1998. The number of producers experiencing operating losses increased. When demand again declined in interim 2001, the imports maintained their significant presence in the market, and the domestic industry's performance further deteriorated. The domestic industry's poor performance despite increasing demand in 2000 indicates that it is the imports, not changes in demand, that explain the serious injury the domestic industry is experiencing.

We have also considered respondents' arguments that the domestic industry's poor performance was due more to the presence of a purportedly inefficient producer with structural problems, RTI, than to increased imports.⁵⁴¹⁷ RTI's structural difficulties, however, ***,⁵⁴¹⁸ ***. We consequently reject the proposition that RTI's performance was somehow anomalous or served to skew overall data for the domestic industry.

We consequently conclude that alternative causes proffered by respondents cannot individually or collectively explain the serious injury to the domestic industry, particularly the declining market share over the course of the period examined, and

⁵⁴¹⁶ (original footnote) See CFTC Prehearing Brief at 7.

⁵⁴¹⁷ (original footnote) See Cold-Finished Bar Respondents Prehearing Brief at 18-23.

⁵⁴¹⁸ (original footnote) *** Producer's Questionnaire Response.

the poor operating performance in 2000. Accordingly, we find that increased imports are a substantial cause of serious injury to the domestic cold-finished bar industry that is not less than any other cause."⁵⁴¹⁹

Factors considered by the USITC

Declines in demand

Claims and arguments of the parties

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

Analysis by the Panel

10.461 In the Panel's view, the USITC clearly acknowledged that decline in demand contributed to injury that was being suffered by the domestic industry. In particular, the USITC stated that: "The domestic industry acknowledges that prices for cold-finished bar have historically tracked demand conditions."⁵⁴²⁰ Indeed, the domestic industry's decline in operating performance in 1999, a year when import volume and market penetration declined, appears to a large extent attributable to the declines in demand during that year." As is apparent from this last statement, the USITC made a clear linkage between declines in demand and operating performance, the latter being an important injury factor referred to in Article 4.2(a) of the Agreement on Safeguards.

10.462 We note that the USITC considered demand changes that occurred during the period of investigation. In particular, it noted demand declines and increases during the period of investigation. In addition, in the section in which it analysed the conditions of competition, the USITC stated that:

"The record indicates strong demand during most of the period examined with US apparent consumption of cold-finished bar increasing during every full-year but one. Apparent consumption rose from 1.41 million tons in 1996 to 1.60 million tons in 1997 and then to 1.67 million tons in 1998. Apparent consumption then declined to 1.61 million tons in 1999 but increased to 1.64 million tons in 2000. Apparent consumption was lower in interim 2001, at 700,202 tons, than in interim 2000, when it was 905,184 tons."⁵⁴²¹ ⁵⁴²²

10.463 Having acknowledged that demand declines contributed to the state of the domestic industry, the USITC dismissed this factor in its non-attribution analysis on the basis of the assertion that: "The domestic industry's poor performance despite increasing demand in 2000 indicates that it is the imports, not changes in demand, that explain the serious injury the domestic industry is experiencing." In the Panel's view, the mere fact that demand increased during a segment of the period of investigation during which injury persisted does not detract from the conclusion reached by the USITC itself that decline in demand contributed to injury that was being suffered by the domestic industry.

10.464 We find nothing in the report to indicate whether and how the injury caused by this factor was not attributed to increased imports. In our view, the need to separate and distinguish the effects of

⁵⁴¹⁹ USITC Report, Vol. I, p. 107.

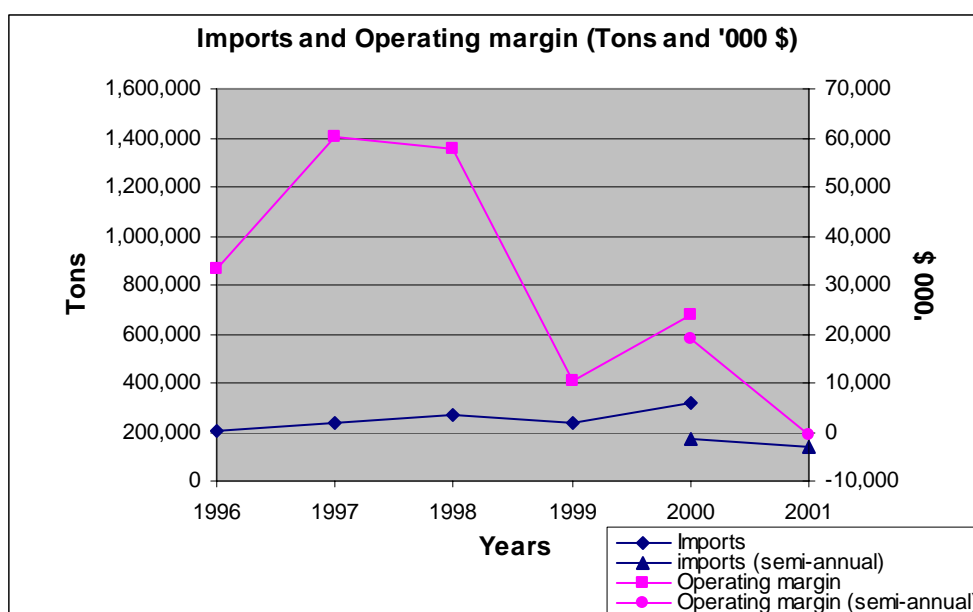
⁵⁴²⁰ (original footnote) See CFTC Prehearing Brief at 7.

⁵⁴²¹ (original footnote) CR and PR, Table LONG-71.

⁵⁴²² See para. 10.446.

declines in demand was particularly important in this case given the acknowledgement by the USITC itself that "the domestic industry's decline in operating performance in 1999, a year when import volume and market penetration declined, appears to a large extent attributable to the declines in demand during that year."

10.465 The significance of this decline in operating performance in 1999 that was "to a large extent attributable to declines in demand" should be viewed in context. Below is a graph that has been generated using USITC data. This graph illustrates that the industry's operating margin dropped precipitously in 1999. Prior to 1999, the operating margin was significantly higher. Following 1999, the operating margin began to increase again.⁵⁴²³



10.466 Clearly, 1999 was a significant year in terms of the industry's operating performance. Given that "the domestic industry's decline in operating performance in 1999, a year when import volume and market penetration declined, appears to a large extent attributable to the declines in demand during that year", we consider that this illustrates that declines in demand potentially played a significant role in causing injury to the domestic industry.

Conclusions

10.467 The Panel considers that, with respect to cold-finished bar, the USITC failed to comply with its non-attribution obligation contained in the second sentence of Article 4.2(b). In particular, we consider that the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of factors other than increased imports that were causing injury to the domestic industry. This, to us, is clear from the fact that the USITC dismissed one factor (namely, declining domestic demand) of the two that it considered in its non-attribution analysis even though it acknowledged the importance of that factor in causing injury to the industry.

⁵⁴²³ The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-6 at LONG-10; Table LONG-28 at LONG-34; Table LONG-C-4.

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

10.468 The Panel finds that the USITC failed to explain why it did not conduct a coincidence analysis and did not provide a compelling explanation indicating the existence of a causal link between increased imports of cold-finished bar and serious injury to the relevant domestic producers. Further, the Panel found that the USITC's non-attribution analysis for cold-finished bar was flawed because the USITC failed to separate, distinguish and assess the nature and extent of the injurious effects of declines in demand so that the injury caused by these factors, together with other factors, was not attributed to increased imports. We found this flaw to be significant given the acknowledgement by the USITC itself that "the domestic industry's decline in operating performance in 1999, a year when import volume and market penetration declined, appears to a large extent attributable to the declines in demand during that year." Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

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

(e) *Rebar*

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

(i) *Coincidence and conditions of competition*

USITC findings

10.471 The USITC's findings read as follows:

"We find that the increased imports of rebar are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of rebar are a substantial cause of serious injury to the domestic rebar industry.

a. *Conditions of Competition*

We have taken into account a number of factors that affect the competitiveness of domestic and imported rebar in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, and market conditions. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestically-produced or imported articles.

Market participants generally agree that there are few or no substitutes for long products such as rebar.⁵⁴²⁴ Rebar is used solely for structural reinforcement within cast concrete structures.⁵⁴²⁵

US apparent consumption of rebar increased throughout the period examined. Apparent consumption rose every year from 1996, when it was 5.5 million tons, to 2000, when it was 8.1 million tons, a net increase of 48.1 percent. Apparent consumption was also higher in interim 2001, at 4.2 million tons, than in interim 2000, when it was 4.1 million tons.⁵⁴²⁶

With regard to supply of rebar, US capacity increased throughout the period examined. Capacity utilization fluctuated; for full-year periods it ranged between 64.9 percent in 1996 to 68.5 percent in 2000. Foreign capacity reported in questionnaires increased from 24.0 million tons in 1996 to 29.6 million tons in 2000, and was higher in interim 2001 than in interim 2000. Foreign capacity utilization for full-year periods ranged from 81.7 percent in 1996 to 86.5 percent in 2000.⁵⁴²⁷

Price is a very important purchasing factor in purchasing decisions for rebar. A majority of all purchasers listed price as the number one factor in purchasing decisions for rebar, and price was named over three times more often than any other individual factor.⁵⁴²⁸ One purchaser testified at the Commission hearing that rebar was a commodity product sold on the basis of price, a proposition not disputed by any respondent.⁵⁴²⁹

Finally, rebar imports from several countries were subject to antidumping duties during portions of the period examined. In particular, Commerce imposed provisional antidumping duties on rebar from Turkey on October 10, 1996 and issued an antidumping order on these imports on April 17, 1997.⁵⁴³⁰ Commerce imposed provisional antidumping duties on rebar from Belarus, China, Indonesia, Korea, Latvia, Moldova, Poland, and Ukraine on January 30, 2001 and issued an antidumping order on imports from these eight countries on September 7, 2001.⁵⁴³¹

⁵⁴²⁴ (original footnote) CR and PR at LONG-78.

⁵⁴²⁵ (original footnote) CR and PR at LONG- 2.

⁵⁴²⁶ (original footnote) CR and PR, Table LONG-72.

⁵⁴²⁷ (original footnote) CR and PR, Table LONG-48. We have relied upon the questionnaires for foreign capacity and capacity utilization data, although such data are not complete. We acknowledge that the domestic producers contended that the questionnaire data understated foreign capacity and overstated foreign capacity utilization.

⁵⁴²⁸ (original footnote) INV-Y-212 at 47.

⁵⁴²⁹ (original footnote) Tr. at 1316 (Koch).

⁵⁴³⁰ (original footnote) See 61 Fed. Reg. 53203 (Oct. 10, 1996), 62 Fed. Reg. 18748 (April 17, 1997).

⁵⁴³¹ (original footnote) See 66 Fed. Reg. 8324, 8329, 8333, 8339, 8343 (Jan. 30, 2001); 66 Fed. Reg. 46777 (Sept. 7, 2001).

b. Analysis⁵⁴³²

The increased imports put price pressure on domestic producers. This price pressure prevented domestic producers from fully achieving the benefits of cost reductions during certain portions of the period examined and from fully recovering increasing costs during others. It also prevented domestic producers from fully benefitting from the large increase in domestic consumption over the period examined. As a result, operating margins declined and by 2000 the industry's operating income was negative.

Rebar imports increased significantly in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries. As has been observed with other long products, domestic producers did not immediately change their pricing strategy in response to the initial import surge. The average unit value of the domestic industry's US shipments declined by only one dollar per ton from 1997 to 1998.⁵⁴³³ For the rebar product on which the Commission collected pricing data, prices for the domestically-produced product were higher during the first three quarters of 1998 than they were during the comparable quarter of 1997. Prices did begin to fall for the domestically-produced product during the fourth quarter of 1998. Throughout 1998, however, imports undersold the domestically-produced product by margins exceeding 20 percent.⁵⁴³⁴ The imports in 1998 took nearly six percentage points of market share away from the domestic industry.⁵⁴³⁵

During 1999, imports again increased by substantial margins. The quantity of imports was 49.1 percent higher in 1999 than in 1998.⁵⁴³⁶ This surge was accompanied by price declines for both the imports and the domestically-produced product. Average unit values of the imports declined by 23.6 percent from 1998 to 1999, and average unit values of US shipments of domestically produced rebar declined by 8.9 percent.⁵⁴³⁷ For the rebar product on which the Commission collected pricing data, import prices fell by 8.8 percent from the fourth quarter of 1998 to the first quarter of 1999, and the first quarter 1999 price was 11.5 percent below the first quarter 1998 price. Similarly, for the domestically-produced product, prices declined by 5.0 percent from the fourth quarter of 1998 to the first quarter of 1999, and the first quarter 1999 price was 10.6 percent below the first quarter 1998 price. There were further price declines in the second quarter of 1999 before prices stabilized during the final two quarters of the year; the second quarter 1999 price was below the second quarter 1998 price by 12.7 percent for the domestically-produced product and by 15.6 percent for the imports.⁵⁴³⁸

⁵⁴³² (original footnote) The Minimill 201 Coalition produced an economic model that attempted to measure the relationship between imports and the domestic industry's prices and profits.. We considered this model in making our determination but note its limitations. In particular, there were defects in the manner the model measured import competition, and the model did not adequately address changes in domestic competition.

⁵⁴³³ (original footnote) CR and PR, Table LONG-18.

⁵⁴³⁴ (original footnote) INV-Y-212, Table LONG-ALT93.

⁵⁴³⁵ (original footnote) CR and PR, Table LONG-72.

⁵⁴³⁶ (original footnote) CR and PR, Table LONG-7.

⁵⁴³⁷ (original footnote) CR and PR, Tables LONG-7, LONG-18.

⁵⁴³⁸ (original footnote) INV-Y-212, Table LONG-ALT93.

We can discern no reason other than the imports for the magnitude of price and average unit value declines during 1999. The decline was not a function of demand changes, because US apparent consumption for rebar increased by 14.1 percent from 1998 to 1999.⁵⁴³⁹ Indeed, in light of these demand conditions, we would ordinarily expect prices to have stayed stable or risen, and not to have declined by such large amounts. Changes in input costs also cannot explain the magnitude of the price decline. While there was a reduction in per unit COGS from 1998 to 1999, this reduction was less than the per unit decline in average sales values.⁵⁴⁴⁰ In any event, in a period of sharply increasing demand, producers normally need not cut their prices to reflect fully declines in costs of goods sold.⁵⁴⁴¹ Thus the price pressure imposed by the surging volume of imports prevented the domestic rebar producers from achieving the full benefits of declining input costs in a growing market.

The imports undersold domestically-produced rebar by quarterly margins between *** and *** percent during 1999.⁵⁴⁴² During that year, the imports gained another five percentage points of market share.⁵⁴⁴³ Nevertheless, because of the strong growth in demand, the domestic industry continued to perform profitably, although operating margins were below the levels of 1998.⁵⁴⁴⁴

There was not a further import surge in 2000, when import quantity and market share declined somewhat from 1999 levels. Imports did maintain a significant presence in the market in 2000, however. Import quantity and market penetration in 2000 were still both significantly above 1998 levels, not to mention those of earlier years; import quantity in 2000 was considerably more than twice the 1996 level and market penetration was nearly twice the 1996 level.⁵⁴⁴⁵

Imports maintained their pricing pressure as well in 2000. Average unit values of imports in 2000 increased only incrementally from their depressed levels of 1999, while the average unit values for the domestically-produced product declined further from 1999 to 2000.⁵⁴⁴⁶ Prices for both the domestically-produced and the imported rebar product on which the Commission collected data fluctuated within a fairly narrow range, with prices for the domestic product generally being slightly below the 1999 levels. Imports continued to undersell the domestically-produced product by margins of over 20 percent.⁵⁴⁴⁷

As was the case in 1999, factors in the market other than imports cannot explain why rebar pricing in 2000 continued to be at depressed levels. Demand for

⁵⁴³⁹ (original footnote) CR and PR, Table LONG-72.

⁵⁴⁴⁰ (original footnote) CR and PR, Table LONG-29.

⁵⁴⁴¹ (original footnote) Additionally, competition between domestic producers cannot be a cause for price declines of the magnitude observed. While cost differentials do exist among domestic producers, even the domestic producer with the lowest cost structure had per-unit COGS that was considerably above the average unit sales values of the imports. *See* Producers' Questionnaires. Given the importance of price in rebar purchasing decisions, the commodity nature of rebar and the magnitude of underselling by the imports, it is clear that price leadership was exerted by the imports, rather than any domestic producer.

⁵⁴⁴² (original footnote) INV-Y-212, Table LONG-ALT93.

⁵⁴⁴³ (original footnote) CR and PR, Table LONG-72.

⁵⁴⁴⁴ (original footnote) CR and PR, Table LONG-29.

⁵⁴⁴⁵ (original footnote) CR and PR, Tables LONG-7, LONG-72.

⁵⁴⁴⁶ (original footnote) CR and PR, Tables LONG-7, LONG-18.

⁵⁴⁴⁷ (original footnote) INV-Y-212, Table LONG-ALT93.

rebar continued to increase in 2000, although this increase was less than that of the preceding years.⁵⁴⁴⁸ Additionally, per unit COGS increased in 2000 from 1999 levels.⁵⁴⁴⁹ The combination of rising demand and rising costs should have led prices of domestically-produced rebar to increase in 2000. Instead, prices generally declined -- a result we conclude is attributable to the intense price-based competition from imported rebar.⁵⁴⁵⁰ This decline in prices led to the poor financial performance, most notably the negative operating margins discussed above.

The data for interim 2001 indicate a continuation of the trends observed during 2000. Imports continued to maintain their presence in the market. Although import average unit values in interim 2001 were above those for interim 2000, they were still far below those from 1996 to 1998. The average unit values for US shipments of domestically-produced rebar also remained depressed, notwithstanding increasing demand. Underselling by the imports persisted. Operating performance was poor and below the level of interim 2000."⁵⁴⁵¹

Claims and arguments of the parties

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

Analysis by the Panel

10.473 The Panel has considered the relevant section of the USITC Report for rebar and notes that, in determining causal link, the USITC did not conduct a coincidence analysis. As mentioned previously, the Panel considers that if a competent authority has not examined coincidence of trends, it must, in proving causation, provide a reasoned and adequate explanation why such an analysis was not undertaken as well as a compelling explanation establishing the existence of a causal link. We note that the USITC analysed the conditions of competition. Accordingly, we will now proceed to review the conditions of competition analysis undertaken by the USITC for this measure, with a view to determining whether the USITC provided such a compelling explanation.

10.474 The Panel considers that the facts before the USITC did not preclude a finding that "the increased imports put price pressure on domestic producers. This price pressure prevented domestic producers from fully achieving the benefits of cost reductions during certain portions of the period examined and from fully recovering increasing costs during others." In coming to this conclusion, we first examined average unit value data for imports and domestic products. The graph below, which has been generated using USITC data, indicates that imports undersold domestic products throughout the period of investigation and quite significantly so from 1999 onwards. This is consistent with the USITC's pricing trends findings.⁵⁴⁵²

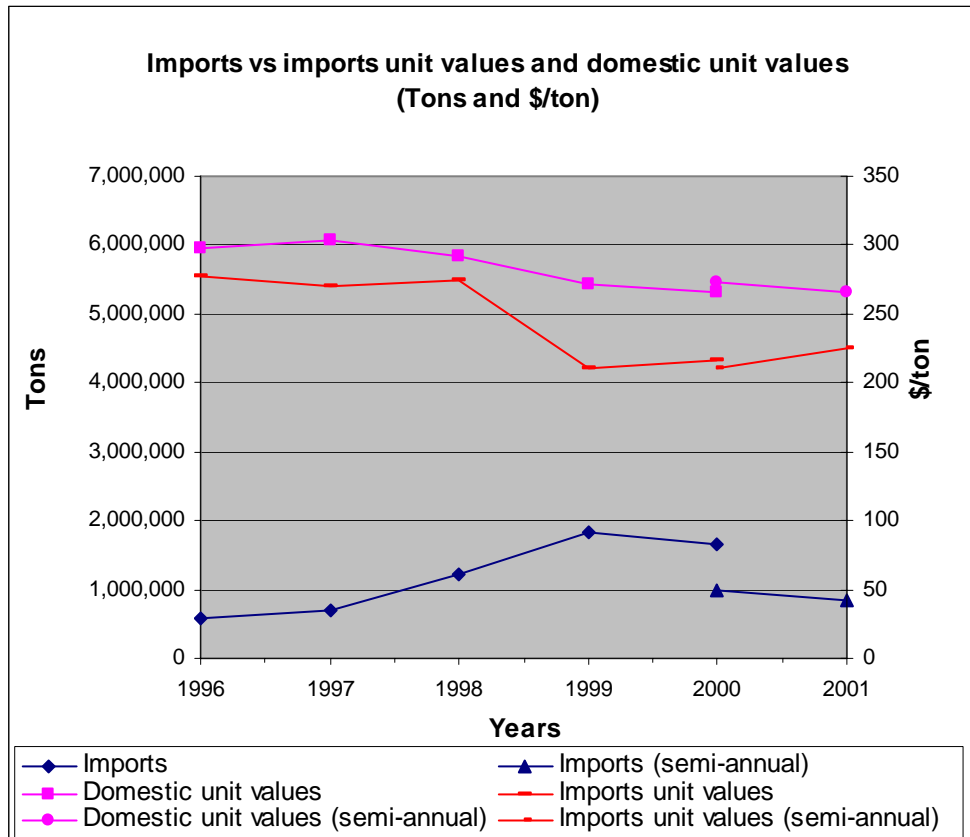
⁵⁴⁴⁸ (original footnote) CR and PR, Table LONG-72.

⁵⁴⁴⁹ (original footnote) CR and PR, Table LONG-29.

