

**UNITED STATES – DEFINITIVE SAFEGUARD MEASURES  
ON IMPORTS OF CIRCULAR WELDED CARBON QUALITY  
LINE PIPE FROM KOREA**

***Report of the Panel***

The report of the Panel on United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 29 October 2001 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). 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.

Note by the Secretariat: This Panel Report 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 report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.



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## I. INTRODUCTION

### A. COMPLAINT OF KOREA

1.1 On 15 June 2000, Korea requested consultations with the United States pursuant to Article 4 of the Dispute Settlement Understanding (the "DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994") and Article 14 of the Agreement on Safeguards<sup>1</sup> (also the "Safeguards Agreement", or "SA") with regard to a definitive safeguard measure imposed by the United States on imports of circular welded carbon quality line pipe (the "line pipe measure").<sup>2</sup>

1.2 On 28 July 2000, Korea and the United States held the requested consultations, but failed to resolve the dispute.

1.3 On 14 September 2000, Korea requested the establishment of a panel to examine the matter.<sup>3</sup>

### B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting of 23 October 2000, the Dispute Settlement Body (the "DSB") established a Panel pursuant to the request made by Korea in document WT/DS202/4.<sup>4</sup>

1.5 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference, as follows:

"To examine, in the light of the relevant provisions of the covered agreements cited by Korea in document WT/DS202/4, the matter referred to the DSB by Korea in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.6 On 12 January 2001, Korea requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 22 January 2001, the Director-General composed the Panel as follows:

Chairman: Mr. Dariusz Rosati

Members: Mr. Roberto Azevedo  
Mr. Eduardo Bianchi

1.7 Australia, Canada, the European Communities, Japan and Mexico, reserved their rights to participate in the panel proceedings as third parties.

## II. FACTUAL ASPECTS

2.1 This dispute concerns a measure imposed by the United States on imports of circular welded carbon quality line pipe ("line pipe"). This measure was imposed following an investigation conducted by the United States International Trade Commission ("ITC") in response to a petition filed on 30 June 1999 and amended on 2 July 1999, alleging that imports of line pipe were causing serious injury to the US manufacturers of line pipe.

2.2 The ITC initiated the investigation on 4 August 1999.

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<sup>1</sup> Unless otherwise indicated, all references to Arabic numbered Articles are to the Agreement on Safeguards, and all references to Roman numeral Articles are to GATT 1994.

<sup>2</sup> WT/DS202/1.

<sup>3</sup> WT/DS202/4.

<sup>4</sup> See, WT/DSB/M/91 at para. 67.

2.3 The ITC held a public "voice" vote on the issue of serious injury on 28 October 1999. Commissioner Crawford voted "no serious injury" and "no threat of serious injury" while Commissioners Bragg and Askey found "threat of serious injury", but no "present serious injury". Three Commissioners found "present serious injury." On this basis the ITC determined that line pipe was being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article.

2.4 On 8 December 1999, the ITC announced its remedy recommendation. Commissioner Crawford, who had voted that the industry was not seriously injured or threatened with serious injury by imports, recommended against the imposition of any remedy. Commissioner Askey and Commissioner Bragg recommended a four-year remedy with an *ad valorem* tariff of 12.5 per cent for the first year, 11 per cent for year two, 9.5 per cent for year three, and 8 per cent for year four. The remaining three Commissioners, Commissioners Miller, Koplman and Hillman, constituting the majority, recommended:

- (1) That the President impose a tariff-rate quota for a 4-year period on imports of line pipe, with the in-quota amount set at 151,124 tons in the first year, and with that amount to be increased by 10 per cent in each of the second, third, and fourth years; with over-quota imports to be subject to a duty of 30 per cent *ad valorem* in addition to current US tariffs;
- (2) That the President, if he determines to allocate the overall quota, recognize the disproportionate growth and impact of the imports from Korea;
- (3) That the President initiate international negotiations with Korea to address the underlying cause of the import surge and the serious injury to the domestic industry;
- (4) Having made negative findings with respect to imports of line pipe from Canada and Mexico under section 311(a) of the NAFTA Implementation Act, that such imports be excluded from the tariff-rate quota; and
- (5) That the tariff-rate quota not apply to imports of line pipe from Israel, or to any imports of line pipe entered duty-free from beneficiary countries under the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act.