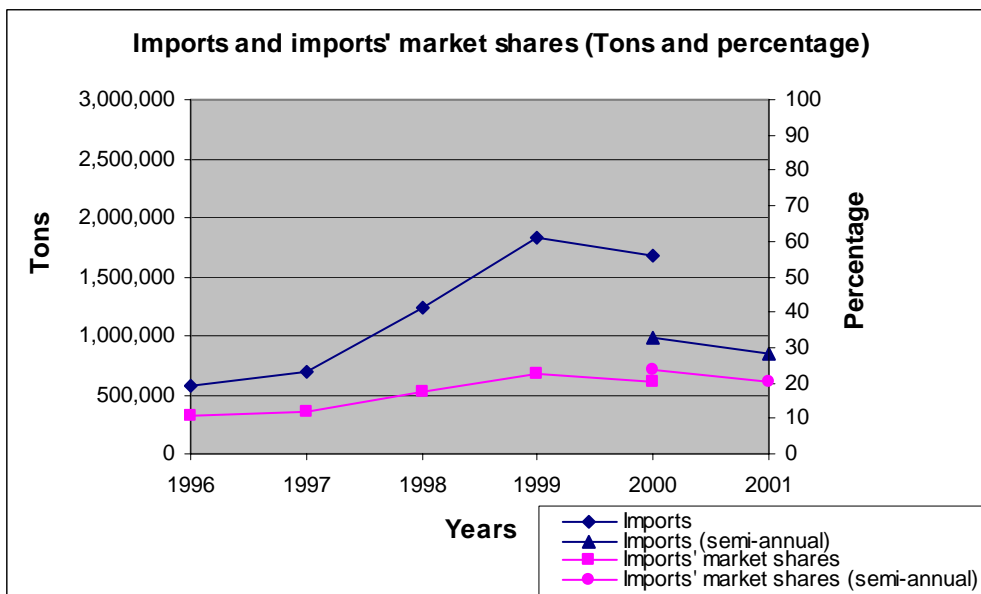
⁵⁴⁵⁰ (original footnote) Moreover, although the largest individual component of COGS – raw materials costs – declined from 1999 to 2000 on a per unit basis, this decline was still not as great as the per unit decline in average commercial sales values. CR and PR, Table LONG-29.

⁵⁴⁵¹ USITC Report, Vol. I, pp. 111-114.

⁵⁴⁵² The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-7 at LONG-11; Table LONG-18 at LONG-23.

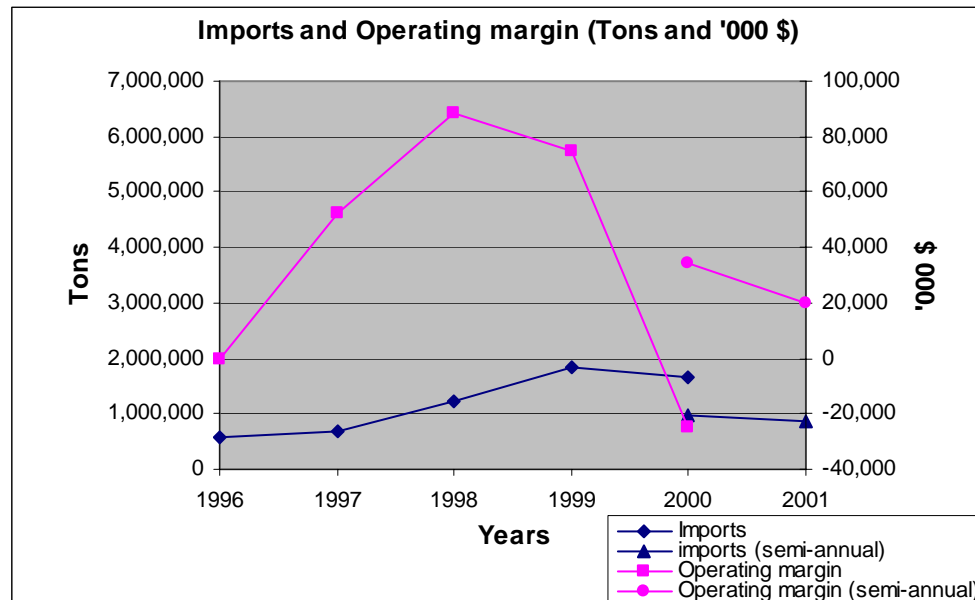


10.475 We also considered the import market share during the period of investigation. As is evident from the graph below, as imports increased from 1997 onwards, the import market share also progressively increased.⁵⁴⁵³



⁵⁴⁵³ The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-7 at LONG-11; Table LONG-72 at LONG-68; Table LONG-C-5.

10.476 In addition, the graph below illustrating import trends and trends in the operating margin seems to indicate that some coincidence between increases in imports from 1997 onwards and declining operating margin existed from 1998 onwards.⁵⁴⁵⁴



10.477 Taken together, it is our view that the above data supports the USITC finding that increased imports exerted downward pressure on domestic prices and that this, in turn, had an impact upon the financial performance of domestic producers. In our view, the USITC provided a compelling explanation indicating the existence of a causal link between increased imports and serious injury, subject, of course, to fulfilment of the non-attribution requirement. Therefore, we reject the complainants' claims and arguments in this regard.

(ii) *Non-attribution*

USITC findings

10.478 The USITC's finding reads as follows:

"In our discussion above, we have already considered and rejected several alternative causes advanced by the respondents to explain the condition of the domestic rebar industry. As discussed in the section on serious injury, the domestic industry's capacity increases cannot be deemed to be an alternative cause of injury because capacity increased far less than did US apparent consumption of rebar during the period examined; indeed, capacity utilization generally increased during the period examined. We have also discussed changes in input costs and demand and found that they cannot explain the changes in pricing that occurred during the period examined; if anything, these factors indicate that prices should have been stable to increasing

⁵⁴⁵⁴ The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-7 at LONG-11; Table LONG-29 at LONG-35; Table LONG-C-5.

during the latter portion of the period examined. Instead, because of competition from the increased imports, prices declined."⁵⁴⁵⁵

Factors considered by the USITC

Domestic capacity increases

Claims and arguments of the parties

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

Analysis by the Panel

10.480 The Panel agrees with the United States that the USITC dismissed this factor in its non-attribution analysis. In particular, during its causation analysis, the USITC stated that: "[T]he domestic industry's capacity increases cannot be deemed to be an alternative cause of injury because capacity increased far less than did US apparent consumption of rebar during the period examined; indeed, capacity utilization generally increased during the period examined." In addition, during its injury analysis, the USITC stated that: "Reported capacity also increased during each year of the period examined, rising from 7.6 million tons in 1996 to 9.7 million tons in 2000. Capacity was higher in interim 2001, when it was 4.8 million tons, than in interim 2000, when it was 4.7 million tons in 2000."⁵⁴⁵⁶ The increases in capacity, however, must be viewed in the context of the increases in demand for rebar during the period examined. The 26.6 percent increase in productive capacity between 1996 and 2000 was far smaller than the 48.1 percent increase in US apparent consumption over that period. Moreover, notwithstanding the overall increases in capacity, several firms that produce rebar have shuttered production facilities during the period examined.^{5457, 5458}

10.481 We consider that the USITC provided a reasoned and adequate explanation as to why domestic capacity increases were not a cause of serious injury. In the Panel's view, the complainants have not put forward a plausible alternative explanation as to why this factor was a cause of serious injury.

Changes in input costs

Claims and arguments of the parties

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

Analysis by the Panel

10.483 The USITC dismissed this factor as a possible cause of injury to the industry. In particular, during its analysis of the conditions of competition, the USITC stated that: "Changes in input costs also cannot explain the magnitude of the price decline. While there was a reduction in per unit COGS from 1998 to 1999, this reduction was less than the per unit decline in average sales values."⁵⁴⁵⁹ Further, it stated that: "Additionally, per unit COGS increased in 2000 from 1999 levels."⁵⁴⁶⁰ The

⁵⁴⁵⁵ USITC report, Vol. I, pp. 114-115.

⁵⁴⁵⁶ (original footnote) CR and PR, Table LONG-18.

⁵⁴⁵⁷ (original footnote) See Minimill 201 Coalition Posthearing Brief, vol. 3 at 5-6.

⁵⁴⁵⁸ USITC Report, Vol. I, p. 109.

⁵⁴⁵⁹ (original footnote) CR and PR, Table LONG-29.

⁵⁴⁶⁰ (original footnote) CR and PR, Table LONG-29.

combination of rising demand and rising costs should have led prices of domestically-produced rebar to increase in 2000. Instead, prices generally declined – a result we conclude is attributable to the intense price-based competition from imported rebar.^{5461, 5462} Finally, in its causation analysis, the USITC stated that: "We have also discussed changes in input costs... and found that they cannot explain the changes in pricing that occurred during the period examined; if anything, these factors indicate that prices should have been stable to increasing during the latter portion of the period examined. Instead, because of competition from the increased imports, prices declined."

10.484 The question remains as to whether the USITC was correct in discounting changes in input costs as a possible cause of injury without further analysis. It is evident from Table-LONG 29 that COGS increased quite significantly between 1999 and 2000. In addition, SG&A expenses increased significantly between 1998 and 2000.⁵⁴⁶³ Notably, the domestic industry's operating margin rose until 1998 and declined quite precipitously thereafter. In our view, at the least, the USITC should have explained why these increases in costs and expenses were not a cause of injury. It was not enough, in our view, to dismiss the effects of these increases on the mere basis that they could not account for domestic price declines.

Conclusions

10.485 In the Panel's view, the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of increases in COGS and SG&A expenses, contrary to the requirements of Article 4.2(b) of the Agreement on Safeguards. The Panel finds that, in failing to adequately analyse increases in COGS and SG&A, the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by these factors, together with other factors, was not attributed to increased imports.

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

10.486 As indicated above, the Panel found that, although the USITC did not explain why it did not undertake a coincidence analysis, it nonetheless provided a compelling explanation that indicated, leaving aside the issue of compliance with the non-attribution requirement, the existence of a causal link. However, we found that the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by increases in COGS and SG&A, together with other factors, was not attributed to increased imports. Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

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

⁵⁴⁶¹ (original footnote) Moreover, although the largest individual component of COGS – raw materials costs – declined from 1999 to 2000 on a per unit basis, this decline was still not as great as the per unit decline in average commercial sales values. CR and PR, Table LONG-29.

⁵⁴⁶² See para. 10.471.

⁵⁴⁶³ Even if SG&A expenses cannot be regarded as "input costs", we consider that such expenses should have been taken into account by the USITC.

(f) Welded pipe

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

10.489 We note that the complainants have not challenged the USITC's coincidence and conditions of competition analyses. Accordingly, we will proceed directly to a review of the USITC's non-attribution analysis.

(i) *Non-attribution*

USITC findings

10.490 The USITC's findings read as follows:

"We find that increased imports of welded pipe are a substantial cause of the threat of serious injury: that is, we find that serious injury – a "significant overall impairment in the position" of the domestic industry – due to imports is "clearly imminent," and that increased imports of welded pipe are an important cause, and a cause not less than any other cause, of the threat of serious injury to the domestic industry.

...

We also considered other possible causes of the current condition of the domestic industry, as well as respondents' arguments that no future threat of serious injury exists. Several respondents argued that increased domestic capacity had a negative impact on prices and therefore on the condition of the domestic industry.⁵⁴⁶⁴ The increase in capacity (1.5 million tons) was only modestly higher than the increase in domestic consumption of welded pipe (1.2 million tons) over the period examined. Thus, the increase was not inconsistent with the overall increase in consumption during the period examined – apparent US consumption increased by 73 percent of the amount of the increase in capacity. We do not view this differential as excessive or as contributing in more than a minor way to the condition of the industry in 2000 or interim 2001.

Joint Respondents argue that the declining profitability is explained by events pertaining to a significant domestic producer that raised the company's costs but are unrelated to imports.⁵⁴⁶⁵ While certain company costs appear to have increased, the main reason for the decline in the company's financial performance was the substantial drop in the unit value of company sales beginning in 1999.⁵⁴⁶⁶ As discussed above, this decline was largely the result of the substantial increased

⁵⁴⁶⁴ (original footnote) *See, e.g.,* Joint Respondents Prehearing Injury Brief on Welded Tubular Products Other Than OCTG at 45.

⁵⁴⁶⁵ (original footnote) Joint Respondents Prehearing Injury Brief on Welded Tubular Products Other Than OCTG at 14-15. Our discussion of this issue is framed in general terms to avoid referencing business proprietary information.

⁵⁴⁶⁶ (original footnote) OINV-Y-212.

imports. Moreover, excluding this company does not substantially alter the downward trend in industry profitability described earlier.

We considered whether the antidumping orders in place on some welded non-OCTG products from several countries reduce the current or likely imminent impact of imports. The orders cover only a limited number of welded pipe products and, of those, only imports from a limited number of countries. Moreover, the orders were issued between 1984 and 1989 and thus were in place before the start of the period examined.⁵⁴⁶⁷ They clearly did not preclude the surge in imports in 2000 and continued high level of imports in 2001, or even prevent a surge in imports from countries covered by the orders.⁵⁴⁶⁸ Given these increases despite the existence of the orders, these pre-existing orders do not provide a basis to conclude that imports would not continue to increase in the imminent future.⁵⁴⁶⁹

Several respondents argue that the industry is not threatened with serious injury because the market for large diameter line pipe has begun to surge and will continue to expand in the imminent future.⁵⁴⁷⁰ We agree with respondents that available information indicates that there has been a recent increase in demand for large diameter line pipe and that projections are for continued growth due to rising demand for pipeline projects. We also agree that rising demand tends to ameliorate the impact of a given volume of imports. However, large diameter line pipe is only a portion of this industry -- an estimated 20 to 30 percent of the overall welded product category.⁵⁴⁷¹ Indeed, even with a recent rise in large diameter line pipe demand, overall demand for covered welded tubular products has been relatively constant on a full-year basis since 1998, as well as between interim periods. Thus, we do not consider the likely increased demand for large diameter line pipe as eliminating the threat of serious injury.

For all of the reasons we have discussed, we conclude that increased imports pose a real and imminent threat of serious injury to the welded pipe industry."⁵⁴⁷²

⁵⁴⁶⁷ (original footnote) CR and PR at Table OVERVIEW-1.

⁵⁴⁶⁸ (original footnote) For example, imports from Thailand, which are covered by the orders, increased by 69,621 tons, or 248.2 percent, between 1998 and 2000 and undersold the domestic product by double digit margins in 2000 and the first half of 2001. Committee on Pipe and Tube Imports Posthearing Injury Brief at 19, exhibits 3, 5. Imports have also increased by significant amounts since 1998 from Korea (68,418 tons, or 19.5 percent), Taiwan (18,762 tons, or 40.1 percent), and Turkey (30,440 tons, or 317.9 percent). In the case of Korea, such imports undersold the domestic product by margins up to 8.8 percent in 2000 and the first half of 2001, and in the case of Taiwan and Turkey generally undersold the domestic product by double digit margins in 2000 and the first half of 2001 in quarters for which data were reported. Committee on Pipe and Tube Imports Posthearing Injury Brief at 15-17, 21-22.

⁵⁴⁶⁹ (original footnote) The pending antidumping investigation on welded non-alloy steel pipe from China is not a basis to conclude that imports will not increase. It would be speculative to attempt to determine the outcome of that investigation or its effect on any imports in the imminent future. The Commission made an affirmative determination in the preliminary phase of this investigation in July 2001, and made negative determinations in the other investigations considered at that time. *See Circular Welded Non-Alloy Steel Pipe From China, Indonesia, Malaysia, Romania, and South Africa*, Invs. Nos. 731-TA-943-947 (Preliminary), USITC Pub. 3439 (July 2001).

⁵⁴⁷⁰ (original footnote) *See, e.g.*, European Steel Tube Association Prehearing Injury Brief at 11-13.

⁵⁴⁷¹ (original footnote) CR at TUBULAR-55; PR at TUBULAR-43.

⁵⁴⁷² USITC Report, Vol. I, pp. 165-166.

Factors considered by the USITC

Domestic industry overcapacity

Claims and arguments of the parties

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

Analysis by the Panel

10.492 In the Panel's view, the USITC clearly considered that domestic industry overcapacity played some role in causing the injury that was suffered by the domestic industry. In particular, the USITC stated that: "The increase in capacity (1.5 million tons) was only modestly higher than the increase in domestic consumption of welded pipe (1.2 million tons) over the period examined. Thus, the increase was not inconsistent with the overall increase in consumption during the period examined – apparent US consumption increased by 73 percent of the amount of the increase in capacity. We do not view this differential as excessive or as contributing in more than a minor way to the condition of the industry in 2000 or interim 2001."

10.493 We note that the USITC identified and considered changes in domestic capacity during the period of investigation. In particular, the USITC stated that:

"Domestic capacity rose 22 percent during the period examined, from 6.86 million short tons in 1996 to 8.37 million short tons in 2000, with the largest one-year increase occurring in the middle of the period, between 1997 and 1998 (7.1 percent). Domestic capacity has increased by smaller amounts recently (by 4.4 percent between 1999 and 2000, and by 0.5 percent between interim 2000 and interim 2001).⁵⁴⁷³

...

Domestic welded pipe capacity increased during the period examined, and was at its highest level in 2000.⁵⁴⁷⁴ US capacity growth largely tracked the increase in apparent US consumption of welded pipe.⁵⁴⁷⁵ However, the recent decline in domestic production coupled with the increase in domestic capacity resulted in a significant decline in capacity utilization beginning in 1999 and continuing through 2000, and in interim 2001 compared to interim 2000. The capacity utilization rate for the industry fluctuated during the first three years of the period examined (66.7 percent in 1996, 71.9 percent in 1997, and 70.7 percent in 1998), and then declined sharply to 63.8

⁵⁴⁷³ (original footnote) CR and PR at TUBULAR-C-4.

⁵⁴⁷⁴ (original footnote) US producers' average capacity was 6.86 million short tons in 1996, and increased to 7.04 million short tons in 1997, 7.54 million short tons in 1998, 8.02 million short tons in 1999, and 8.38 million short tons in 2000. US producers' average capacity was 4.69 million short tons in interim 2001 (half year basis), virtually the same as in the same period of 2000 (4.67 million short tons). CR and PR at Table TUBULAR-C-4.

⁵⁴⁷⁵ (original footnote) The increase in average annual capacity of approximately 1.5 million short tons during the period examined was slightly above the 1.2 million short ton increase in domestic consumption that occurred during that period. We note that US producers maintain capacity to export, and that exports have accounted for as much as 475,000 tons of production during the period examined. CR and PR at Table TUBULAR-C-4.

percent in 1999 and 56.2 percent in 2000. This rate was 53.2 percent in interim 2001 as compared to 53.4 percent in the same period of 2000.⁵⁴⁷⁶

10.494 The Panel further notes that the USITC dismissed this factor in its non-attribution analysis on the basis that it was not regarded as contributing to injury suffered by the domestic industry in "more than a minor way." In our view, that a factor contributes to injury in no "more than a minor way" does not detract from the implicit acknowledgement that it, nevertheless, contributes to the injury. In our view, the need to separate and distinguish the effects of domestic industry over-capacity was particularly pertinent in this case given its apparent inter-relationship with a number of the injury factors referred to in Article 4.2(a), namely, domestic production and capacity utilization. This relationship was referred to by the USITC itself when it stated that: "However, the recent decline in domestic production coupled with the increase in domestic capacity resulted in a significant decline in capacity utilization beginning in 1999 and continuing through 2000, and in interim 2001 compared to interim 2000."

10.495 As a further point, the Panel notes that the apparent premise upon which the USITC dismissed domestic industry overcapacity in its non-attribution analysis was that: "The increase in capacity (1.5 million tons) was only modestly higher than the increase in domestic consumption of welded pipe (1.2 million tons) over the period examined." Even though the USITC dismissed this factor on the basis that it contributed to injury in no "more than a minor way", the Panel considers that the USITC implicitly acknowledged the importance of this factor. In particular, it noted that capacity increased by a not insubstantial amount of 22% during the period of investigation.

10.496 The Panel considers that in dismissing this factor in its non-attribution analysis, the USITC failed to meet its obligation to establish, through a reasoned and adequate explanation, that the injury caused by it, together with other factors, was properly distinguished and not attributed to increased imports. At the very least, the USITC should have specifically identified what it considered to be the "minor" contribution that domestic industry over-capacity played in causing serious injury to the industry.

Aberrational performance of one member of the industry

Claims and arguments of the parties

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

Analysis by the Panel

10.498 The Panel notes that the USITC addressed the aberrational performance of one member of the domestic industry in its Report. In particular, it stated that:

"Joint Respondents argue that the declining profitability is explained by events pertaining to a significant domestic producer that raised the company's costs but are unrelated to imports.⁵⁴⁷⁷ While certain company costs appear to have increased, the main reason for the decline in the company's financial performance was the

⁵⁴⁷⁶ (original footnote) CR and PR at Table TUBULAR-C-4.

⁵⁴⁷⁷ (original footnote) Joint Respondents Prehearing Injury Brief on Welded Tubular Products Other Than OCTG at 14-15. Our discussion of this issue is framed in general terms to avoid referencing business proprietary information.

substantial drop in the unit value of company sales beginning in 1999.⁵⁴⁷⁸ As discussed above, this decline was largely the result of the substantial increased imports. Moreover, excluding this company does not substantially alter the downward trend in industry profitability described earlier."

10.499 The Panel considers that the USITC's decision to dismiss the aberrational performance of one member of the domestic industry in its non-attribution analysis was not adequately reasoned. The USITC states that the "main" reason for the decline in the company's financial performance was the drop in units sales caused "largely" by imports. In our view, words such as "main" and "largely" indicate subjective judgement on the part of the USITC, which should have been the subject of further explanation. We believe that the USITC should have identified and considered possible reasons other than the asserted "main" one for the company's decline, which apparently were identified in the Joint Respondents Prehearing Injury Brief for welded pipe.⁵⁴⁷⁹ In addition, we note that the USITC stated that excluding the poor performer from the analysis would not have "substantially" affected the downward trend in profitability. By implication, the exclusion had some effect, albeit not substantial. In the Panel's view, this effect should have been identified, evaluated and explained.

Conclusions

10.500 The Panel considers that, with respect to welded pipe, the USITC failed to comply with its non-attribution obligation contained in the second sentence of Article 4.2(b). In particular, we consider that the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of factors other than increased imports that were causing injury to the domestic industry. This, to us, is clear from the fact that the USITC dismissed a number of factors (namely, domestic industry overcapacity and aberrational performance of one member of the industry) in its non-attribution analysis even though it acknowledged that those factors were causing injury to the industry.

10.501 We thus find that the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by other factors such as domestic industry overcapacity and aberrational performance of one member of the industry, together with other factors, was not attributed to increased imports.

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

10.502 In the Panel's view, the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of domestic industry overcapacity and the aberrational performance of one member of the industry, contrary to the requirements of Article 4.2(b) of the Agreement on Safeguards. The USITC, therefore, failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by these factors, together with other factors, was not attributed to increased imports. Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

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

⁵⁴⁷⁸ (original footnote) INV-Y-212.

⁵⁴⁷⁹ See the complainants' Common Exhibit CC-78.

(g) FFTJ

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

(i) *Coincidence and conditions of competition*

USITC findings

10.505 The USITC's findings read as follows:

"We find that the increased imports of fittings, flanges, and tool joints are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of fittings, flanges, and tool joints are a substantial cause of serious injury to the domestic industry.

a. Conditions of Competition

Pipe connection products are diverse (flanges, butt-weld fittings, other fittings, including couplings and nipples, and tool joints), but in general are used to join or cap pipe. Many of the products are commodity grade, produced to standards and specifications established by standards and testing bodies such as ASTM, API, and AWWA. Fittings and flanges are often distributed with other tubular products, and purchasers stated that demand for them is driven by utilities, automotive products, and import competition in downstream markets.⁵⁴⁸⁰ Demand for tool joints is connected with OCTG demand, since tool joints are used in manufacturing finished drill pipe.⁵⁴⁸¹ Purchasers of fittings and flanges reported that imported and domestically produced fittings and flanges produced to the same grade and specification are used in the same applications.⁵⁴⁸² Once the standards are met, price and cost competitiveness often become the most important factor.⁵⁴⁸³

Apparent US consumption of fittings and flanges increased by 9.7 percent between 1996 and 2000, with most of this increase occurring between 1996 and 1997. Demand was less volatile thereafter, until interim 2001, when it rose by 10.4 percent over interim 2000.⁵⁴⁸⁴

Domestic producers' capacity increased by 7.4 percent over the period examined, somewhat less than the growth rate in consumption. Domestic capacity reached its highest level of the period examined in 1999, and declined by 5.2 percent in 2000, and by an additional 4.6 percent in interim 2001 compared to interim 2000.⁵⁴⁸⁵ As indicated above, Trinity Fitting Group, a domestic producer, has closed plants in

⁵⁴⁸⁰ (original footnote) CR at TUBULAR-55; PR at TUBULAR-43.

⁵⁴⁸¹ (original footnote) CR at TUBULAR-55; PR at TUBULAR-43.

⁵⁴⁸² (original footnote) CR at TUBULAR-62; PR at TUBULAR-50.

⁵⁴⁸³ (original footnote) CR at TUBULAR-59; PR at TUBULAR-47; Tr. at 2514 (Berger); Tr. at 2516 (Zidell); Tr. at 2524 (Keilers).

⁵⁴⁸⁴ (original footnote) CR and PR at Table TUBULAR-C-6.

⁵⁴⁸⁵ (original footnote) CR and PR at Table TUBULAR-C-6.

Kentucky, Arkansas, Mississippi, and in early 2001, Texas, effectively exiting the flange business. Domestic production fluctuated during the period examined, and was 5.3 percent lower in 2000 than in 1996; domestic production was 11.6 percent lower in interim 2001.⁵⁴⁸⁶

Foreign producers' reported capacity increased throughout the period examined, and was 19.5 percent higher in 2000 than in 1996. It rose in interim 2001 compared to interim 2000. Foreign producers' production, on the other hand, fluctuated, and was higher in 2000 than in 1996, and higher in interim 2001 than in interim 2000. Foreign producers became more export-oriented during the period examined. Their share of total shipments exported also fluctuated, but was higher in 2000 at 60.5 percent (60.6 percent in interim 2001) than at the beginning of the period examined (58.9 percent in 1996). The share shipped to the US market also fluctuated but was at its highest level at the end of the period examined, 19.0 percent in 2000 and 19.2 percent in interim 2001. Foreign producers' capacity utilization rate also fluctuated during the period examined, and was 58.4 percent in 2000 and 70.4 percent in interim 2001⁵⁴⁸⁷, indicating available capacity for additional production.

b. Analysis of Factors

As indicated above, imports of fittings and flanges have increased in both actual terms and relative to domestic production. Imports increased in actual terms by 30.8 percent (as measured in quantity) during the course of the investigation, and by 15.3 percent between 1999 and 2000. Imports were 32.1 percent higher in interim 2001 than in the same period of 2000. Imports increased in each year of the period examined and were at their highest level of the period in 2000.⁵⁴⁸⁸

Imports have taken an increasingly larger share of the domestic market each year since 1997, with the largest increase occurring in 2000. The market share captured by imports also increased sharply in interim 2001 as compared to the same period of 2000. The share of the domestic market held by imports was 35.0 percent in 1996 and fell to 32.9 percent in 1997 and then rose to 35.5 percent in 1998, 37.7 percent in 1999, and 41.7 percent in 2000. The share of the market held by imports was 46.7 percent in interim 2001, well above the market share of 39.0 percent in the same period of 2000.⁵⁴⁸⁹ The steady increase in volume of imports, and the increase in import market share, especially since 1997, coincided with the deterioration of the condition of the domestic industry described above.

Information on prices was mixed. The AUVs of domestic shipments fluctuated from 1996 to 1998, then fell somewhat from 1998 to 2000; they were lower in interim 2001 compared to interim 2000. The AUVs of imports fluctuated but increased

⁵⁴⁸⁶ (original footnote) CR and PR at Table TUBULAR-C-6.

⁵⁴⁸⁷ (original footnote) CR and PR at Table TUBULAR-36.

⁵⁴⁸⁸ (original footnote) The ratio of imports to domestic production also increased significantly during the period examined, from 50.5 percent in 1996 to 69.7 percent in 2000, and was at its highest full-year level in 2000. This was significantly above the level of 55.3 percent in 1998 and 63.0 percent in 1999. The ratio in interim 2001 (88.8 percent) was substantially above the level of the same period of 2000 (59.4 percent). CR and PR at Table TUBULAR-15.

⁵⁴⁸⁹ (original footnote) CR and PR at Table TUBULAR-C-6.

overall during the period. Import AUVs were generally above domestic AUVs.⁵⁴⁹⁰ By contrast, pricing information gathered by the Commission on a butt weld fitting product⁵⁴⁹¹ showed that imports from non-NAFTA sources and Mexico (there were no reported imports from Canada) undersold the domestic product in each quarterly period for which data were provided. The data further showed that the margin of underselling was at its highest level in 2000 and January-June 2001. Non-NAFTA imports have been priced at more than 20 percent below the domestic product since the fourth quarter of 1999.⁵⁴⁹² Domestic prices for the butt-weld product fell slightly during the period, before rising in the final quarter.⁵⁴⁹³ Import prices for this product fell significantly over the period, particularly since 1998.

Purchasers of tubular products indicated that price was a key factor in their purchasing decisions, behind only quality.⁵⁴⁹⁴ Moreover, nearly all purchasers indicated that imported and domestic fittings and flanges made to the same grade and specification may be used in the same applications. We find that such broad interchangeability indicates that price plays an important role in the market. In light of these facts, we find the product-specific evidence of underselling to be significant.

In sum, the steady and large increase in imports, which captured an increasing share of the US market, led to erosions in such industry indicators as production, capacity utilization, shipments, and employment indicators. Lower production and shipments meant fewer sales over which to spread fixed costs, contributing to increased unit costs. The increasing presence of imports, in at least some cases at substantial underselling margins, prevented the industry from recouping increased costs through higher prices; instead, prices fell somewhat over the period. Accordingly, we find that imports are a substantial cause of serious injury.⁵⁴⁹⁵

Respondents argued that none of the injury data in the Commission prehearing staff report can be correlated to import volumes. They allege that when import volumes increased by the greatest margin, domestic industry operating income increased by the greatest margin.⁵⁴⁹⁶ The evidence in the record does not support respondents' contentions. Imports increased by the greatest margin of the period examined in 2000

⁵⁴⁹⁰ (original footnote) We are cautious of placing undue weight on AUV information, as it may be influenced by issues of product mix.

⁵⁴⁹¹ (original footnote) Carbon steel butt-weld fitting, 6 inch nominal diameter, 90 degree elbow, long radius, standard weight, meeting ASTM A-234, grade WPB or equivalent specification.

⁵⁴⁹² (original footnote) CR and PR at Table TUBULAR-61.

⁵⁴⁹³ (original footnote) We observe that the domestic producers' attempt to raise prices in that final quarter, even in a period of rising demand, resulted in a substantial loss of volume.

⁵⁴⁹⁴ (original footnote) CR and PR at Table TUBULAR-53. Domestic producers of fittings and flanges and a distributor of fittings testified that price was an important consideration in customer purchasing decisions. Tr. at 2516 (Zidell); Tr. at 2518 (Graham); Tr. at 2520 (Ketchum); Tr. at 2523 (Bernobich).

⁵⁴⁹⁵ (original footnote) Domestic producers cited increased imports as the cause of injury to the domestic industry. In the questionnaire sent to fittings producers, the Commission asked recipients to identify the factors, from a list of 13, including imports, that are adversely impacting the domestic industry. Recipients were given the option of identifying more than one factor. Of those responding, 16 producers identified imports, and one identified the general economic downturn. No other factors were identified. Persons testifying at the public hearing also cited imports. One company official asserted that declining sales volumes and profits caused by imports have forced his firm to shelve plans for capital investment, severely impairing the firm's competitiveness and efficiency. Tr. at 2517 (Zidell).

⁵⁴⁹⁶ (original footnote) Bebitz et al. posthearing brief at 11-17.

(15.3 percent), and the domestic industry operated at a loss that year, its worst year of the period examined. This occurred notwithstanding a 4.3 percent increase in apparent US consumption of fittings and related products that year.⁵⁴⁹⁷ While it is true that industry profit margins also fell sharply in 1999 when the quantity of imports increased by only a small amount (0.3 percent), the unit value of imports fell that year by 7.1 percent, domestic consumption fell by 5.5 percent, and the share of the market held by imports that year increased to 37.7 percent from 35.5 percent in 1998.⁵⁴⁹⁸

Respondents also contend that segments of the market are wholly or partially closed to imports due to Approved Manufacturers' Lists.⁵⁴⁹⁹ However, it is questionable how much, if any, impact that such lists have on limiting import competition in fittings and flanges. Domestic fittings and flanges producers who appeared at the Commission's injury hearing testified that approved manufacturer lists have been expanded to include many foreign producers of fittings and flanges, and approved lists of butt-weld pipe fittings suppliers include firms in Italy, Thailand, Japan, the United Kingdom, Austria, France, Germany, Canada, and Mexico.⁵⁵⁰⁰ More generally, approved manufacturer lists do not appear to have been an insurmountable hurdle to imports entering the US market, as they increased by over 30 percent from 1996 to 2000, and by another 32 percent between interim 2000 and 2001.⁵⁵⁰¹

Claims and arguments of the parties

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

Analysis by the Panel

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

10.508 In particular, we note that USITC found that:

"Imports have taken an increasingly larger share of the domestic market each year since 1997, with the largest increase occurring in 2000. The market share captured by imports also increased sharply in interim 2001 as compared to the same period of 2000. The share of the domestic market held by imports was 35.0 percent in 1996 and fell to 32.9 percent in 1997 and then rose to 35.5 percent in 1998, 37.7 percent in 1999, and 41.7 percent in 2000. The share of the market held by imports was 46.7 percent in interim 2001, well above the market share of 39.0 percent in the same period of 2000.⁵⁵⁰² The steady increase in volume of imports, and the increase in import market share, especially since 1997, coincided with the deterioration of the condition of the domestic industry described above."⁵⁵⁰³

⁵⁴⁹⁷ (original footnote) CR and PR at Table TUBULAR-C-6.

⁵⁴⁹⁸ (original footnote) CR and PR at Table TUBULAR-C-6.

⁵⁴⁹⁹ (original footnote) Bebitz et al. Posthearing Injury Brief at 11-17.

⁵⁵⁰⁰ (original footnote) Tr. at 2516-17 (Zidell); at 2522-23 (Bernovich).

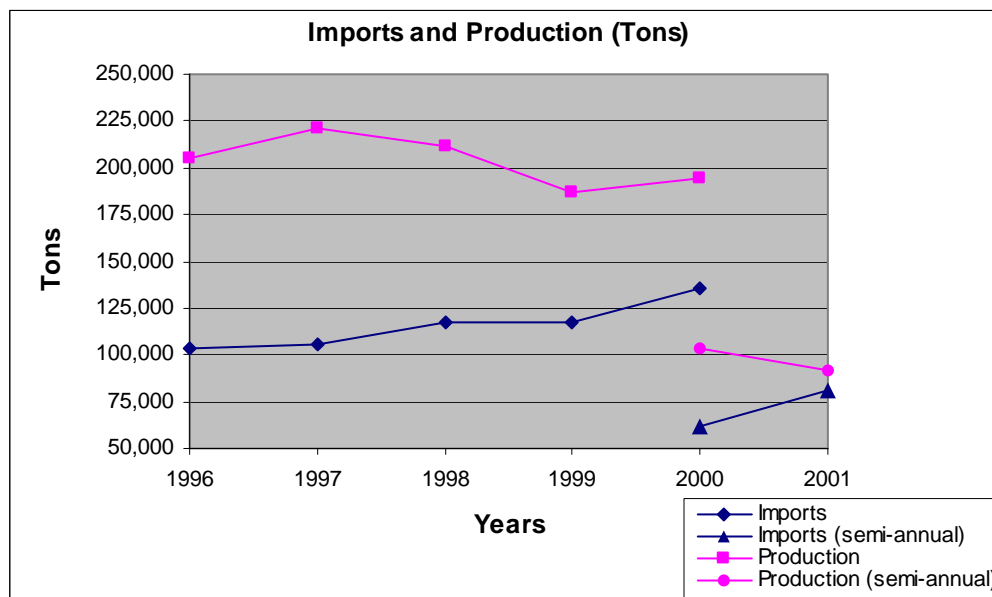
⁵⁵⁰¹ USITC Report, Vol. I, pp. 174-177.

⁵⁵⁰² (original footnote) CR and PR at Table TUBULAR-C-6.

⁵⁵⁰³ See para. 10.505.

10.509 The Panel recalls that, when examined, coincidence needs to be established between the movements or trends in imports and the movements or trends in injury factors. The Panel has considered coincidence between a number of the injury factors mentioned in Article 4.2(a), including those referred to by the USITC, and imports on the basis of facts that were available to the USITC in making its determination.

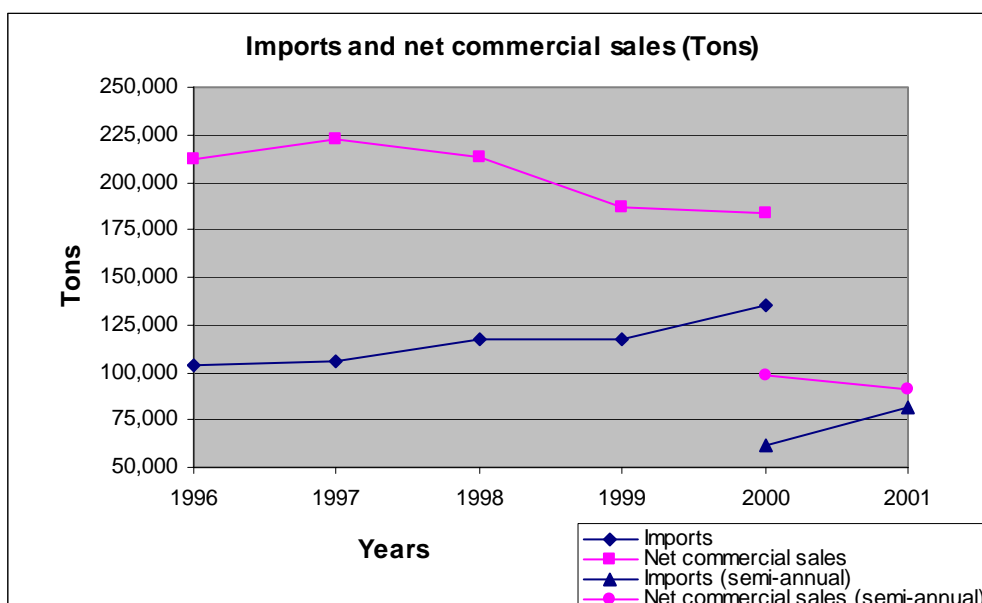
10.510 First, the Panel considers that coincidence does appear to exist between upward trends in imports and downward trends in production for the duration of the period of investigation.⁵⁵⁰⁴



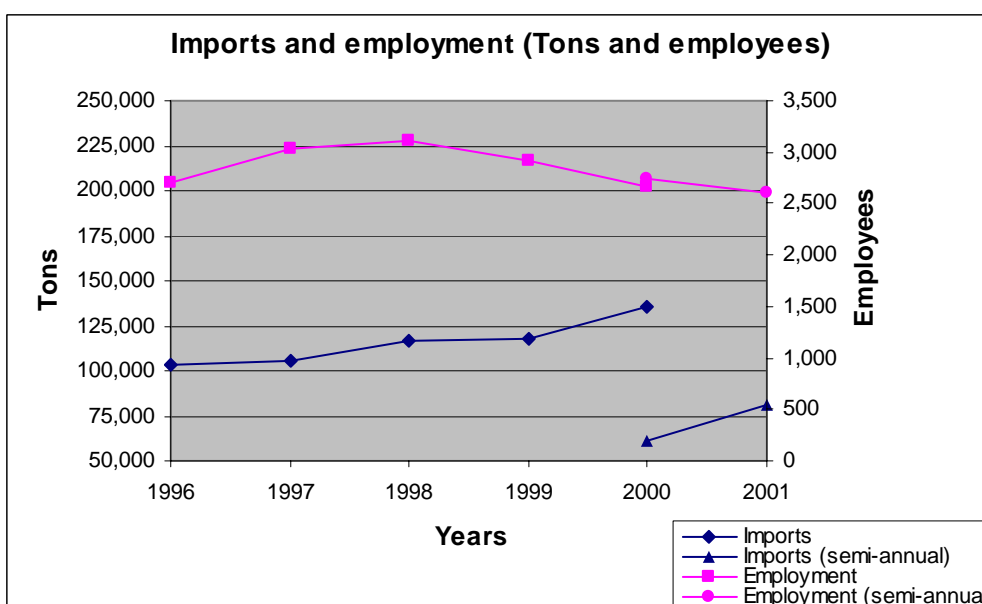
10.511 With respect to the relationship between increased imports and net commercial sales, the Panel again considers that coincidence does appear to exist between upward trends in imports and downward trends in net commercial sales during the period of investigation.⁵⁵⁰⁵

⁵⁵⁰⁴ The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-14 at TUBULAR-17; Table TUBULAR-C-6.

⁵⁵⁰⁵ The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-20 at TUBULAR-24; Table TUBULAR-C-6.



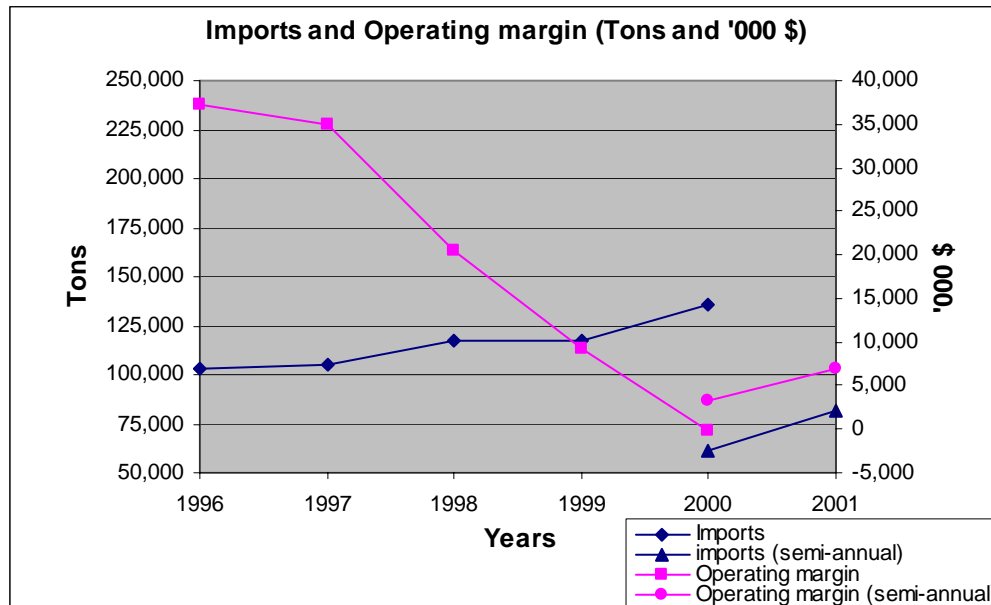
10.512 Similarly, the Panel considers that coincidence does appear to exist between upward trends in imports and overall downward trends in employment during the period of investigation.⁵⁵⁰⁶



10.513 The Panel also considers that coincidence does appear to exist between upward trends in imports and downward trends in operating margin during the period of investigation. More particularly, the level of operating margin dropped quite precipitously from 1997 onwards as import

⁵⁵⁰⁶ The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-14 at TUBULAR-17; Table TUBULAR-C-6.