2.5 The President announced the measure on 11 February 2000. The action would take the form of a duty increase for three years and one day. The first 9,000 short tons of imports from each country were excluded each year, with annual reductions in the rate of duty in the second and third years. In the first year, imports above 9,000 short tons would be subject to a 19 per cent duty. In the second year, the duty would be reduced to 15 per cent and in the third year the duty would be 11 per cent. Mexico and Canada were excluded from the remedy. The United States notified the WTO of its action on 23 February 2000.

### III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Korea requests the Panel to find that:

- (1) The US measure does not comply with Article XIII or Article XIX of the GATT 1994 nor does it comply with the requirements of Article 5 of the Agreement on Safeguards;
- (2) Regardless of the type of measure, the measure violates Article XIX:I of the GATT 1994 and Articles 5.1 and 7.1 of the Agreement on Safeguards because the measure

was not limited to the extent and the time necessary to remedy the injury and allow adjustment;

- (3) The United States violated Article 2 of the Agreement on Safeguards, as well as Article I, Article XIII:1 and Article XIX of the GATT 1994 by exempting Mexico and Canada from the measure;
- (4) The US measure did not respect the provisions of Article 9.1 of the Agreement on Safeguards regarding the exclusion of developing countries;
- (5) The US measure is inconsistent with Article XIX of the GATT 1994 and Article 2 of the Agreement on Safeguards because imports did not increase suddenly, sharply and recently;
- (6) The United States failed to demonstrate that the US line pipe industry was suffering serious injury as required by Article XIX of the GATT 1994 and Articles 3.1 and 4 of the Agreement on Safeguards;
- (7) The United States failed to demonstrate a causal relationship between increased imports and serious injury in violation of Article XIX of the GATT 1994 and Article 4 of the Agreement on Safeguards;
- (8) The ITC's threat of serious injury determination violated Articles 2 and 4 of the Agreement on Safeguards and Article XIX of the GATT 1994;
- (9) The United States failed to demonstrate the unforeseen developments which led to the increased imports which caused serious injury;
- (10) The US decision did not satisfy the requirements of emergency action of Article 11 of the Agreement on Safeguards or Article XIX of the GATT 1994;
- (11) The United States violated the obligation in Article 12.3 of the Agreement on Safeguards to consult concerning the measure before the measure is imposed; and
- (12) The United States violated the compensation provisions of Article 8.1 of the Agreement on Safeguards.

3.2 Therefore Korea requests that the Panel find that the US safeguard measure should be lifted immediately and the ITC safeguard investigation on line pipe terminated.

3.3 The United States requests the Panel to reject Korea's claims.

#### **IV. ARGUMENTS OF THE PARTIES**

4.1 The main arguments, presented by the parties in their written submissions and oral statements, are summarized below.

##### **A. FIRST WRITTEN SUBMISSION OF KOREA**

4.2 The following is Korea's own executive summary of its first written submission:

## 1. Factual Background

4.3 Carbon steel line pipe is a tubular product used primarily in the gathering and transmission of oil and gas. The oil and gas industry is typically a “boom-or-bust” industry that experiences wide swings in prices and production. Consequently, demand and pricing for line pipe as well as certain other pipe products such as oil country tubular goods (“OCTG”) are also subject to wide cyclical swings.

4.4 After mid-1998, oil prices declined and continued dropping precipitously through early 1999. Natural gas prices followed a similar but less volatile pattern. By April 1999, the number of active oil drilling rigs in the United States was at the lowest level ever recorded since tracking began in 1944. Predictably, the US line pipe industry’s performance declined dramatically over the same period. In fact, the performance of the US line pipe industry almost perfectly tracks the performance of the oil and gas industry: both rose through the first half of 1998 (as did import levels) and then both fell dramatically in the second half of 1998 (imports declined with domestic shipments). US line pipe performance declined further still in the first quarter of 1999 as the oil and gas crisis continued. Notably, imports continued to decline.