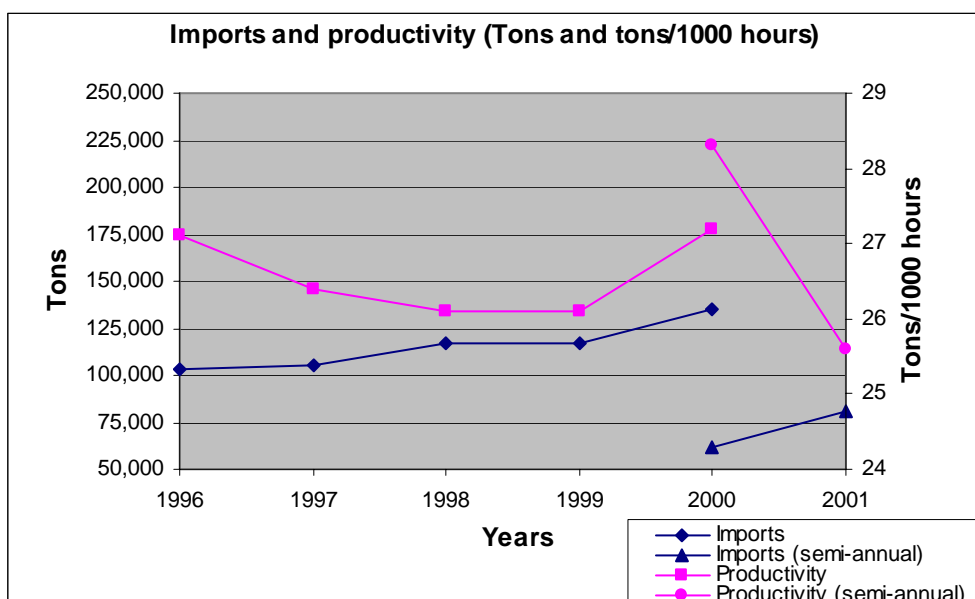
levels started to rise. In this regard, the Panel does not consider that rising operating margin during interim 2001, which was accompanied by rising imports, detracts from our conclusion.⁵⁵⁰⁷



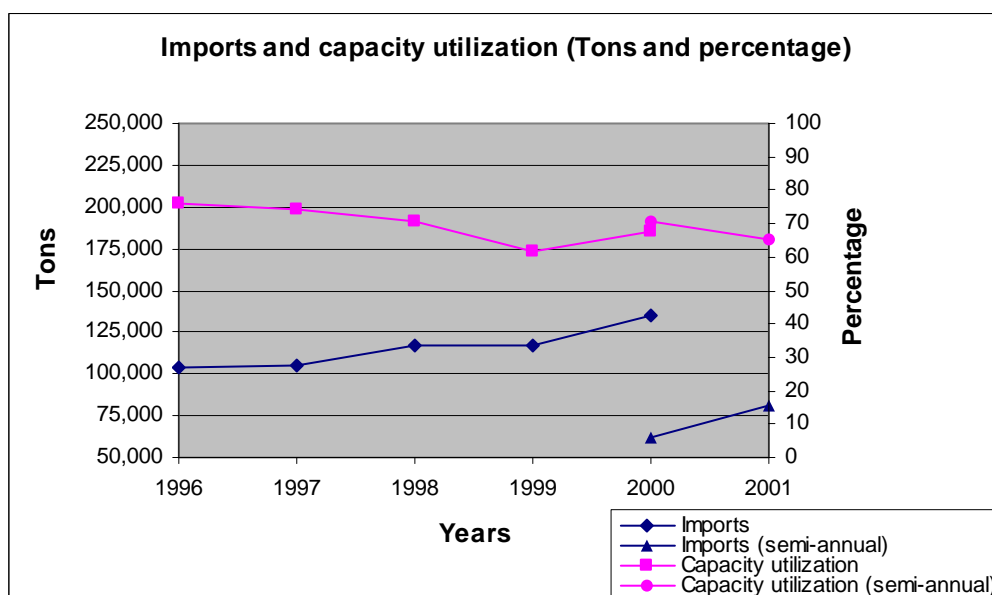
10.514 The Panel does not discern coincidence between productivity trends and imports trends. While it is true that coincidence can be discerned at the very end of the period of investigation when productivity declined quite significantly and imports increased, the Panel considers that the trends during the rest of the period of investigation do not demonstrate any coincidence. In particular, between 1997 and 1999 when imports started to rise, productivity levels remained more or less unchanged. From 1999 until 2000, as import levels increased further, productivity also increased.⁵⁵⁰⁸

⁵⁵⁰⁷ The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-20 at TUBULAR-24; Table TUBULAR-C-6.

⁵⁵⁰⁸ The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-14 at TUBULAR-17; Table TUBULAR-C-6.



10.515 The Panel considers that coincidence does appear to exist between upward trends in imports and downward trends in capacity utilization during the period of investigation. More particularly, as import levels started to rise from 1997 onwards, capacity utilization also declined.⁵⁵⁰⁹



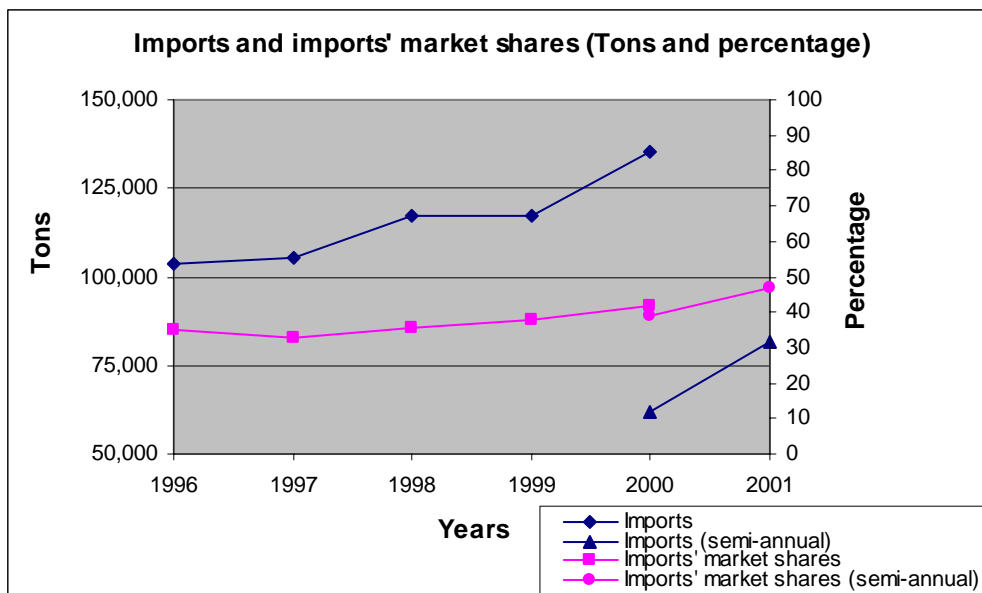
Conclusions

10.516 On the basis of the foregoing, the Panel concludes that, overall, clear coincidence exists between the upward trend in imports and the downward trend in the injury factors, except for productivity. Accordingly, we consider that the USITC was justified in concluding that: "The steady increase in volume of imports, and the increase in import market share, especially since 1997,

⁵⁵⁰⁹ The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-14 at TUBULAR-17; Table TUBULAR-C-6.

coincided with the deterioration of the condition of the domestic industry." We note, however, that the USITC did not provide a reasoned and adequate explanation of how the facts support the finding that that coincidence existed. Indeed, apart from the quoted sentence from the USITC Report (at paragraph 10.508), we cannot find anything further in the USITC Report that demonstrates that movements in imports coincided with movements in injury factors. Given that the USITC failed to provide a reasoned and adequate explanation that demonstrated the existence of coincidence between movements in imports and movements in injury factors, it was for the USITC to provide a compelling explanation as to why a causal link was considered, nevertheless, to exist. We proceed now to the USITC's analysis of the conditions of competition for FFTJ.

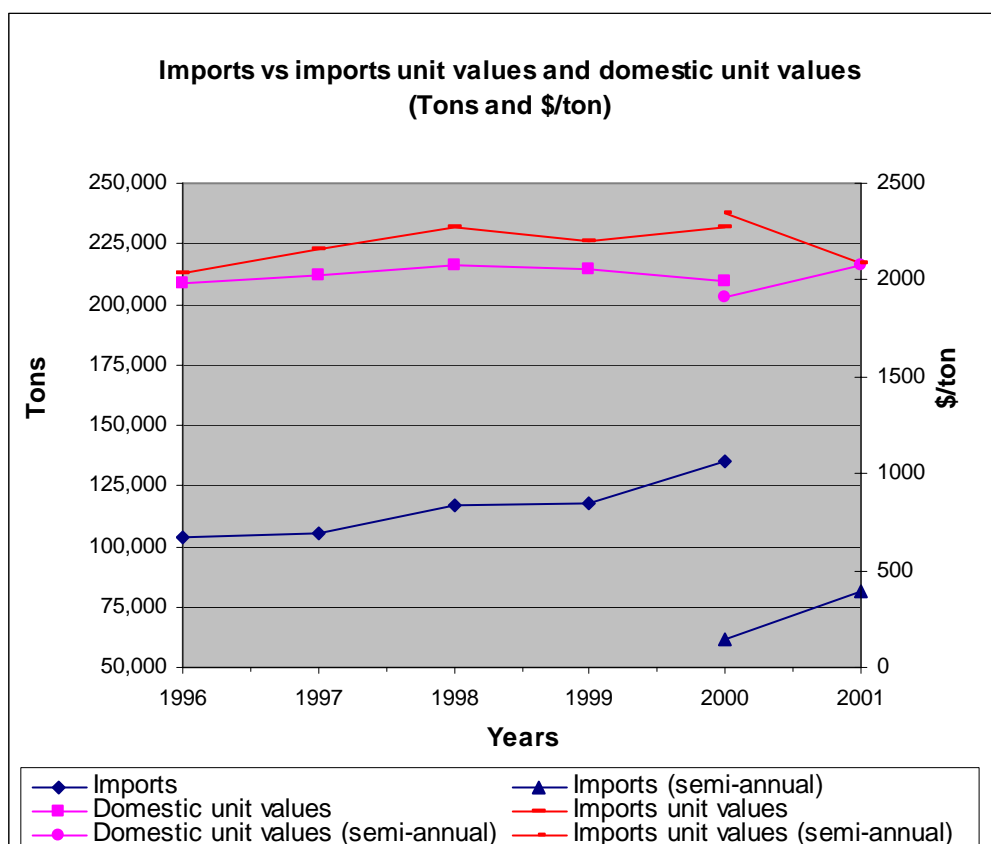
10.517 The Panel considers that the following observations made by the USITC are seminal to its conditions of competition analysis. First, the USITC stated that "[i]mports have taken an increasingly larger share of the domestic market each year since 1997". We agree with this observation on the basis of the graph below, which has been generated using USITC data.⁵⁵¹⁰



10.518 Secondly, the USITC observed that "Import AUVs were generally above domestic AUVs. By contrast, pricing information gathered by the Commission on a butt weld fitting product showed that imports from non-NAFTA sources and Mexico (there were no reported imports from Canada) undersold the domestic product in each quarterly period for which data were provided." We also agree with the USITC's observation that import average unit values were generally above domestic average unit values on the basis of the graph below, which, again, has been generated using USITC data.⁵⁵¹¹

⁵⁵¹⁰ The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-45 at TUBULAR-38; Table TUBULAR-C-6.

⁵⁵¹¹ The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-14 at TUBULAR-17; Table TUBULAR-C-6.

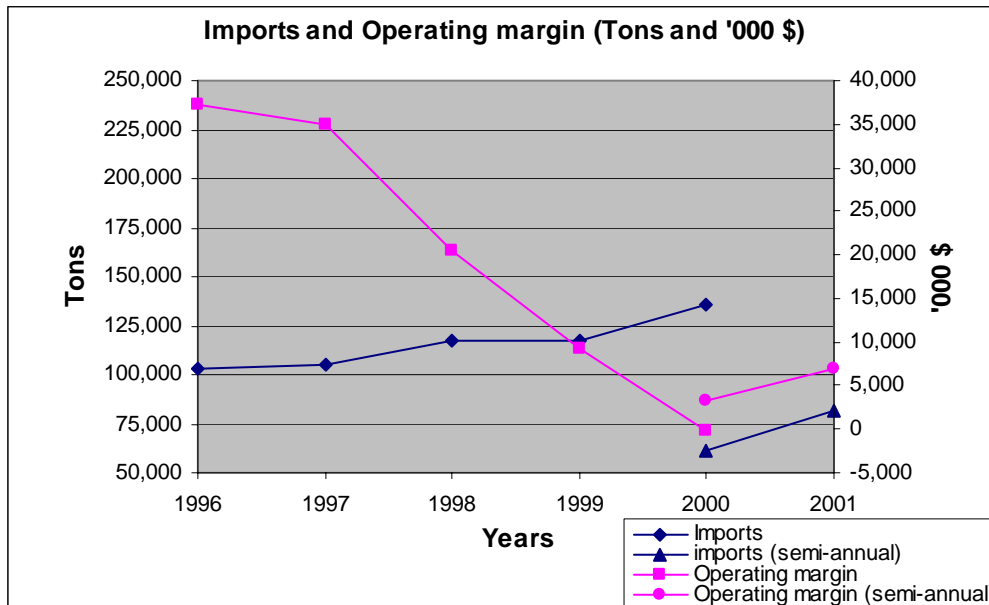


10.519 We note that the USITC questioned the relevance of average unit values in the context of its conditions of competition analysis, stating that: "We are cautious of placing undue weight on AUV information, as it may be influenced by issues of product mix." While we consider that the USITC should have provided a more detailed explanation of why it so readily dismissed such data, we do not necessarily consider that the USITC was wrong to rely upon data for the "butt weld fitting product" to the exclusion of the average unit value data. Indeed, at page TUBULAR-54 of Volume II of the USITC Report, it is stated that this product, otherwise referred to as "Product 22", is a "high volume" fitting product. This suggests to us that Product 22 was a reasonably representative basis for the USITC's conditions of competition analysis. We also agree with the USITC's observation that "pricing information gathered by the Commission on a butt weld fitting product showed that imports ... undersold the domestic product in each quarterly period for which data were provided." This much is evident from Table TUBULAR-61.⁵⁵¹²

10.520 Finally, we note that the USITC found "the product-specific evidence of underselling to be significant" and concluded that "[t]he increasing presence of imports, in at least some cases at substantial underselling margins, prevented the industry from recouping increased costs through higher prices; instead, prices fell somewhat over the period. Accordingly, we find that imports are a substantial cause of serious injury." As noted above, there was evidence of import underselling for Product 22, which we consider to be sufficiently representative to have formed the basis of the USITC's conditions of competition analysis. We find that the existence of underselling together with the increasing level (and market share) of imports, as evidenced above in relation to our review of the

⁵⁵¹² USITC Report, Vol. II, TUBULAR-61.

USITC's coincidence analysis, coincided with the decline in the situation of the domestic industry and tends to support the USITC finding above.⁵⁵¹³



10.521 Therefore, on the basis of the foregoing, the Panel concludes that the USITC provided a compelling explanation that indicated, subject to the fulfilment of the non-attribution requirement, that a causal link existed between increased imports and serious injury.

(ii) *Non-attribution*

USITC findings

10.522 The USITC's findings read as follows:

"Respondents also alleged that causes other than imports were responsible for any injury experienced by the domestic industry. First, respondents assert that the industry's performance is related to factors such as the business cycle in the oil and gas industry.⁵⁵¹⁴ A certain portion of domestic production is used for oil- and gas-related purposes and thus would be affected by market dynamics in that sector. However, to the extent that the industry's performance is related to the business cycle in the oil and gas industry, this should mean that the industry's financial performance should have been strong in 2000 and into 2001 because demand for OCTG and other oil and gas related products was very strong during that period. In fact, consumption of fittings and flanges was 4.3 percent higher in 2000 than in 1999, and was 10.4 percent higher in interim 2001 than in interim 2000. However, the financial performance of the fittings industry was at its lowest level in 2000, and the profit

⁵⁵¹³ The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-20 at TUBULAR-24; Table TUBULAR-C-6.

⁵⁵¹⁴ (original footnote) Joint Respondents Prehearing Injury Brief on Product 22, Carbon Steel Flanges, Fittings, and Tool Joints, at 49.

level in interim 2001, while positive, remained well below the level of earlier years in the period examined on an annualized basis.⁵⁵¹⁵

Respondents also claim that the domestic industry's capacity expansion and intra-industry price competition led to injury.⁵⁵¹⁶ The industry did add capacity over the period examined, but at a rate less than the increase in apparent consumption.⁵⁵¹⁷ Thus, the increase in capacity would not be expected to place substantial pressure on domestic prices. Nor have respondents identified what has changed over the period examined such that competition among domestic producers alone would turn a solidly profitable industry into one experiencing operating losses.

Respondents allege that the decreasing profitability of the domestic has resulted from industry facilities that are inefficient or outdated, and that domestic producers are unable to obtain sufficient forgings used in domestic production.⁵⁵¹⁸ These allegations are not supported by record information.

Respondents also claim that the industry suffered from a shortage of qualified workers.⁵⁵¹⁹ While a few producers noted worker shortages at certain times, the claim of a worker shortage is inconsistent with the fact that the domestic industry reduced its production workers by 6 percent from 1998 to 1999, another 8.7 percent from 1999 to 2000, and by 4.5 percent between interim 2000 and interim 2001. These reductions coincided with reduced industry production, shipments, and market share, as imports increased.

Finally, respondents claim that purchaser consolidation explains any negative price effects experienced by the industry.⁵⁵²⁰ In support, respondents cite one domestic producer who indicated that consolidation had negatively impacted price levels, but also had the benefit of reducing shipping costs. In general, purchaser consolidation would be expected to place some pressure on domestic prices. However, any consolidation would not explain the reduction in domestic production, shipments, employment, and other non-price indicators that occurred during the period examined.

In summary, we find that the increase in imports of fittings is an important cause of the serious injury to the domestic fittings industry and not less important than any other cause, and therefore have made an affirmative determination."⁵⁵²¹

⁵⁵¹⁵ (original footnote) CR and PR at Table TUBULAR-C-6.

⁵⁵¹⁶ (original footnote) Joint Respondents Prehearing Injury Brief on Product 22, Carbon Steel Flanges, Fittings, and Tool Joints, at 53, 59.

⁵⁵¹⁷ (original footnote) CR and PR at Table TUBULAR-C-6.

⁵⁵¹⁸ (original footnote) Joint Respondents Prehearing Injury Brief on Product 22, Carbon Steel Flanges, Fittings, and Tool Joints, at 51, 53.

⁵⁵¹⁹ (original footnote) Joint Respondents Prehearing Injury Brief on Product 22, Carbon Steel Flanges, Fittings, and Tool Joints, at 58.

⁵⁵²⁰ (original footnote) Joint Respondents Prehearing Injury Brief on Product 22, Carbon Steel Flanges, Fittings, and Tool Joints, at 52.

⁵⁵²¹ USITC Report, Vol. I, pp. 177-178

Factors considered by the USITC

Increased capacity

Claims and arguments of the parties

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

Analysis by the Panel

10.524 The Panel considers that the USITC acknowledged that domestic capacity increases played a role in causing the injury that was suffered by the domestic industry. In particular, the USITC stated that: "Thus, the increase in capacity would not be expected to place substantial pressure on domestic prices." In our view, this statement implies that increases in capacity would be expected to place some pressure on domestic prices, even if not "substantial".

10.525 That the USITC considered pricing to be important is evident from the following statement contained in its analysis of the conditions of competition for FFTJ:

"Purchasers of tubular products indicated that price was a key factor in their purchasing decisions, behind only quality.⁵⁵²² Moreover, nearly all purchasers indicated that imported and domestic fittings and flanges made to the same grade and specification may be used in the same applications. We find that such broad interchangeability indicates that price plays an important role in the market."⁵⁵²³

10.526 In addition, in the same section of its report, the USITC stated that:

"The increasing presence of imports, in at least some cases at substantial underselling margins, prevented the industry from recouping increased costs through higher prices; instead, prices fell somewhat over the period. Accordingly, we find that imports are a substantial cause of serious injury."⁵⁵²⁴⁵⁵²⁵

10.527 It is clear to the Panel from the foregoing that the USITC considered that downward pressure on prices played an important role in causing the injury that was suffered by the domestic industry. Accordingly, it can be deduced from the foregoing that the USITC conceded that increases in capacity lead, at least in part, to downward pressure on domestic prices, which, in turn, impacted upon the state of the domestic industry. Indeed, the Panel considers that downward pressure *was* exerted by increases in capacity on prices, regardless of how one interprets "substantial" (the adjective used by

⁵⁵²² (original footnote) CR and PR at Table TUBULAR-53. Domestic producers of fittings and flanges and a distributor of fittings testified that price was an important consideration in customer purchasing decisions. Tr. at 2516 (Zidell); Tr. at 2518 (Graham); Tr. at 2520 (Ketchum); Tr. at 2523 (Bernobich).

⁵⁵²³ See para. 10.505.

⁵⁵²⁴ (original footnote) Domestic producers cited increased imports as the cause of injury to the domestic industry. In the questionnaire sent to fittings producers, the Commission asked recipients to identify the factors, from a list of 13, including imports, that are adversely impacting the domestic industry. Recipients were given the option of identifying more than one factor. Of those responding, 16 producers identified imports, and one identified the general economic downturn. No other factors were identified. Persons testifying at the public hearing also cited imports. One company official asserted that declining sales volumes and profits caused by imports have forced his firm to shelve plans for capital investment, severely impairing the firm's competitiveness and efficiency. Tr. at 2517 (Zidell).

⁵⁵²⁵ See para. 10.505.

the USITC). The Panel is of the view that all relevant "other factors" – even those with limited injurious effects on the domestic industry – must, together with other relevant factors, be identified, distinguished and assessed with a view to reaching an overall conclusion that increased imports have a genuine and substantial relationship of cause and effect with the injury suffered by the relevant domestic producers.

10.528 The Panel notes that the USITC considered trends in domestic industry capacity during the period of investigation, noting that domestic producer's capacity increased by 7.4% over the period of investigation. In particular, it stated that:

"Domestic producers' capacity increased by 7.4 percent over the period examined, somewhat less than the growth rate in consumption. Domestic capacity reached its highest level of the period examined in 1999, and declined by 5.2 percent in 2000, and by an additional 4.6 percent in interim 2001 compared to interim 2000."⁵⁵²⁶

10.529 Despite the fact that the USITC acknowledged the role played by this factor in causing injury to the industry, it appeared to dismiss it in its non-attribution analysis. In our view, in dismissing increased capacity in its non-attribution analysis, the USITC did not, through a reasoned and adequate explanation, separate, distinguish and assess the nature and extent of the injurious effects caused by increased capacity so that the injury caused by this factor, together with other factors, was not attributed to increased imports.

Purchaser consolidation

Claims and arguments of the parties

10.530 The arguments of the parties are set out in Sections VII.H.3(b)(vii) *supra*.

Analysis by the Panel

10.531 The Panel also considers that the USITC acknowledged that purchaser consolidation played a role in the injury that was suffered by the domestic industry. In particular, the USITC stated that: "[i]n general, purchaser consolidation would be expected to place some pressure on domestic prices. However, any consolidation would not explain the reduction in domestic production, shipments, employment, and other non-price indicators that occurred during the period examined." In our view, although this statement indicates that the USITC did not consider that purchaser consolidation would explain declines in all injury factors, it nevertheless implicitly accepted that purchaser consolidation would place "some" pressure on domestic prices. For the reasons explained below, we consider that this effectively amounts to an acknowledgement that purchaser consolidation played a role in causing injury to the industry.

10.532 As mentioned above, it is clear to the Panel that the USITC considered that downward pressure on prices played an important role in causing the injury that was suffered by the domestic industry. Also pointed out above, the USITC stated that purchaser consolidation exerted downward pressure on prices. Therefore, following the USITC's logic, we consider that there is a link between purchaser consolidation and injury suffered by the domestic industry.

10.533 However, despite this link, the USITC dismissed this factor in its non-attribution analysis on the basis of the assertion that "any consolidation would not explain the reduction in domestic

⁵⁵²⁶ (original footnote) CR and PR at Table TUBULAR-C-6.

production, shipments, employment, and other non-price indicators that occurred during the period examined." Other than this statement, the USITC did not provide any explanation of why "consolidation would not explain the reduction in domestic production, shipments, employment, and other non-price indicators that occurred during the period examined." Accordingly, in the Panel's view, the USITC's explanation of its analysis of purchaser consolidation was not adequately reasoned. Further, it is our view that in failing to adequately explain this factor, the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by purchaser consolidation, together with other factors, was properly separated and distinguished and not attributed to increased imports.

Conclusions

10.534 The Panel considers that, with respect to FFTJ, the USITC failed to comply with its non-attribution obligation contained in the second sentence of Article 4.2(b). In particular, we consider that the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of factors other than increased imports that were causing injury to the domestic industry on the basis of a reasoned and adequate explanation. This, to us, is clear from the fact that the USITC dismissed a number of factors (namely, increased capacity and purchaser consolidation) in its non-attribution analysis even though it effectively acknowledged that those factors were causing injury to the industry.

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

10.535 Notwithstanding the fact that the USITC did not provide an adequate and reasoned explanation of how the facts supported its finding of coincidence, the Panel was of the view that clear coincidence existed between the upward trend in imports and the downward trend in injury factors. The Panel proceeded to review the USITC's examination of the condition of competition and concluded that the USITC provided a compelling explanation that indicated, subject to fulfilment of the non-attribution requirement, a causal link existed between increased imports of FFTJs and serious injury to the relevant domestic producers. Further, we found that the USITC's non-attribution analysis failed to separate, distinguish and assess the nature and extent injurious effects of purchaser consolidation and increased capacity so that the injury caused by these factors, together with other factors, was not attributed to increased imports. Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

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

(h) Stainless steel bar

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

(i) *Coincidence and conditions of competition*

USITC findings

10.538 The USITC's findings read as follows:

"We find that the increased imports of stainless bar are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of stainless bar are a substantial cause of serious injury to the domestic stainless bar industry.

a. *Conditions of Competition*

We have taken into account a number of factors that affect the competitiveness of domestic and imported stainless bar in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, and market conditions. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestically-produced or imported articles.

First, demand for stainless bar fluctuated somewhat but grew overall during the five full-years of the period of investigation. Apparent US consumption of stainless bar increased from 276.6 thousand short tons in 1996 to 294.4 thousand short tons in 1997 but then declined to 280.3 thousand short tons in 1998 and to 265.5 thousand short tons in 1999. In 2000, however, apparent consumption of bar increased by 22.2 percent, growing to 324.2 thousand short tons.⁵⁵²⁷ This level of consumption was 17.2 percent larger than in 1996.⁵⁵²⁸ As the overall economy declined in 2001, apparent consumption of bar declined by 13 percent between interim 2000 and interim 2001.⁵⁵²⁹

Second, stainless steel bar is used in the aerospace, automotive, chemical processing, dairy, food processing, pharmaceutical equipment, marine application, and other fluid handling industries.⁵⁵³⁰ The large majority of market participants indicate that there are no known substitutes for stainless bar.⁵⁵³¹

Third, although fourteen domestic firms reported producing stainless steel bar in 2000⁵⁵³², four firms accounted for the large majority of domestic production of stainless bar in 2000: Carpenter/Talley, Crucible Specialty Metals, AvestaPolarit, and Slater Steels Corp.⁵⁵³³ The domestic bar industry became more concentrated during the period of investigation. In 1997, Carpenter Technology, the *** domestic

⁵⁵²⁷ (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.

⁵⁵²⁸ (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.

⁵⁵²⁹ (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.

⁵⁵³⁰ (original footnote) CR at STAINLESS-2, PR at STAINLESS-1.

⁵⁵³¹ (original footnote) EC-Y-046 at Table STAINLESS-6.

⁵⁵³² (original footnote) CR and PR at Table STAINLESS-1.

⁵⁵³³ (original footnote) In 2000, these four firms accounted for *** percent of reported domestic production of stainless bar. CR and PR at Table STAINLESS-1.

producer of stainless bar in 2000⁵⁵³⁴, purchased Talley, the *** largest producer in 2000.⁵⁵³⁵ In addition, Empire Specialty Steel, the *** largest bar producer in 2000, shut down its stainless operations in June 2001.⁵⁵³⁶

The industry's aggregate capacity level increased during the period of investigation, growing by 5.5 percent from 1996 to 2000.⁵⁵³⁷ Capacity was 2.2 percent higher in interim 2001 than in interim 2000.⁵⁵³⁸ Capacity utilization declined from 63.0 percent in 1996 to 52.1 percent in 1999 but increased to 55.8 percent in 2000.⁵⁵³⁹ Industry capacity utilization then declined from 59.5 percent to 49.6 percent between interim 2000 and 2001.⁵⁵⁴⁰

Fourth, price is an important factor in purchasing decisions for stainless bar. Although quality was generally ranked by the majority of responding purchasers as the most important factor in the purchasing decision for stainless bar, the large majority of purchasers reported price as being one of the three most important factors in the purchase decision.⁵⁵⁴¹

Fifth, like many stainless steel products, the price of stainless bar is directly affected by the price of nickel.⁵⁵⁴² To account for fluctuations in the cost of nickel, stainless steel producers impose a surcharge on the price of their stainless bar products whenever the price of nickel reaches a certain level.⁵⁵⁴³ Generally, after declining during the first three years of the period of investigation, nickel prices increased significantly throughout 1999 and the first half of 2000. Nickel prices fell thereafter, declining through interim 2001.⁵⁵⁴⁴ The price of domestic stainless bar followed this trend somewhat during the period of investigation, with average unit values of domestic bar shipments and sales declining through the end 1999, recovering in 2000, and then declining in interim 2001.⁵⁵⁴⁵

Sixth, during the period of investigation, there were imports of stainless bar from over 40 countries, although not every country exported stainless bar to the United States in every year.⁵⁵⁴⁶ The quantity of imports of stainless bar from sources other than Mexico increased by 54 percent from 1996 to 2000 but fell by 17 percent

⁵⁵³⁴ (original footnote) Carpenter accounted for *** percent of reported domestic production of stainless bar in 2000. CR and PR at Table STAINLESS-1.

⁵⁵³⁵ (original footnote) Talley accounted for *** percent of reported domestic production of stainless bar in 2000. CR and PR at Table STAINLESS-1.

⁵⁵³⁶ (original footnote) Empire Specialty Steel, Inc. Questionnaire Response at August 6, 2001 Attachment.

⁵⁵³⁷ (original footnote) CR and PR at Tables STAINLESS-18 & STAINLESS-C-4.

⁵⁵³⁸ (original footnote) CR and PR at Tables STAINLESS-18 & STAINLESS-C-4.

⁵⁵³⁹ (original footnote) CR and PR at Tables STAINLESS-18 & STAINLESS-C-4.

⁵⁵⁴⁰ (original footnote) CR and PR at Tables STAINLESS-18 & STAINLESS-C-4.

⁵⁵⁴¹ (original footnote) INV-Y-212 at 95.

⁵⁵⁴² (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.

⁵⁵⁴³ (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.

⁵⁵⁴⁴ (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.

⁵⁵⁴⁵ (original footnote) CR and PR at Tables STAINLESS-18, STAINLESS-30, & STAINLESS-C-4.

⁵⁵⁴⁶ (original footnote) INV-Y-180 at Table G25 – Stainless Bar and Light Shapes.

between interim 2000 and interim 2001.⁵⁵⁴⁷ The record indicates that domestic and imported stainless bar are comparable in most respects.⁵⁵⁴⁸

The aggregate capacity of foreign producers of stainless bar in countries other than Mexico increased by 10.5 percent during the period examined. The capacity utilization of these producers increased from 74.2 percent in 1996 to 82.3 percent in 1998, declined to 77.2 percent in 1999, and then increased to 87.1 percent in 2000. Aggregate foreign capacity utilization increased from 89.2 percent to 90 percent in interim 2001.⁵⁵⁴⁹

Seventh, antidumping duty orders were imposed on imports of stainless bar from Brazil, India, Japan, and Spain in 1995.⁵⁵⁵⁰ Antidumping duty orders were imposed against imports of stainless steel angle from Japan, Korea, and Spain in May 2001.⁵⁵⁵¹

b. Analysis

We find first that the import increases between 1996 and 2000 had a serious adverse impact on the production levels, shipments, commercial sales and market share of the domestic industry. As we described above, the quantity and market share of imports both increased considerably during the period of investigation, with the quantity of imports increasing by 53.8 percent during the period from 1996 to 2000 and import market share increasing by 11 percentage points during that period as well.⁵⁵⁵² Despite the fact that these import increases occurred during a period of growing demand, the industry's production volumes, shipment levels and sales revenues all declined significantly as a result of increases in import volume during the period.⁵⁵⁵³

In particular, the industry's production levels fell by 10 thousand short tons (or 5.5 percent) during the period between 1996 and 2000⁵⁵⁵⁴; its net commercial sales fell by *** short tons (or *** percent) during that period⁵⁵⁵⁵, and the value of its net commercial sales declined by *** percent during the period.⁵⁵⁵⁶ As a result of these production and sales declines, the industry's capacity utilization rates fell considerably as well, dropping from 63.0 percent in 1996 to 55.8 percent in 2000.⁵⁵⁵⁷

⁵⁵⁴⁷ (original footnote) CR and PR at Tables STAINLESS-6 & STAINLESS-C-4.

⁵⁵⁴⁸ (original footnote) EC-Y-046 at Table STAINLESS-24; *see generally* EC-Y-046 at 14-28.

⁵⁵⁴⁹ (original footnote) CR and PR at Table STAINLESS-45.

⁵⁵⁵⁰ (original footnote) CR and PR at Table OVERVIEW-1.

⁵⁵⁵¹ (original footnote) CR and PR at Table OVERVIEW-1.

⁵⁵⁵² (original footnote) CR and PR at Tables STAINLESS-67 & STAINLESS-C-4.

⁵⁵⁵³ (original footnote) CR and PR at Tables STAINLESS-18, STAINLESS-30, & STAINLESS-C-4.

⁵⁵⁵⁴ (original footnote) CR and PR at Tables STAINLESS-18 & STAINLESS-C-4.

⁵⁵⁵⁵ (original footnote) CR and PR at Tables STAINLESS-30 & STAINLESS-C-4.

⁵⁵⁵⁶ (original footnote) CR and PR at Tables STAINLESS-30 & STAINLESS-C-4.

⁵⁵⁵⁷ (original footnote) In this regard, purchasers in the market reported that there was a moderately high level of substitutability between the imported and domestic merchandise, suggesting that the volume increase on the part of imports came directly out of domestic market share.

Moreover, the industry's share of the market also fell considerably, dropping from 64.6 percent in 1996 to 59.8 percent in 1999 and then to 53.5 percent in 2000.⁵⁵⁵⁸

In fact, the declines in the industry's production, shipment and market share levels occurred despite the fact that the industry added significant amounts of capacity during a period of reasonably strong growth in demand for stainless bar. Even with this increased capacity, the industry was unable to take advantage of the growth in demand for stainless bar as imports obtained an increasingly larger share of the domestic market for bar over the period of investigation. In particular, while apparent consumption of stainless bar grew by 48 thousand short tons between 1996 and 2000, the quantity of imports grew at a more accelerated rate, increasing by nearly 53 thousand short tons during this same period. This growth in imports effectively foreclosed the domestic industry from participating in the growth in demand during the period of investigation. In sum, the import increases that occurred during the period clearly had a serious adverse impact on the production volumes, sales levels, sales revenues, and market share of the industry during the period.

The record also indicates that imports affected domestic prices of stainless bar negatively during the period of investigation. The record in this investigation shows that most purchasers consider domestic and imported stainless bar to be comparable in most respects⁵⁵⁵⁹, indicating that there is a high degree of substitutability between the products. Moreover, the record of this investigation also indicates that price is an important part of the purchasing decision.⁵⁵⁶⁰ Finally, we note that imports undersold the domestic merchandise throughout the period of investigation in 47 of 53 possible quarterly comparisons at underselling margins of up to 51 percent.⁵⁵⁶¹

We find that this underselling depressed and suppressed domestic prices during the period of investigation. Although the price of stainless bar is expected by market participants to track the price of nickel, the net sales revenues of the domestic stainless bar industry failed to keep pace with movements in the cost of nickel during the second half of the period of investigation, particularly during the latter half of 1999 and 2000, when the price of nickel increased substantially.⁵⁵⁶² While the average unit value of the industry's net commercial sales increased in 2000 and interim 2001, the industry's cost of goods sold rose from *** percent of its net sales revenues in 1998 to *** percent of its net commercial values in 1999, *** percent of net commercial sales in 2000, and *** percent in interim 2001. As a result of these

⁵⁵⁵⁸ (original footnote) CR and PR at Tables STAINLESS-67 & STAINLESS-C-4. Indeed, the most significant adverse impact of imports in quantity terms occurred during the last full-year of the period of investigation, when apparent consumption of stainless bar grew by 22.1 percent and import quantities grew by 41.3 percent. In that year, the industry lost 6.3 percentage points of market share and experienced the most significant declines in its capacity utilization rates of the entire period of investigation. CR and PR at Tables STAINLESS-18, STAINLESS-30, STAINLESS-67, & STAINLESS-C-4.

⁵⁵⁵⁹ (original footnote) INV-Y-212 at 95.

⁵⁵⁶⁰ (original footnote) INV-Y-212 at 95.

⁵⁵⁶¹ (original footnote) CR and PR at Tables STAINLESS-87, STAINLESS-99, & Figure STAINLESS-9. These consistent underselling figures are supported by an examination of the average unit value for domestic and imported merchandise, which also show imports being priced at consistently lower levels than domestic merchandise during the period. CR and PR at Table STAINLESS-C-4.

⁵⁵⁶² (original footnote) CR and PR at 95-96, PR at STAINLESS-70-71 & Tables STAINLESS-6, STAINLESS-18, STAINLESS-30, & STAINLESS-C-4.

decreasing margins between the industry's cost of goods sold and its net sales values, the industry's operating income levels declined from a profit of *** percent in 1998 to a loss of *** percent in 1999, recovered only slightly to a minimal profit of *** percent in 2000, and then fell to a loss of *** percent in interim 2001.⁵⁵⁶³ Moreover, the overall declines in the industry's operating levels in the last two-and-a-half years of the period occurred when imports were at their highest market share levels during the period⁵⁵⁶⁴ and when imports were consistently underselling the domestic merchandise.⁵⁵⁶⁵ Therefore, we find that consistent and significant price underselling by imports during the latter half of the period of investigation suppressed and depressed domestic prices to a serious degree, despite the fact that nickel prices and the industry's average unit values also increased significantly during this period.

In sum, we find that increased quantities of imports of stainless bar during the period were a substantial cause of the declines in the industry's trade and financial condition during the period. ...⁵⁵⁶⁶

Claims and arguments of the parties

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

Analysis by the Panel

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

10.541 The Panel again recalls that coincidence, when examined, needs to be established between the movements or trends in imports and the movements or trends in injury factors. Applying our standard of review, the Panel has considered coincidence between a number of the injury factors mentioned in Article 4.2(a), including those referred to by the USITC, and imports on the basis of facts that were available to the USITC in making its determination.

10.542 First, with regard to import trends and production trends, the Panel notes that there does not appear to be any coincidence. In particular, production declined between 1997 and 1999, when import levels declined during the same period. Similarly, as imports increased from 1999 to 2000, so too did production. Finally, as imports decreased at the very end of the period of investigation, so too did production.⁵⁵⁶⁷

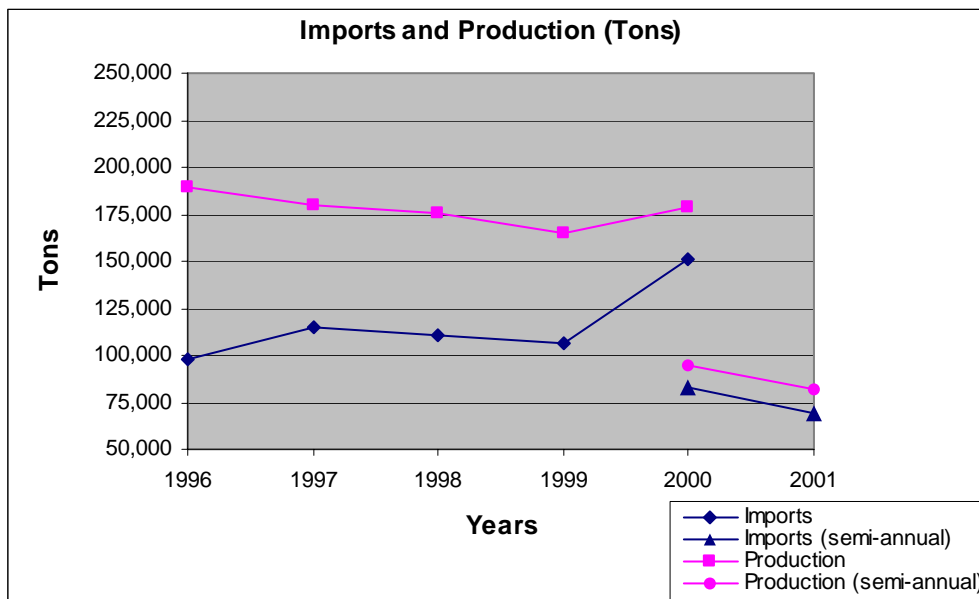
⁵⁵⁶³ (original footnote) CR and PR at Table STAINLESS-30 & STAINLESS-C-4.

⁵⁵⁶⁴ (original footnote) CR and PR at Table STAINLESS-67 & STAINLESS-C-4.

⁵⁵⁶⁵ (original footnote) CR and PR at Tables STAINLESS-86-87 & STAINLESS-Figures 9-10.

⁵⁵⁶⁶ USITC Report, Vol. I, pp. 208-212.

⁵⁵⁶⁷ The data represented in the graph below are contained in the USITC Report, in particular in Table STAINLESS-6 at STAINLESS-11; Table STAINLESS-18 at STAINLESS-24; Table STAINLESS-C-4.



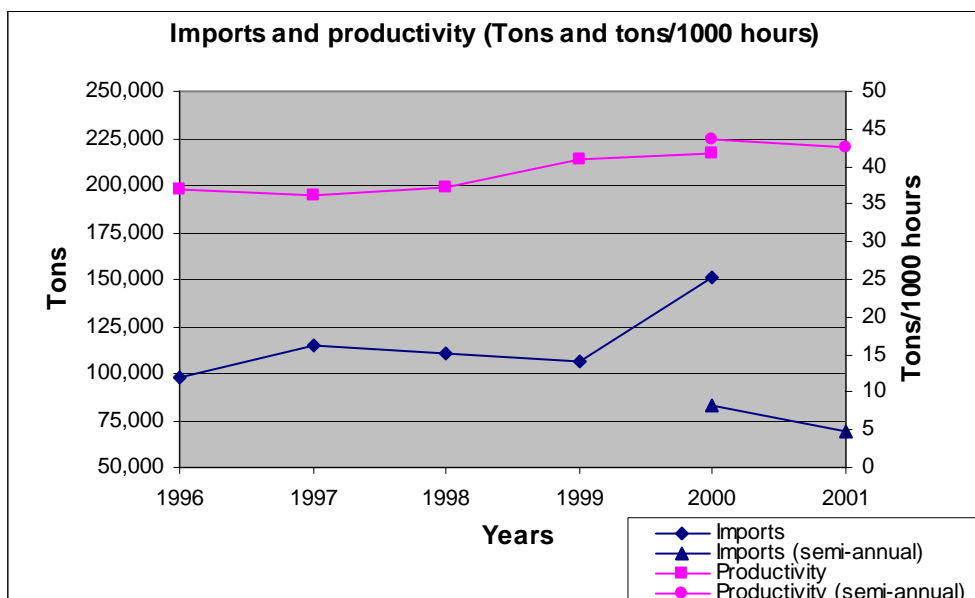
10.543 There appears to be a similar disconnect between import trends and trends in employment as that detected in relation to production. In particular, employment declined between 1997 and 1999. During the same period, import levels declined. Similarly, as imports increased from 1999 to 2000, so too did employment. Finally, as imports decreased at the very end of the period of investigation, so too did employment.⁵⁵⁶⁸



10.544 We also discern no coincidence between import trends and productivity trends. In particular, productivity progressively climbed from 1997 onwards. Apparently, this occurred independently of trends in imports, which declined between 1997 and 1999 and then increased between 1999 and 2000.

⁵⁵⁶⁸ The data represented in the graph below are contained in the USITC Report, in particular in Table STAINLESS-6 at STAINLESS-11; Table STAINLESS-18 at STAINLESS-24; Table STAINLESS-C-4.

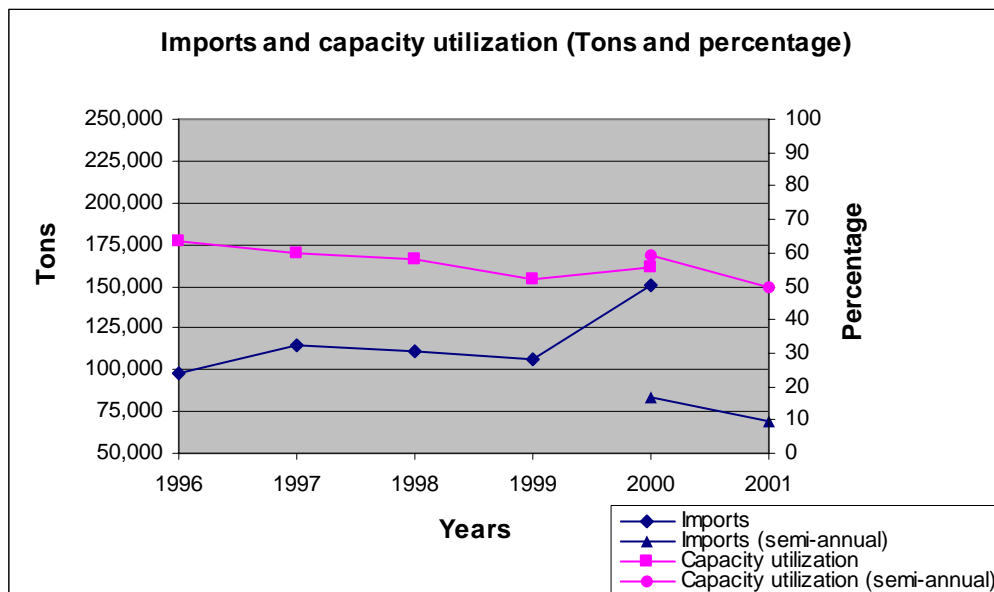
Finally, as imports decreased at the very end of the period of investigation, so too did productivity, albeit slightly.⁵⁵⁶⁹



10.545 Similarly, there does not appear to be any coincidence between increases in imports and capacity utilization. In particular, capacity utilization declined between 1997 and 1999 despite the fact that imports also declined during that period. Capacity utilization increased (albeit slightly) between 1999 and 2000, during which time imports also increased. Finally, as imports decreased at the very end of the period of investigation, so too did capacity utilization.⁵⁵⁷⁰

⁵⁵⁶⁹ The data represented in the two graphs below are contained in the USITC Report, in particular in Table STAINLESS-6 at STAINLESS-11; Table STAINLESS-18 at STAINLESS-24; Table STAINLESS-C-4.

⁵⁵⁷⁰ The data represented in the graph below are contained in the USITC Report, in particular in Table STAINLESS-6 at STAINLESS-15; Table STAINLESS-18 at STAINLESS-24; Table STAINLESS-C-4.



10.546 While our evaluation is that coincidence does not exist between, on the one hand, import trends and, on the other hand, trends in production, employment, productivity and capacity utilization, this does not necessarily mean that, overall, coincidence did not exist. In this regard, we note that we were unable to consider whether the facts indicated that coincidence existed between the import trends and trends in operating margin and net commercial sales, given that data relating to the latter two factors had been redacted from the USITC Report on the ground of confidentiality. Such facts may affect the overall conclusion as to the existence or otherwise of coincidence in trends in imports and injury factors. Accordingly, the Panel is unable to come to a definitive conclusion as to whether, overall, coincidence existed.

10.547 As stated previously, in cases where, as part of an overall demonstration of causal link, a coincidence analysis has been undertaken but does not demonstrate a causal link, the Panel will continue its review turning to the conditions of competition analysis to assess whether the USITC, nevertheless, managed to provide a compelling analysis that a genuine and substantial relationship between cause and effect existed. We note that the USITC analysed the conditions of competition in addition to undertaking a coincidence analysis.

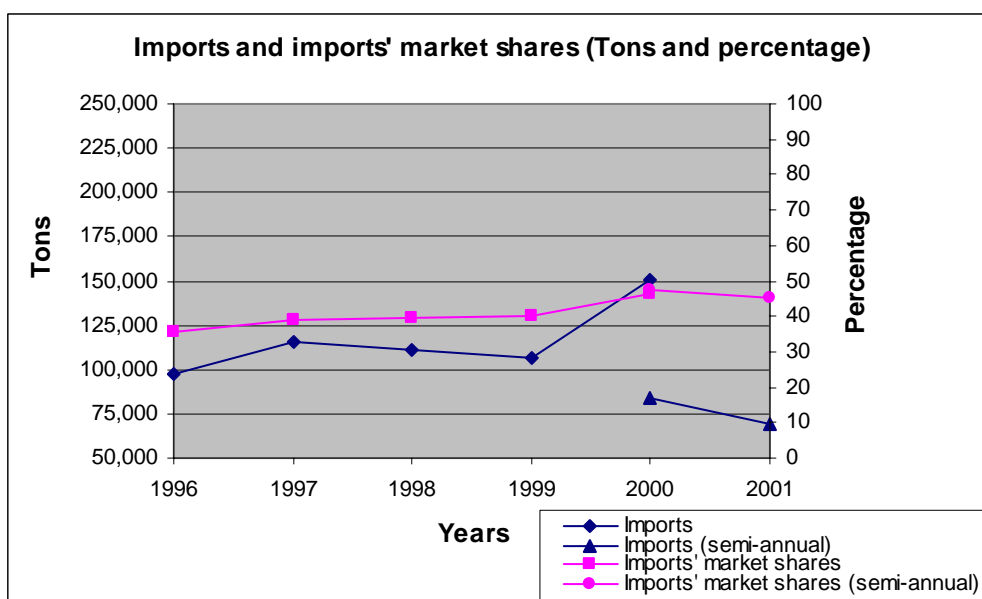
10.548 The Panel notes that the USITC considered that "imports affected domestic prices of stainless bar negatively during the period of investigation." The USITC additionally stated that "imports undersold the domestic merchandise throughout the period of investigation in 47 of 53 possible quarterly comparisons at underselling margins of up to 51 percent." Finally, it found that "this underselling depressed and suppressed domestic prices during the period of investigation Therefore, we find that consistent and significant price underselling by imports during the latter half of the period of investigation suppressed and depressed domestic prices to a serious degree, despite the fact that nickel prices and the industry's average unit values also increased significantly during this period."

10.549 We note as a preliminary point that the relevant domestic prices have been redacted from the USITC record, on the ground of confidentiality. The Panel agrees that, in some circumstances, Members have the obligation, pursuant to Article 3.2 of the Agreement on Safeguards, to confidentialize certain information although the competent authorities can base their determination on

such confidentialized information.⁵⁵⁷¹ Such an obligation should not reduce Members' rights to take safeguard actions. In cases where information has been confidentialized, the Panel will examine whether the competent authority provided a reasoned and adequate explanation through means other than full disclosure of that data.⁵⁵⁷²

10.550 We note in this regard in relation to stainless steel bar that Table STAINLESS-99 summarizes the number of instances of underselling and provides a range of the margins of underselling that occurred for all of those instances. In particular, that Table indicates that there were 40 instances of underselling by non-NAFTA imports and that the range of underselling was between 0.1%-51.8%. We note also that this factual allegation – that there were 40 instances of underselling by non-NAFTA imports – is not contested by the complainants and it is contrary to our standard of review to reassess the quality of this evidence in the absence of any prima facie challenge. In our view, although relevant data was redacted from the USITC Report, the USITC nevertheless provided alternative information in Table STAINLESS-99 that sought to substitute the redacted data. In light of the foregoing, the Panel concludes that the facts that are available to us tend to support the USITC's conclusion that there was import underselling during the period of investigation.

10.551 We note that trends in import market share are illustrated in the graph below, which has been generated using USITC data.⁵⁵⁷³



10.552 The Panel notes that the facts indicate that import market share increased quite significantly during the period of investigation, which would be consistent with a finding of import underselling. In particular, the USITC found that "consistent and significant price underselling by imports during the latter half of the period of investigation suppressed and depressed domestic prices to a serious degree". In our view, given the facts referred to above, the USITC provided a compelling explanation indicating that, subject to the fulfilment of the non-attribution requirement, a causal link existed between increased imports and serious injury.

⁵⁵⁷¹ Appellate Body Report, *Thailand – H-Beams*, paras. 111, 112 and 119.

⁵⁵⁷² See our discussions in paras. 10.272-10.275.

⁵⁵⁷³ The data represented in the graph below are contained in the USITC Report, in particular in Table STAINLESS-6 at STAINLESS-11; Table STAINLESS 67 at STAINLESS-55; Table STAINLESS-C-4.

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

(ii) *Non-attribution*

USITC findings

10.554 The USITC's findings read as follows:

"In fact, the declines in the industry's production, shipment and market share levels occurred despite the fact that the industry added significant amounts of capacity during a period of reasonably strong growth in demand for stainless bar. Even with this increased capacity, the industry was unable to take advantage of the growth in demand for stainless bar as imports obtained an increasingly larger share of the domestic market for bar over the period of investigation. In particular, while apparent consumption of stainless bar grew by 48 thousand short tons between 1996 and 2000, the quantity of imports grew at a more accelerated rate, increasing by nearly 53 thousand short tons during this same period. This growth in imports effectively foreclosed the domestic industry from participating in the growth in demand during the period of investigation. In sum, the import increases that occurred during the period clearly had a serious adverse impact on the production volumes, sales levels, sales revenues, and market share of the industry during the period.

...

In sum, we find that increased quantities of imports of stainless bar during the period were a substantial cause of the declines in the industry's trade and financial condition during the period. In making this finding, we considered the argument of the respondents that the adverse changes in the industry's condition during the latter half of the period were caused primarily by a downturn in the demand for stainless steel bar in late 2000 and in interim 2001, as well as an increase in energy costs during the same period.⁵⁵⁷⁴ Although we agree with Eurofer that there was a downturn in demand for stainless bar and an increase in energy costs in late 2000 and interim 2001, the record indicates that there were substantial declines in the industry's production, sales, and profitability levels during the years prior to 2000 and 2001. In particular, we note that the industry's market share, production volumes, employment levels and profitability levels all declined considerably during the period from 1996 to 1999 in the face of increasing import volumes. Given this, we find that imports were a more important cause of the declines in the industry's condition in 2000 and interim 2001 than demand declines and energy cost increases, especially given that import volumes and market share both increased significantly in 2000. In fact, we find that the industry's inability to maintain its operating profits in the face of these demand and energy cost changes is a direct result of the increasing share of the market obtained by imports and their consistent underselling of domestic merchandise during the period.

In addition, we have considered respondents' argument that the industry's condition during the period was affected significantly by the poor operations of the domestic

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

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

Finally, we note that antidumping duty orders were put in place against imports of stainless bar from Brazil, India, Japan, and Spain in 1995.⁵⁵⁷⁸ While these orders are intended to offset dumping margins on sales of these imports, we note that the record of this investigation indicates that the orders did not limit the ability of producers in these countries to continue shipping substantial, and even increasing, volumes of stainless bar to the United States during the period of investigation.⁵⁵⁷⁹

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

Factors considered by the USITC

Downturn in demand

Claims and arguments of the parties

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

Analysis by the Panel

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

⁵⁵⁷⁵ (original footnote) Eurofer Prehearing Brief on Injury at 10-17.

⁵⁵⁷⁶ (original footnote) ***.

⁵⁵⁷⁷ (original footnote) Finally, we also note that, although the statute directs us to assess whether a significant number of producers have been able to operate at reasonable levels of profits, it ultimately requires us to assess whether increased imports have been a substantial cause of serious injury to the industry "as a whole". 19 U.S.C. §2252(c)(6).

⁵⁵⁷⁸ (original footnote) CR and PR at Table OVERVIEW-1. We also note that antidumping order were put in place against imports of stainless steel angle from Japan, Korea, and Spain in May 2001. We note that it is too early to assess whether these orders will significantly reduce the level of imports from these countries.

⁵⁵⁷⁹ (original footnote) INV-Y-180 at G25 – Stainless Bar and Light Shapes.

⁵⁵⁸⁰ USITC Report, Vol. I, pp. 211-213.

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

"First, demand for stainless bar fluctuated somewhat but grew overall during the five full-years of the period of investigation. Apparent US consumption of stainless bar increased from 276.6 thousand short tons in 1996 to 294.4 thousand short tons in 1997 but then declined to 280.3 thousand short tons in 1998 and to 265.5 thousand short tons in 1999. In 2000, however, apparent consumption of bar increased by 22.2 percent, growing to 324.2 thousand short tons.⁵⁵⁸¹ This level of consumption was 17.2 percent larger than in 1996.⁵⁵⁸² As the overall economy declined in 2001, apparent consumption of bar declined by 13 percent between interim 2000 and interim 2001.^{5583, 5584}

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

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

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

⁵⁵⁸¹ (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.

⁵⁵⁸² (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.

⁵⁵⁸³ (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.

⁵⁵⁸⁴ See para. 10.538.

Increases in energy costs

Claims and arguments of the parties

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

Analysis by the Panel

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

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

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

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

Conclusions

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

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

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

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

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

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

(i) *Stainless steel wire*

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

10.571 In the March Proclamation, the President did not select any of the various affirmative determinations as the basis of the decision to impose the safeguard measure on stainless steel wire. Rather, pursuant to domestic law, the President "decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to [tin mill products and stainless steel wire] to be the determination of the USITC".⁵⁵⁸⁵ It is, therefore, apparent that the President based his determination on the findings of all three Commissioners (Bragg, Devaney and Koplan), although

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

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

10.572 For the reasons set out above in relation to the USITC's determination(s) on tin mill⁵⁵⁸⁶, the Panel believes that the Agreement on Safeguards does not permit the combination of findings reached on the basis of differently defined products. Such findings cannot be reconciled with each other and they cannot simultaneously form the basis of a determination. In conclusion, the Panel finds that an explanation that consists of alternative explanations which, given the different products upon which such explanations are based, cannot be reconciled as a matter of substance, amounts to a violation of the obligations under Articles 2.1, 4.2(b) and 3.1 to provide a reasoned and adequate explanation of how the facts support the determination of causation.

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

- (j) Stainless steel rod
- (i) *Coincidence and conditions of competition*

USITC findings

10.574 The USITC's findings read as follows:

"We find that the increased imports of stainless rod are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of stainless rod are a substantial cause of serious injury to the domestic stainless rod industry.

a. Conditions of Competition

We have taken into account a number of factors that affect the competitiveness of domestic and imported stainless rod in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, market conditions, and exchange rates. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestically-produced or imported articles.

First, demand for stainless rod remained essentially stable during the period of investigation. Apparent US consumption of stainless rod was *** thousand short tons in 1996, *** thousand short tons in 1997, *** thousand short tons in 1998 and 1999, and *** thousand short tons in 2000.⁵⁵⁸⁷ With the overall decline in the economy in interim 2001, apparent consumption of stainless rod also declined, falling by *** percent between interim 2000 and interim 2001.⁵⁵⁸⁸

⁵⁵⁸⁶ See paras. 10.420-10.422.

⁵⁵⁸⁷ (original footnote) CR and PR at Tables STAINLESS-68 and STAINLESS-C-5.

⁵⁵⁸⁸ (original footnote) CR and PR at Tables STAINLESS-68 and STAINLESS-C-5.

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

Third, the domestic stainless rod industry became increasingly concentrated during the period of investigation. Only four domestic firms reported producing stainless steel rod in 2000.⁵⁵⁹¹ In 1997, Carpenter Technology, the dominant domestic producer of stainless rod in 2000⁵⁵⁹², purchased Talley, the *** largest producer of stainless rod.⁵⁵⁹³ In addition, Empire Specialty Steel, the *** largest rod producer in 2000, shut down its stainless rod operations in June 2001.⁵⁵⁹⁴ With the acquisition of Talley by Carpenter in 1997 and the exit of Empire from the market, Carpenter/Talley remains the only large domestic producer of stainless rod in the market.

The industry's aggregate capacity level increased during the period of investigation, growing by *** percent from 1996 to 2000.⁵⁵⁹⁵ Domestic capacity was *** percent higher in interim 2001 than in interim 2000.⁵⁵⁹⁶ The industry's capacity utilization rate declined from *** percent in 1996 to *** percent in 1999, and then to *** percent in 2000. Capacity utilization also declined between interim periods, dropping from *** percent to *** percent.⁵⁵⁹⁷ Moreover, the stainless rod industry captively consumes more than *** of its stainless rod production in the downstream production of wire and other stainless products.⁵⁵⁹⁸

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

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

⁵⁵⁸⁹ (original footnote) CR and PR at STAINLESS-3.

⁵⁵⁹⁰ (original footnote) EC-Y-046 at Table STAINLESS-6.

⁵⁵⁹¹ (original footnote) CR and PR at Table STAINLESS-1.

⁵⁵⁹² (original footnote) Carpenter accounted for *** percent of reported domestic production of stainless rod in 2000. CR and PR at Table STAINLESS-1.

⁵⁵⁹³ (original footnote) Eurofer Prehearing Brief on Injury at 2. Talley accounted for *** percent of reported domestic production of stainless rod in 2000. CR and PR at Table STAINLESS-1.

⁵⁵⁹⁴ (original footnote) Empire Specialty Steel, Inc. Questionnaire Response at August 6, 2001 Attachment.

⁵⁵⁹⁵ (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.

⁵⁵⁹⁶ (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.

⁵⁵⁹⁷ (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.

⁵⁵⁹⁸ (original footnote) CR and PR at Table STAINLESS-19.

⁵⁵⁹⁹ (original footnote) INV-Y-212 at 95.

⁵⁶⁰⁰ (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.

⁵⁶⁰¹ (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.

years of the period of investigation, nickel prices increased significantly throughout 1999 and the first half of 2000. Nickel prices fell thereafter, declining through interim 2001.⁵⁶⁰² The price of domestic stainless rod generally followed this trend during the period of investigation, with the average unit values of domestic rod shipments and sales declining through the end of 1999, recovering in 2000, and then declining again in interim 2001.⁵⁶⁰³

Sixth, during the period of investigation, there were imports of stainless rod from over 30 countries, although not every country exported stainless rod in every year.⁵⁶⁰⁴ The quantity of imports of stainless steel rod from sources other than Canada and Mexico increased by 36 percent from 1996 to 2000 but fell by 31 percent between interim 2000 and interim 2001.⁵⁶⁰⁵ The record indicates that purchasers generally perceive domestically-produced and imported stainless rod to be comparable in most respects, which indicates that they are at least reasonably substitutable.⁵⁶⁰⁶ The level of substitutability is reduced somewhat by the significant degree of captive consumption of stainless rod by the domestic industry.⁵⁶⁰⁷

The aggregate capacity of foreign producers of stainless steel rod from sources other than Mexico and Canada increased by 16.5 percent during the period of investigation. The capacity utilization rates of these producers increased from 70.8 percent in 1996 to 83.7 percent in 1997 and remained essentially stable thereafter, with capacity utilization being 84.3 percent in 2000 and 82.2 percent in interim 2001.⁵⁶⁰⁸

Seventh, antidumping and countervailing duty orders were imposed against imports of stainless rod from Brazil, France, India, Italy, Japan, Korea, Spain, Sweden, and Taiwan in 1993, 1994, and 1998.⁵⁶⁰⁹

b. Analysis

We find that the increased quantities of stainless rod imports during the period of investigation had a direct and serious adverse impact on the production levels, shipments, commercial sales, and market share of the domestic industry. With demand remaining essentially flat during the period of investigation⁵⁶¹⁰, the increases in import volumes during the period (particularly the surge that occurred in the last year of the period) resulted in a dramatic increase in the market share of stainless rod imports.⁵⁶¹¹ With the growth in the quantity and market share of imports during the

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

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

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

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

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

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

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

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

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

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

period of investigation, especially during the last year of the period, the industry's production levels, shipment volumes, net commercial sales, and net commercial sales revenues all fell considerably, especially in the last full-year of the period. In particular, the industry's production levels declined by *** percent during the period from 1996 to 2000, its US shipment volumes fell by *** percent during the period, its net commercial sales fell by *** percent during the period, and its net commercial sales revenues fell by *** percent.⁵⁶¹² Moreover, the industry's capacity utilization rates were impacted as well, falling from *** percent in 1996 to *** percent in 2000, and then to *** percent in interim 2001.⁵⁶¹³ Further, as import quantity and market share increased during the period of investigation, the share of the market held by the domestic industry declined dramatically as well, falling from *** percent in 1996 to *** percent in 1999 and to *** percent in 2000.⁵⁶¹⁴

Indeed, the most serious adverse impact of imports in quantity terms occurred during the last full-year of the period of investigation, when import quantities reached their highest level during the period, growing by 25.0 percent from the previous year.⁵⁶¹⁵ With growth in imports in that year, the market share of the industry fell by *** percentage points, its production volumes fell by *** percent, its US shipment levels fell by *** percent, and its net commercial sales quantities fell by *** percent from the prior year's levels.⁵⁶¹⁶ Moreover, partly as a direct result of these volume declines⁵⁶¹⁷, the industry's profitability levels declined by *** percentage points in that year from the previous year's level.⁵⁶¹⁸ In our view, the increases in import quantities during the period of investigation, particularly its last full-year, have had a serious and adverse impact on the sales revenue and production volumes of the industry.

The record also indicates that imports had a negative effect on domestic prices of stainless rod during the period of investigation. Purchasers generally consider domestic and imported stainless rod to be comparable in most respects,⁵⁶¹⁹ which indicates that there is a high degree of substitutability between the products. Moreover, the record shows that price is an important part of the purchasing decision⁵⁶²⁰ and that imports consistently and significantly undersold the domestic merchandise throughout the period of investigation.⁵⁶²¹ In addition to causing

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

Claims and arguments of the parties

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

Analysis by the Panel

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions

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

(ii) *Non-attribution*

USITC findings

10.583 The USITC's findings read as follows:

⁵⁶³³ (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.

⁵⁶³⁴ (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.

⁵⁶³⁵ (original footnote) CR and PR at Table STAINLESS-31.

⁵⁶³⁶ See our discussions in para. 10.275.

"The industry's aggregate capacity level increased during the period of investigation, growing by *** percent from 1996 to 2000.⁵⁶³⁷ Domestic capacity was *** percent higher in interim 2001 than in interim 2000.⁵⁶³⁸ The industry's capacity utilization rate declined from *** percent in 1996 to *** percent in 1999, and then to *** percent in 2000. Capacity utilization also declined between interim periods, dropping from *** percent to *** percent.⁵⁶³⁹ Moreover, the stainless rod industry captively consumes more than *** of its stainless rod production in the downstream production of wire and other stainless products.⁵⁶⁴⁰

...

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

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

⁵⁶³⁷ (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.

⁵⁶³⁸ (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.

⁵⁶³⁹ (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.

⁵⁶⁴⁰ (original footnote) CR and PR at Table STAINLESS-19.

⁵⁶⁴¹ (original footnote) Eurofer Prehearing Brief on Injury at 2.

⁵⁶⁴² (original footnote) Eurofer Prehearing Brief on Injury at 2.

⁵⁶⁴³ (original footnote) Empire Specialty Steel, Inc. Questionnaire Response at August 6, 2001 Attachment; Republic Technologies International Questionnaire Response at p. 54.

⁵⁶⁴⁴ (original footnote) We also note that, although the statute directs us to assess whether a significant number of producers have been able to operate at reasonable levels of profits, it ultimately requires us to assess whether increased imports have been a substantial cause of serious injury to the industry "as a whole". 19 U.S.C. §2252(c)(6).

Finally, although antidumping and countervailing duty orders were imposed against imports of stainless rod from Brazil, France, India, Italy, Japan, Korea, Spain, Sweden, and Taiwan in 1993, 1994, and 1998⁵⁶⁴⁵, the imposition of these orders appears not to have limited the ability of foreign producers in most of these countries to increase their stainless rod exports to the United States in 1999 and 2000.⁵⁶⁴⁶

In light of the foregoing, we conclude that increased imports of stainless rod are an important cause, and a cause no less important than any other cause, of serious injury to the domestic industry producing stainless rod. Accordingly, we find that imports of stainless rod are a substantial cause of serious injury to the domestic industry producing stainless rod."⁵⁶⁴⁷

Factors considered by the USITC

Increases in capacity

Claims and arguments of the parties

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

Analysis by the Panel

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

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

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

F. CLAIMS RELATING TO PARALLELISM

1. Claims and arguments of the parties

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

⁵⁶⁴⁵ (original footnote) CR and PR at Table OVERVIEW-1.

⁵⁶⁴⁶ (original footnote) INV-Y-180 at G26 – Stainless Steel Rod.

⁵⁶⁴⁷ USITC Report, Vol. I, pp. 221-222.

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

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

2. Relevant WTO provisions

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

1. A Member¹ may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

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

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

3. Analysis by the Panel

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

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

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

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

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

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

10.592 When the determination and the eventual measure do not correspond, the Panel believes that Members can establish explicitly that imports from sources covered satisfy the conditions for safeguard action, also when the decision to exclude certain sources from the safeguard measure is made *subsequent* to a determination, in the sense of Article 2.1. In such cases, the importing Member is entitled to make and publish these findings subsequent to the publication of the report setting out the determination in the sense of Article 2.1.⁵⁶⁵²

10.593 On that basis, in the present case, both the findings made in the initial USITC Report and those contained in the Second Supplementary Report issued in February 2002, are able to satisfy the requirement of establishing explicitly that imports covered by the measure satisfy the conditions of Articles 2.1 and 4.2. This, of course, assumes that such findings are necessary because there is a gap between sources covered by the ultimate measure and sources covered by the October 2001 determination. Conversely, however, that requirement must be fulfilled before the application of the safeguard measure. An explanation provided after the start of the application of the safeguard measure on 20 March 2002⁵⁶⁵³ is not capable of meeting the requirement to establish explicitly that imports from sources covered by the measure meet the requirements for its application.

10.594 The Panel notes that there is some debate between the parties as to what amounts to a finding that does indeed establish explicitly that imports from sources covered by the measure satisfy the conditions for a safeguard measure. The United States maintains that Articles 3 and 4 of the Agreement on Safeguards do not require an "explicit" finding and that the Appellate Body has never related such a requirement to the text of the Agreement on Safeguards. According to the United States, the Appellate Body's use of the term "explicit" is best understood as referring to the competent authorities' formal conclusion as to whether non-FTA imports have caused serious injury, and does not require an "explicit" recitation of the results of each step of the analytical process leading to that conclusion.⁵⁶⁵⁴ In contrast, New Zealand rejects the idea of reducing the requirement for a "reasoned and adequate explanation" to a simple requirement for a conclusion by way of mere assertion that even if FTA imports had not been included, the result would have been the same.⁵⁶⁵⁵ The European Communities stresses that the "parallelism" requirement is clearly discernible from the text and the Appellate Body has clarified that it entails that there must be an explicit finding and a reasoned explanation that imports covered by a measure alone satisfy the requirements of Articles 2 and 4.⁵⁶⁵⁶

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

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

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

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

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

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

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

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

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

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

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

4. Measure-by-measure analysis

(a) CCFRS

(i) *The USITC's findings*

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

⁵⁶⁵⁷ Appellate Body Report, *US – Line Pipe*, para. 181.

⁵⁶⁵⁸ Appellate Body Report, *US – Line Pipe*, para. 194.

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

⁵⁶⁶⁰ Appellate Body Report, *US – Line Pipe*, para. 194;

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

"We report that increased imports of certain carbon flat-rolled steel from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing certain carbon flat-rolled steel.

Non-NAFTA imports of certain carbon flat-rolled steel have increased. Imports of certain carbon flat-rolled steel from non-NAFTA sources increased from 14.5 million short tons in 1996 to 21.2 million short tons in 1998, an increase of 46.8 percent. Non-NAFTA imports were lower in 1999 and in 2000 but remained well above 1996 levels.⁵⁶⁶²

In addition, the increase in non-NAFTA imports as a share of domestic production was substantial. Non-NAFTA imports were equivalent to 7.8 percent of domestic production in 1996 and peaked at 11.1 percent of domestic production in 1998. Such imports were equivalent to 8.4 percent of domestic production in 2000, still above the 1996 level.⁵⁶⁶³

The average unit values of non-NAFTA imports followed the same pattern as the average unit values of imports from all sources. The average unit value of non-NAFTA imports peaked at \$372 per short ton in 1997, then fell notably in both 1998 and in 1999. The average unit value of non-NAFTA imports rose somewhat in 2000, although average unit values of non-NAFTA imports were lower in interim 2001 than in interim 2000.⁵⁶⁶⁴

Finally, excluding imports from Canada and Mexico from the database does not appreciably change import pricing trends during the period examined. Our finding that imports were generally priced below domestically-produced certain carbon flat-rolled steel, and that imports led to the decline in domestic prices, also applies to non-NAFTA imports.⁵⁶⁶⁵

Consequently, the same considerations that led us to conclude that increased imports of certain carbon flat-rolled steel are a substantial cause of serious injury to the domestic industry⁵⁶⁶⁶ are also applicable to increased imports of certain carbon flat-rolled steel from all sources other than Canada and Mexico."⁵⁶⁶⁷

(ii) *Claims and arguments of the parties*

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

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

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

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

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

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

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

⁵⁶⁶⁷ USITC Second Supplementary Report, pp. 4-5

(iii) *Analysis by the Panel*

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

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

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

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

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

⁵⁶⁶⁸ USITC Second Supplementary Report, pp. 4-5.

⁵⁶⁶⁹ USITC Report, Vol. I, pp. 65-66.

⁵⁶⁷⁰ United States' first written submission, paras. 797-804.

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

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

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

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

(iv) *Conclusion*

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

⁵⁶⁷¹ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

⁵⁶⁷² USITC Second Supplementary Report, p. 4.

⁵⁶⁷³ USITC Report, Vol. I, p. 366 and footnote 69.

(b) Tin mill products

(i) *Claims and arguments of the parties*

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

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

(ii) *Analysis by the Panel*

Split findings

10.612 The Panel first notes that imports from Canada, Mexico, Israel and Jordan have been excluded from the safeguard measure on tin mill products.⁵⁶⁷⁴ Second, the October 2001 determination by the USITC covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. In this regard, the United States relies, before the Panel, on findings made by Commissioners Miller⁵⁶⁷⁵ and Bragg⁵⁶⁷⁶ in the USITC Report.

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

⁵⁶⁷⁴ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

⁵⁶⁷⁵ USITC Report, Vol. I, pp. 307-308 and footnotes 28 and 29 on p. 310.

⁵⁶⁷⁶ USITC Report, Vol. I, pp. 15-17.

⁵⁶⁷⁷ USITC Report, Vol. I, p. 71, footnote 368. The Panel notes that the United States does not rely on findings made by Commissioner Devaney in defence against the claim of violation of parallelism, possibly because this Commissioner appears not to have reached any conclusions about imports other than excluded imports. See USITC Report, Vol. I, p. 317.

⁵⁶⁷⁸ USITC Report, Vol. I, p. 25.

⁵⁶⁷⁹ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.

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

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

Commissioner Miller's and the USITC's findings

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

"I note that in my analysis of whether increased imports as a whole are a substantial causes of serious injury, I would have reached the same result had I excluded imports from Mexico. The quantity of imports from Mexico was so minuscule – 57 tons in 1996, 21 tons in 1997, 286 tons in 1998, 156 tons in 1999, 39 tons in 2000, and no imports in 2001 – that it accounted for zero percent of US market share in each year of the period examined. At their highest, in 1998, imports from Mexico represented 0.1 percent of imports, and zero percent in all other years. Therefore, the results with respect to increases in imports, their share of apparent US consumption, and their ratio to US production are virtually the same whether imports from Mexico are included in total imports or not. CR/PR at Table FLAT-10, Table FLAT-C-8.⁵⁶⁸⁰

I further note that I would have found imports of tin mill products to be a substantial cause of serious injury had I excluded imports from Canada. Imports from all other sources increased by a significant amount – 22.4 percent – over the period, despite an overall decline in consumption. In addition, the US market share held by these imports increased by 2.9 percentage points over the period, while imports from Canada as a share of the US market increased by only 1.3 percentage points. CR/PR at Table-FLAT-C-8. The pricing data collected by the Commission show no underselling by imports from Canada. CR/PR at Table-FLAT-75. Also, while the AUVs of imports from Canada declined overall during the period, the rate of decline – 3.5 percentage points – was significantly lower than that of all other imports – 13.1 percentage points, and toward the end of the period, in 1999, 2000, and interim 2001, the AUVs of imports from Canada were higher than those of the other imports. CR/PR at Table-FLAT-C-8."⁵⁶⁸¹

10.617 In her recommendation on remedy, Commissioner Miller stated:

⁵⁶⁸⁰ USITC Report, Vol. I, p. 310, footnote 28.

⁵⁶⁸¹ USITC Report, Vol. I, p. 310, footnote 29.

"I also recommend that the President not include imports from Israel and from beneficiary countries under the Caribbean Basin Economic Recovery Act and the Andean Trade Preference Act in any remedy action.⁵ The only imports of tin mill products from these countries during the period of investigation were small and sporadic."⁵⁶⁸²

⁵The U.S.-Jordan Free Trade Area Implementation Act became effective on December 17, 2001, two days before submission of this report on our findings and recommendations in investigation No. TA-201-73, Steel, to the President. There have been no imports of tin mill products from Jordan during the period of investigation, and they are therefore not a substantial cause of serious injury or threat of serious injury. Therefore, to the extent that section 221(a) of the Jordan FTA applies to this investigation, I recommend that such imports not be subject to the additional tariff described above."

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

Panel's Assessment

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

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

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

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

⁵⁶⁸² USITC Second Supplementary Report, p. 529

⁵⁶⁸³ USITC Second Supplementary Report, p. 4 (footnote omitted).

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

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

(c) Hot-rolled bar

(i) *The USITC's findings*

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

"We report that increased imports of carbon and alloy hot-rolled bar and light shapes ('hot-rolled bar') from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing hot-rolled bar.

Non-NAFTA imports of hot-rolled bar have increased. The quantity of these imports rose from 584,126 short tons in 1996 to 644,577 short tons in 1997 and to 1.1 million short tons in 1998. Non-NAFTA imports then declined to 925,711 short tons in 1999 and increased to 1.2 million short tons in 2000. Non-NAFTA imports increased by 107.9 percent from 1996 to 2000, and had major increases from 1997 to 1998 (when they increased by 70.4 percent) and from 1999 to 2000 (when they increased by 31.2 percent). These were the same years that imports from all sources increased most rapidly. Non-NAFTA imports, however, increased at a greater rate than imports from all sources.⁵⁶⁸⁸

⁵⁶⁸⁴ USITC Second Supplementary Report, p. 4.

⁵⁶⁸⁵ USITC Report, Vol. I, p. 529 and footnote 5; United States' first written submission, para. 754.

⁵⁶⁸⁶ USITC Report, Vol. I, footnote 28 on p. 310.

⁵⁶⁸⁷ USITC Second Supplementary Report, p. 4 (footnote omitted).

⁵⁶⁸⁸ (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-3. The quantity of non-NAFTA imports was lower in interim 2001, when it was 403,165 short tons, than in interim 2000, when it was 630,673 short tons.

The ratio of non-NAFTA imports of hot-rolled bar to domestic production also increased significantly during the period examined, growing from 6.8 percent in 1996 to 13.2 percent in 2000. The ratio increased most notably from 1997 to 1998 and from 1999 to 2000.⁵⁶⁸⁹

In our analysis of causation with respect to imports from all sources, we observed that increased imports caused domestic hot-rolled bar producers to lose market share at the same time prices were falling, leading to poor operating results and plant closures.⁵⁶⁹⁰ This is also applicable to non-NAFTA imports.

With respect to market share measured by quantity, hot-rolled bar imports from sources other than Canada and Mexico declined from 5.8 percent in 1996 to 5.7 percent in 1997, increased to 9.4 percent in 1998, declined to 8.4 percent in 1999, and then increased to 10.8 percent in 2000. Like imports from all sources, non-NAFTA imports posted their greatest increases in market share between 1997 and 1998 and between 1999 and 2000. Moreover, the bulk of the increased market share that all imports captured from the domestic industry during the period examined was attributable to non-NAFTA imports.⁵⁶⁹¹

Average unit values of non-NAFTA imports declined during every full-year of the period examined, as did average unit values of imports from all sources. However, the average unit values of non-NAFTA imports declined by a greater proportion from 1996 to 2000 than did imports from all sources. The average unit values of non-NAFTA imports fell from \$679 in 1996 to \$478 in 2000, a decline of 29.6 percent. By contrast, the average unit value of imports from all sources fell 13.5 percent over the same period.⁵⁶⁹²

In our analysis of import competition, we placed particular emphasis on underselling by imports from all sources during 1998 and the first half of 2000.⁵⁶⁹³ During these periods, non-NAFTA imports undersold domestically produced hot-rolled bar by substantial margins.⁵⁶⁹⁴ Indeed, non-NAFTA imports were priced lower than imports from all sources during these periods.⁵⁶⁹⁵

Consequently, the same considerations that led us to conclude that increased imports of hot-rolled bar are a substantial cause of serious injury are also applicable to increased imports of hot-rolled bar from all sources other than Canada and Mexico."⁵⁶⁹⁶

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

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

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

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

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

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

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

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

(ii) *Claims and arguments of the parties*

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

(iii) *Analysis by the Panel*

10.626 The Panel notes that the safeguard measure on hot-rolled bar excludes imports from Canada, Mexico, Israel and Jordan⁵⁶⁹⁷ and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.

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

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

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

⁵⁶⁹⁷ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

⁵⁶⁹⁸ USITC Second Supplementary Report, pp. 4-6.

⁵⁶⁹⁹ Second Supplementary Report, p. 6.

⁵⁷⁰⁰ United States' first written submission, para. 834.

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

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

10.632 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.⁵⁷⁰² The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"⁵⁷⁰³ or, as the USITC found, "at very low levels" and non-existent⁵⁷⁰⁴, it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

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

(d) Cold-finished bar

(i) *The USITC's findings*

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

⁵⁷⁰¹ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

⁵⁷⁰² USITC Second Supplementary Report, p. 4.

⁵⁷⁰³ United States' first written submission, para. 754.

⁵⁷⁰⁴ USITC Report, Vol. I, p. 376 and footnote 117.

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

"We report that increased imports of carbon and alloy cold-finished bar ("cold-finished bar") from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing cold-finished bar.

Non-NAFTA imports of cold-finished bar have increased. The quantity of these imports rose from 137,834 short tons in 1996 to 167,256 short tons in 1997 and then to 201,473 short tons in 1998. Non-NAFTA imports then declined to 154,971 short tons in 1999 and increased to 233,940 short tons in 2000. Non-NAFTA imports had a major increase from 1999 to 2000, when they rose by 51.0 percent. This was the same year that imports from all sources increased most sharply. Non-NAFTA imports, however, increased at a greater rate than imports from all sources both from 1999 to 2000 and over the entire period examined.⁵⁷⁰⁶

The ratio of non-NAFTA imports of cold-finished bar to domestic production also increased significantly during the period examined, growing from 11.8 percent in 1996 to 17.6 percent in 2000. The ratio increased most notably from 1999 to 2000, when it rose by 6.4 percentage points.⁵⁷⁰⁷

In our analysis of causation with respect to imports from all sources, we stated that aggressive pricing by imports during the latter portion of the period examined caused the industry to lose market share and revenues.⁵⁷⁰⁸ This observation is applicable as well to non-NAFTA imports.

With respect to market share measured by quantity, cold-finished bar imports from non-NAFTA sources increased from 9.8 percent in 1996 to 10.5 percent in 1997 and then to 12.1 percent in 1998. The market share of these imports then declined to 9.6 percent in 1999 and increased to 14.3 percent in 2000. Like imports from all sources, non-NAFTA imports posted a significant increase in market share between 1999 and 2000. Indeed, non-NAFTA imports were responsible for the entire increase in import market share both during this period and the period between 1996 and 2000.⁵⁷⁰⁹

Average unit values of cold-finished bar imports from sources other than Canada and Mexico declined during every full-year of the period examined, falling from \$919 in 1996 to \$758 in 2000. The 17.6 percent decline in average unit values for non-

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

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

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

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

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

NAFTA imports from 1996 to 2000 was greater than the decline in average unit values for imports from all sources over the same period.⁵⁷¹⁰

In our analysis of import competition, we discussed pricing trends and underselling of one-inch round C12L14 during 1999 and 2000.⁵⁷¹¹ For imported C12L14 from non-NAFTA sources, there were significant price declines during 1999. Prices declined further during 2000, particularly during the final quarter of the year. Between the second quarter of 1999 and the fourth quarter of 2000, non-NAFTA imports of C12L14 undersold the domestically-produced product by margins ranging from ***.⁵⁷¹² Both the pricing trends and the underselling data for non-NAFTA imports are similar to those for imports from all sources on which we relied in our injury determination.⁵⁷¹³

Consequently, the same considerations that led us to conclude that increased imports of cold-finished bar are a substantial cause of serious injury are also applicable to increased imports of cold-finished bar from all sources other than Canada and Mexico."⁵⁷¹⁴

(ii) *Claims and arguments of the parties*

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

(iii) *Analysis by the Panel*

10.636 The Panel notes that the safeguard measure on cold-finished bar excludes imports from Canada, Mexico, Israel and Jordan⁵⁷¹⁵ and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.

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

⁵⁷¹⁰ (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-4. The average unit values of non-NAFTA imports were higher in interim 2001 than in interim 2000.

⁵⁷¹¹ (original footnote) See USITC Pub. 3479, vol. I at 106-07.

⁵⁷¹² (original footnote) CR, Table LONG-92.

⁵⁷¹³ (original footnote) Compare USITC Pub. 3479 at 105-07.

⁵⁷¹⁴ USITC Second Supplementary Report, pp. 6-7.

⁵⁷¹⁵ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

⁵⁷¹⁶ USITC Second Supplementary Report, pp. 4, 6-7.

examined, and that non-NAFTA imports of the C12L14 product undersold the domestically producer product between the second quarter of 1999 and the fourth quarter of 2000.⁵⁷¹⁷

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

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

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

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

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

⁵⁷¹⁷ See para. 10.634.

⁵⁷¹⁸ United States' first written submission, paras. 838-846.

⁵⁷¹⁹ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding (establishing explicitly) to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.⁵⁷²⁰ The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"⁵⁷²¹ or non-existent⁵⁷²², it is very likely that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

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

(e) Rebar

(i) *The USITC's findings*

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

"We find that our injury analysis would not be affected in any way by the exclusion of rebar imports from Canada and Mexico.

Exclusion of imports from Canada and Mexico only makes the increase in imports during the period examined more dramatic. Imports of rebar from all sources other than Canada and Mexico increased from 302,217 tons in 1996 to 403,881 tons in 1997, to 1.1 million tons in 1998, and then to 1.7 million tons in 1999. Imports then decreased to 1.6 million tons in 2000. Imports from sources other than Mexico and Canada were lower in interim 2001, at 778,779 tons, than in interim 2000, when they were 960,625 tons. Imports from sources other than Mexico and Canada increased by 434.8 percent from 1996 to 2000, and had major increases both from 1997 to 1998 (183.5 percent) and from 1998 to 1999 (50.2 percent). *See* CR and PR, Table LONG-7.

Excluding Canada and Mexico also serves to accentuate the increase in market share of imports from other sources. The market share of rebar imports from sources other than Canada and Mexico increased from 5.5 percent in 1996 to 21.4 percent in 1999, its peak level of the period examined, and then declined to 19.9 percent in 2000. The market share of imports from sources other than Mexico and Canada was lower in interim 2001 than interim 2000. *See* CR and PR, Table LONG-72.

Average unit values of imports from sources other than Canada and Mexico followed the same pattern as average unit values of imports from all sources. The average unit value of imports from sources other than Canada and Mexico from \$300 in 1996 to

⁵⁷²⁰ USITC Second Supplementary Report, p. 4.

⁵⁷²¹ United States' first written submission, para. 754.

⁵⁷²² USITC Report, Vol. I, p. 376 and footnote 117.

\$275 in 1998, then plummeted to \$207 in 1999, and increased slightly to \$215 in 2000. These average unit values were \$210 in interim 2000 and \$224 in interim 2001. *See* CR and PR, Table LONG-7.

Finally, excluding imports from Canada and Mexico from the database does not appreciably change import pricing trends during the period examined. There were no pricing observations for imports from Canada, and imports from Mexico were sold at higher prices than imports from all other sources during every quarter for which pricing data were collected except the fourth quarter of 1996 and the first quarter of 1997. Consequently, for periods after 1998, exclusion of Mexican imports increases the magnitude of underselling margins somewhat. *See* CR and PR, Table LONG-93.

Consequently, the conclusions we have made concerning the effects of increased imports are equally applicable whether or not imports from Canada and Mexico are included among the imports evaluated."⁵⁷²³

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

(ii) *Claims and arguments of the parties*

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

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

(iii) *Analysis by the Panel*

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

⁵⁷²³ USITC Report, Vol. I, p. 116, footnote 704.

⁵⁷²⁴ USITC Second Supplementary Report, p. 4 (footnote omitted).

⁵⁷²⁵ USITC Report, p. 116, footnote 704.

⁵⁷²⁶ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

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

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

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

10.652 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.⁵⁷²⁹ The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"⁵⁷³⁰ or non-existent⁵⁷³¹, it is very likely that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

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

⁵⁷²⁷ USITC Report, Vol. I, p. 116, footnote 704.

⁵⁷²⁸ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

⁵⁷²⁹ Second Supplementary Report, p. 4.

⁵⁷³⁰ United States' first written submission, para. 754.

⁵⁷³¹ USITC Report, Vol. I, p. 376 and footnote 117.

(f) Welded pipe

(i) *The USITC's findings*

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

"We report that increased imports of welded tubular products other than OCTG from non-NAFTA countries are a substantial cause of the threat of serious injury to the domestic industry producing welded tubular products other than OCTG.

Non-NAFTA imports of welded tubular products other than OCTG have increased. Imports from sources other than the NAFTA countries increased from 786,151 short tons in 1996 to 1,420,685 short tons in 2000, and from 724,859 short tons in interim 2000 to 870,944 short tons in interim 2001. Non-NAFTA imports had major increases of 20-30 percent in every year of the period examined except 1999.⁵⁷³³ Similarly, the ratio of non-NAFTA imports of such welded tubular products to US production increased in each year except 1999 during the period examined; the ratio rose from 16.9 percent in 1996 to 29.7 percent in 2000, and was 34.5 percent in interim 2001 compared to 28.6 percent in interim 2000.⁵⁷³⁴

Similarly, with respect to market share, measured by quantity, non-NAFTA imports increased from 13.1 percent in 1996 to 19.8 percent in 2000, and were 22.7 percent of the market in the first half of 2001, compared to 18.9 percent in the first half of 2001 [sic].⁵⁷³⁵

Moreover, prices for standard pipe and mechanical pipe from non-NAFTA sources undersold comparable domestic products in all but one quarter (32 of 33 quarters) for which data were available. For both products, the prices of pipe from non-NAFTA countries fell over the period examined, including during the most recent quarter or quarters for which data are available.⁵⁷³⁶

Finally, excluding Canada and Mexico from the database does not appreciably alter projections for foreign production, capacity, and exports to the United States. Indeed, capacity, production, and exports to the United States from non-NAFTA countries are all projected to reach new peaks during the period 2001-2002.⁵⁷³⁷

Consequently, the same considerations that led us to conclude that increased imports of welded tubular products (other than OCTG) are a substantial cause of the threat of

⁵⁷³² Second Supplementary Report, p. 4 (footnote omitted).

⁵⁷³³ (original footnote) USITC Pub. 3479, vol. III, at Table TUBULAR C-4.

⁵⁷³⁴ (original footnote) USITC Pub. 3479, vol. II, at Table TUBULAR-6.

⁵⁷³⁵ (original footnote) USITC Pub. 3479, vol. III, at Table TUBULAR C-4.

⁵⁷³⁶ (original footnote) USITC Pub. 3479, vol. II, at Table TUBULAR-58-59.

⁵⁷³⁷ (original footnote) USITC Pub. 3479, vol. II, at Tables TUBULAR-30-32.

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

(ii) *Claims and arguments of the parties*

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

(iii) *Analysis by the Panel*

10.656 The Panel notes that the safeguard measure on welded pipe excludes imports from Canada, Mexico, Israel and Jordan⁵⁷³⁹ and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. In this regard, the Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question whether increased imports of welded pipe from non-NAFTA countries are a substantial cause of the threat of serious injury to the domestic industry.⁵⁷⁴⁰

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

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

⁵⁷³⁸ USITC Second Supplementary Report, pp. 10-11.

⁵⁷³⁹ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

⁵⁷⁴⁰ USITC Second Supplementary Report, pp. 4, 10-11.

⁵⁷⁴¹ USITC Second Supplementary Report, p. 10.

⁵⁷⁴² Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

10.659 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.⁵⁷⁴³ The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"⁵⁷⁴⁴ or below one per cent and non-existent⁵⁷⁴⁵, it is very likely that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

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

(g) FFTJ

(i) *The USITC's findings*

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

"We report that increased imports of carbon and alloy fittings from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing carbon and alloy fittings.

Non-NAFTA imports of carbon and alloy fittings have increased. Imports from sources other than the NAFTA countries increased from 76,079 short tons in 1996 to 100,592 short tons in 2000; non-NAFTA imports increased in each year of the period examined except 1997.⁵⁷⁴⁷ Similarly, the ratio of non-NAFTA imports to US production increased in each year of the period examined except 1997; the ratio rose from 37.1 percent in 1996 to 51.8 percent in 2000, and was 69.0 percent in interim 2001 compared to 43.9 percent in interim 2000.⁵⁷⁴⁸

⁵⁷⁴³ USITC Second Supplementary Report, p. 4.

⁵⁷⁴⁴ United States' first written submission, para. 754.

⁵⁷⁴⁵ USITC Report, Vol. I, p. 385 and footnote 155.

⁵⁷⁴⁶ USITC Second Supplementary Report, p. 4 (footnote omitted).

⁵⁷⁴⁷ (original footnote) USITC Pub. 3479, vol. III, at Table TUBULAR C-6.

⁵⁷⁴⁸ (original footnote) USITC Pub. 3479, vol. II, at Table TUBULAR-8.

With respect to market share, measured by quantity, non-NAFTA imports increased from 25.7 percent in 1996 to 31.0 percent in 2000, and were 36.3 percent of the market in the first half of 2001, compared to 28.8 percent in the first half of 2001 [sic].⁵⁷⁴⁹

Average unit values of non-NAFTA imports were similar to the average unit values of imports from all sources and generally were above domestic average unit values.⁵⁷⁵⁰ ***⁵⁷⁵¹ ***.

Consequently, the same considerations that led us to conclude that increased imports of carbon and alloy fittings are a substantial cause of serious injury are also applicable to increased imports of carbon and alloy fittings from all sources other than Canada and Mexico.

The conclusion would not be different if only Mexico was excluded, or if only Canada was excluded."⁵⁷⁵²

(ii) *Claims and arguments of the parties*

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

(iii) *Analysis by the Panel*

10.663 The Panel notes that the safeguard measure on FFTJ excludes imports from Canada, Mexico, Israel and Jordan⁵⁷⁵³ and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. In this regard, the Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question whether increased imports of FFTJ from non-NAFTA countries are a substantial cause of serious injury to the domestic industry.⁵⁷⁵⁴

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

⁵⁷⁴⁹ (original footnote) USITC Pub. 3479, vol. III, at Table TUBULAR C-6. Non-NAFTA imports increased from 45,537 short tons in interim 2000 to 63,226 short tons in interim 2000 [sic]. *Id.*

⁵⁷⁵⁰ (original footnote) USITC Pub. 3479, Vol. I, at 176.

⁵⁷⁵¹ (original footnote) USITC Pub. 3479, Vol. II, at Table TUBULAR-61.

⁵⁷⁵² Second Supplementary Report, p. 8.

⁵⁷⁵³ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

⁵⁷⁵⁴ USITC Second Supplementary Report, pp. 4, 8.

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

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

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

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

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

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

⁵⁷⁵⁵ USITC Second Supplementary Report, p. 8.

⁵⁷⁵⁶ United States' first written submission, para. 882.

⁵⁷⁵⁷ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

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

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

(h) Stainless steel bar

(i) *The USITC's findings*

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

"We report that increased imports of stainless bar and light shapes ("stainless bar") from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing stainless bar.

Non-NAFTA imports of stainless bar have increased. In terms of quantity, imports of stainless bar and light shapes from non-NAFTA countries increased by 61.1 percent during the five full-years of the period of investigation, growing from 81,426 short tons in 1996 to 131,184 short tons in 2000.⁵⁷⁶² Although the quantity of non-NAFTA imports fluctuated somewhat during the period (remaining essentially stable in 1998 and declining somewhat in 1999 from its level in 1997 and 1998), a rapid and dramatic increase in the quantity of non-NAFTA imports occurred during the last full-year of the period of investigation, when non-NAFTA imports of stainless bar grew by 38,843 short tons.⁵⁷⁶³

The ratio of non-NAFTA imports of stainless steel bar to domestic production also increased significantly during the period, growing from 43.1 percent in 1996 to 73.3

⁵⁷⁵⁸ USITC Second Supplementary Report, p. 4.

⁵⁷⁵⁹ United States' first written submission, para. 754.

⁵⁷⁶⁰ USITC Report, Vol. I, p. 390 and footnote 180.

⁵⁷⁶¹ USITC Second Supplementary Report, p. 4 (footnote omitted).

⁵⁷⁶² (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-6 & STAINLESS-C-4.

⁵⁷⁶³ (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-6 & STAINLESS-C-4. The quantity of these imports declined between interim 2000 and interim 2001, dropping from 73,738 short tons to 57,584 short tons. USITC Pub. 3479, Vol. III at Tables STAINLESS-6 & STAINLESS-C-4.

percent in 2000, with the largest single percentage increase in the ratio (17.1 percentage points) occurring in 2000.⁵⁷⁶⁴

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

As we concluded with respect to imports of stainless bar from all sources, we report that increases in non-NAFTA import volumes between 1996 and 2000 had a serious adverse impact on the production levels, shipments, commercial sales and market share of the domestic industry. During the period from 1996 to 2000, the quantity of non-NAFTA imports increased by 61.1 percent and the market share of those imports increased by 11 percentage points as well.⁵⁷⁶⁵ Although these import increases occurred during a period of growing demand, the industry's production volumes, shipment levels and sales revenues all declined significantly as a result of increases in non-NAFTA import volume during the period between 1996 and 2000⁵⁷⁶⁶, with the industry's production levels falling by 5.3 percent⁵⁷⁶⁷, its net commercial sales falling by *** percent⁵⁷⁶⁸, and the value of its net commercial sales falling by *** percent during the period.⁵⁷⁶⁹ Moreover, the industry's share of the market also fell considerably, dropping from 64.6 percent in 1996 to 59.8 percent in 1999 and then to 53.5 percent in 2000, with imports from non-NAFTA sources accounting for all of the industry's market share loss during that period.⁵⁷⁷⁰ Accordingly, we report that the increasing imports from non-NAFTA sources had a serious adverse impact on the production, shipment, sales and market share levels of the industry during the period of investigation.

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

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

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

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

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

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

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

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

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

to 51 percent.⁵⁷⁷² Given these underselling trends and taking into account the analysis set forth in our pricing analysis for imports of stainless bar from all sources, we report that this underselling by non-NAFTA imports depressed and suppressed domestic prices during the period of investigation and led to declines in the sales revenues and operating profits of the industry.

Consequently, the same considerations that led us to conclude that increased imports of stainless bar from all sources are a substantial cause of serious injury to the domestic industry are also applicable to increased imports of stainless bar from all sources other than Canada and Mexico.^{5773 5774}

(ii) *Claims and arguments of the parties*

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

(iii) *Analysis by the Panel*

10.673 The Panel notes that the safeguard measure on stainless steel bar excludes imports from Canada, Mexico, Israel and Jordan⁵⁷⁷⁵ and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet the conditions for the application of a safeguard measure as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. In this regard, the Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question whether increased imports of stainless steel bar from non-NAFTA countries are a substantial cause of serious injury to the domestic industry.⁵⁷⁷⁶

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

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

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

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

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

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

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

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

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

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

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

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

⁵⁷⁷⁷ USITC Second Supplementary Report, p. 9. See para. 10.671.

⁵⁷⁷⁸ United States' first written submission, para. 893.

⁵⁷⁷⁹ USITC Report, Vol. I, p. 212.

⁵⁷⁸⁰ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

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

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

(i) Stainless steel wire

(i) *Claims and arguments of the parties*

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

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

(ii) *Analysis by the Panel*

Split findings

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

⁵⁷⁸¹ USITC Second Supplementary Report, p. 4.

⁵⁷⁸² United States' first written submission, para. 754.

⁵⁷⁸³ USITC Report, Vol. I, p. 399 and footnote 225.

⁵⁷⁸⁴ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

10.684 The Panel recalls that Commissioner Bragg made her findings on a product category broader than, and comprising, stainless steel wire (stainless steel wire and stainless steel wire rope), as Commissioner Devaney did.⁵⁷⁸⁵ The Panel also recalls that stainless steel wire is not only the product category for a separate remedy imposed by the United States, but also the product for which the three Commissioners were reported to have made the affirmative determination⁵⁷⁸⁶ which later served as the basis for the safeguard measure.⁵⁷⁸⁷ Those three Commissioners *supported* this determination with findings that are based on different product categories. However, for the purposes of WTO law, the USITC has actually made a determination on stainless steel wire as a separate product. The Panel notes that this is confirmed by the Proclamation of the President of 5 March 2001, in which the President "decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to [tin mill products and stainless steel wire] to be the determination of the [US]ITC".⁵⁷⁸⁸

10.685 Therefore, and for the reasons elaborated in the context of tin mill products⁵⁷⁸⁹, the Panel does not believe that findings on a product category other than stainless steel wire are able to support a measure relating to stainless steel wire, unless there is a reasoned and adequate explanation relating the two product categories. If it was necessary to establish explicitly certain conditions with regard to stainless steel wire, then these conditions cannot be established with findings on a different (broader) product category. Such findings would not be specific to the product to which the USITC determination and the United States' safeguard measure related. Hence, the views of Commissioners Bragg⁵⁷⁹⁰ and Devaney⁵⁷⁹¹, who reached no findings on stainless steel wire but did reach findings on a broader category including stainless steel wire, do not meet the requirements of parallelism. Therefore, in the remainder of this section, the Panel will review the findings reached by Commissioner Koplan which relate to stainless steel wire as a separate product.

Commissioner Koplan's and the USITC's findings

10.686 Commissioner Koplan made the following findings:

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

⁵⁷⁸⁵ USITC Report, Vol. I, p. 277 (Commissioner Bragg) and p. 335 (Commissioner Devaney).

⁵⁷⁸⁶ USITC Report, Vol. I, p. 27.

⁵⁷⁸⁷ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.

⁵⁷⁸⁸ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.

⁵⁷⁸⁹ *Supra* paras. 10.613-10.614.

⁵⁷⁹⁰ USITC Second Supplementary Report, pp. 22-23.

⁵⁷⁹¹ The Panel notes that the United States does not rely on findings made by Commissioner Devaney in defence, possibly because this Commissioner appears not to have reached any conclusions about imports other than excluded imports. See USITC Report, Vol. I, p. 347.

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

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

Panel's assessment

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

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

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

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

⁵⁷⁹² USITC Report, p. 260, footnote 36.

⁵⁷⁹³ USITC Second Supplementary Report, p. 4 (footnote omitted).

⁵⁷⁹⁴ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

⁵⁷⁹⁵ Second Supplementary Report, p. 4.

⁵⁷⁹⁶ United States' first written submission, para. 754.

⁵⁷⁹⁷ USITC Report, Vol. I, p. 405 and footnote 268.

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

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

(j) Stainless steel rod

(i) *The USITC's findings*

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

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

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

(ii) *Claims and arguments of the parties*

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

(iii) *Analysis by the Panel*

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

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

⁵⁷⁹⁸ USITC Second Supplementary Report, p. 223, footnote 1437.

⁵⁷⁹⁹ USITC Second Supplementary Report, p. 4 (footnote omitted).

⁵⁸⁰⁰ Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

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

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

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

G. ADDITIONAL FINDINGS

1. Judicial economy

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

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

⁵⁸⁰² USITC Second Supplementary Report, p. 4.

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

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

10.701 The principle of judicial economy is recognized in WTO law. In *US – Wool Shirt and Blouses*, the Appellate Body made clear that panels are not required to address all the claims made by a complaining party. The Appellate Body relied on the explicit aim of the dispute settlement mechanism which is to secure a positive solution to a dispute (Article 3.7) or a satisfactory settlement of the matter (Article 3.4). Thus, the basic aim of dispute settlement in the WTO is to settle disputes and not to develop jurisprudence. The Appellate Body stated:

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

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

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

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

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

10.705 In addressing several of the claims raised in this dispute (those relating to unforeseen developments, increased imports, causation and parallelism), the Panel believes that it has effectively

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

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

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

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

resolved the dispute in finding inconsistencies that result in the absence of the right of the United States to take the safeguard measures at issue in this dispute. Since the safeguard measures at issue were deprived of a legal basis, the United States could not impose such safeguard measures against any WTO Members. Thus, the Panel does not need to examine the remaining claims, a number of which, have been raised only by some of the complainants and sometimes only for some of the measures at issue.

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

10.707 The Panel finds support for its exercise of judicial economy in the practice of panels and the Appellate Body in previous dispute settlement proceedings relating to safeguard measures. In *US – Wheat Gluten*, the Appellate Body upheld the panel's exercise of judicial economy by not ruling on claims relating to Article XIX (unforeseen developments), Article I of GATT 1994 and Article 5 of the Agreement on Safeguards.⁵⁸⁰⁹ In *US – Lamb*, the Appellate Body upheld the panel's exercise of judicial economy by not ruling on a claim relating to Article 5 of the Agreement on Safeguards.⁵⁸¹⁰ In fact, the panel had exercised judicial economy in relation to claims under Articles 2.2, 3.1, 5.1, 8, 11 and 12 of the Agreement on Safeguards and Articles II and XI of GATT 1994.⁵⁸¹¹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10.716 The Panel recalls that in accordance with Article 6 of the DSU, the DSB originally established multiple panels to examine similar matters raised by the various complainants. Pursuant to two procedural agreements (one concluded on 27 June 2002 between, on the one hand, the European Communities, Japan, Korea, China, Switzerland, Norway and New Zealand and, on the other hand, the United States⁵⁸¹⁶ and the other concluded on 18 July 2002 between Brazil and the United States⁵⁸¹⁷), the United States accepted, *inter alia*, the establishment of a single panel under Article 9.1 of the DSU. Pursuant to the two agreements and in accordance with Article 9.1 of the DSU, the DSB agreed that the various disputes would proceed on the basis of a single panel.⁵⁸¹⁸

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

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

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

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

⁵⁸¹⁷ WT/DS259/9.

⁵⁸¹⁸ See para. 10.1.

⁵⁸¹⁹ See paras. 2.6-2.19.

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

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

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

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

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

10.723 As for the timing of the United States' request, in the Panel's view, the United States' request for separate Panel Reports was *not necessarily* made in an *untimely* fashion. The Panel finds that the United States' request did not come too late in order to adopt the approach that we have chosen in the issuance of this report. We use the word "necessarily" because we consider that despite the fact that the request was made when the Panel's process was quite advanced – that is, three days before the draft Descriptive Part was due to be issued⁵⁸²⁶, this did not necessarily prevent the Panel from settling the dispute in a prompt fashion. Indeed, for the reasons mentioned in the Panel's letter dated 3 February 2003⁵⁸²⁷ and with a view to expediting the process, while respecting all the parties' rights, the Panel decided to issue a single draft Descriptive Part. The question remains, however, as to whether separate Panel Reports should be issued, of which the common Descriptive Part will form a part, to address the concerns expressed by the United States in requesting the issuance of separate Panel Reports.

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

⁵⁸²¹ See para. 6.1.

⁵⁸²² Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 310.

⁵⁸²³ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 310.

⁵⁸²⁴ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 311.

⁵⁸²⁵ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 311.

⁵⁸²⁶ The draft Descriptive Part was, however, not issued on 31 January 2003 but rather on 6 February 2003; the United States' request for separate reports was made on 28 January 2003.

⁵⁸²⁷ See para. 2.18.

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

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

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

10.726 In coming to this solution, which is specific to the present dispute, the Panel is aware that it must, in exercising its discretion under Article 9.2 of the DSU, bear in mind that "the rights which [*all*] the parties would have enjoyed had separate panels examined the complaints are in no way impaired". In fact, the approach seeks to protect the rights of both sides to the dispute. In particular, we consider that the approach protects the rights of the complainants who, in the present dispute, with the apparent agreement of the United States, referred to and relied upon each other's arguments and demonstrations, cross-referenced each other's written submissions⁵⁸³⁰ and written answers, and explicitly stated as much. From the initiation of the panel process, parties have recognized⁵⁸³¹ that the complainants would act together on some common claims and that the United States would respond once to such common claims while responding as well to claims specific to some of the complainants. The complainants coordinated their presentations to the Panel, divided among themselves the argumentation on common claims often explicitly stating that they were speaking on behalf of all complainants. The complainants submitted common comments on the Descriptive Part, common comments on the Interim Findings as well as a common response to the United States' comments on the Interim Findings. At all these stages, the United States often provided one response addressing collectively the arguments made by the complainants. We are aware that some complainants may not

⁵⁸²⁸ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 315.

⁵⁸²⁹ Appellate Body Report, *EC – Hormones*, footnote 138 to para. 152.

⁵⁸³⁰ See for example, European Communities' first written submission, paras. 16-17; Switzerland's first written submission, para. 10; Norway's first written submission, para. 8; Brazil's first written submission, para. 3; New Zealand's first written submission, para. 1.5; China's first written submission, para. 8; Japan's first written submission, para. 5; Korea's first written submission, para. 7. Throughout their written and oral submissions the complainants referred to each other's allegations and arguments. See also the oral statements of the complainants (before the Panel) stating that each of the complainant was speaking on a specific matter on behalf of the other complainants.

⁵⁸³¹ See para. 5 of the Panel's working procedures quoted in para. 6.1 of the Descriptive Part

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

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

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

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

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

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

⁵⁸³⁴ Appellate Body Report, *Korea – Dairy*, para. 145. The Appellate Body confirmed this view in *Thailand – H-Beams*, para. 134. See also the Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.50.

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

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY THE EUROPEAN COMMUNITIES (WT/DS248)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of the European Communities, that the application of a safeguard measure by the United States on imports of:

CCFRS⁵⁸³⁶:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

⁵⁸³⁶ The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Hot-rolled bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the

conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to the European Communities under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY JAPAN (WT/DS249)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of Japan, that the application of a safeguard measure by the United States on imports of:

CCFRS⁵⁸³⁷:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Hot-rolled bar:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

⁵⁸³⁷ The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to Japan under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

**XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY KOREA⁵⁸³⁸
(WT/DS251)**

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of Korea, that the application of a safeguard measure by the United States on imports of:

CCFRS⁵⁸³⁹:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

⁵⁸³⁸ In its request for the establishment of a Panel, Korea did raise a claim for Unforeseen Developments. However, in its first and second written submissions, Korea did not develop this claim or request any findings on the issue.

⁵⁸³⁹ The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

Hot-rolled bar:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to Korea under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommend that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY CHINA (WT/DS252)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of China, that the application of a safeguard measure by the United States on imports of:

CCFRS⁵⁸⁴⁰:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

⁵⁸⁴⁰ The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Hot-rolled bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the

conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to China under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY SWITZERLAND (WT/DS253)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of Switzerland, that the application of a safeguard measure by the United States on imports of:

CCFRS⁵⁸⁴¹:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

⁵⁸⁴¹ The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Hot-rolled bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the

conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to Switzerland under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY NORWAY (WT/DS254)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of Norway, that the application of a safeguard measure by the United States on imports of:

CCFRS⁵⁸⁴²:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

⁵⁸⁴² The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Hot-rolled bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the

conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to Norway under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY NEW ZEALAND (WT/DS258)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of New Zealand, that the application of a safeguard measure by the United States on imports of:

CCFRS⁵⁸⁴³:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

⁵⁸⁴³ The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Hot-rolled bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the

conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of parallelism between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

- is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to New Zealand under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

**XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY BRAZIL⁵⁸⁴⁴
(WT/DS259)**

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of Brazil, that the application of a safeguard measure by the United States on imports of:

CCFRS⁵⁸⁴⁵:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

⁵⁸⁴⁴ In its request for the establishment of a Panel, Brazil did raise a claim for unforeseen developments. However, in its first and second written submissions, Brazil did not develop this claim or request any findings on the issue.

⁵⁸⁴⁵ The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

Hot-rolled bar:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

- is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;
- is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to Brazil under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.