4.5 Significantly, US line pipe industry performance began its recovery in the second quarter of 1999 (prior to the ITC’s determination in this case) as oil and gas prices as well as drilling activity rose. Imports, however, continued to fall in the first half of 1999, a decline that had commenced in July of 1998.

4.6 At the time of the ITC’s determination in October of 1999, the industry was well on its way up the cycle. For this reason, the ITC majority recommended a tariff-rate quota of 151,124 short tons at the normal rate of duty, a level that approximates the average import level for the most recent three-year period. Nevertheless, the US President ignored this recommendation and imposed a remedy which dramatically reduced imports below the level recommended by the ITC. Each potential supplier was allocated 9,000 short tons (there were seven principal suppliers other than Mexico and Canada) and a duty level of 19 per cent was imposed for over-quota imports with a phase-down only of the tariff level over the three-years-and-one-day period for the measure. The 19 per cent duty level has acted as a virtual ceiling on out-of-quota imports. Import levels dropped to 63,932 short tons in the period of March to December 2000, from 165,652 short tons in 1999 for the same period (based on US Census data).

4.7 Traditional trade patterns also were disrupted: Mexico and Canada were excluded from the safeguard measure and all other suppliers were given an identical quota of line pipe regardless of their historical trade to the US market.

## 2. Preliminary Legal Issues

### (a) Confidential Information

4.8 While Korea takes note of the indexed data provided by the United States in its letter of 16 February 2001, which contains absolute import trends, the US response was deficient under Article 13.1 of the DSU. Korea is of the view that it did not include information regarding the relative trends of imports and domestic production. The Panel’s need for this confidential data on relative import trends is confirmed by the indexed data provided for the absolute trends in imports; the 12-month decline at the end of the period in absolute import volumes is not shown in the public data.

4.9 Korea submits that the Panel should seek additional confidential information in order to conduct its Article 11 (DSU) review, including:

- (1) generally, the full confidential record on which the ITC actually based its determination. The burden should be on the United States to demonstrate why the full deliberative record of the ITC should not be reviewed by the Panel; and
- (2) specifically, information regarding pricing data (since declines in prices were a key element of the ITC majority's causation determination); and information regarding certain producers whose financial data negatively affected industry profitability for reasons not related to line pipe; and
- (3) the ITC's Economic Analysis and Report to the President on the recommended remedy as well as any relevant deliberative documents by the Office of the President which bear directly on Korea's claims regarding the WTO inconsistency of the safeguard measure under Articles XIII and XIX and Article 5.

4.10 Such information can be protected within the Panel process in accordance with Articles 13.1 and 18.2 as well as Appendices 3.3 and 3.11 of the DSU. If the United States refuses to provide the data, the refusal would constitute a violation of the US obligation under Article 13.1 of the DSU and the Panel should use adverse inferences and/or should find that the United States has not met its burden of proof on the claims at issue.

(b) The Panel Should Avoid False Judicial Economy

4.11 Korea requests that the Panel reach both of the independent claims against the United States – the inconsistency of the ITC's investigation and the inconsistency of the US President's safeguard measure. The exercise of judicial economy in this case would not lead to dispute resolution but rather dispute prolongation since Korea otherwise would be required to bring successive Panels to reach both independent claims.

4.12 US law supports the conclusion that these are independent claims because the United States can implement an adverse Panel decision with respect to the investigation and still maintain the safeguard measure. Since the resolution of the WTO inconsistency of the investigation does not resolve the errors in the safeguard measure, full implementation by the United States of the Panel ruling can only be assured if both independent claims are addressed.

4.13 Korea requests that, regardless of the Panel's decision concerning the conformity of the ITC investigation with the WTO, the Panel should review the legal errors alleged with respect to the measure. An illegal measure should not be allowed to continue through the implementation process with the cost of the time and delay falling on Korea, the prevailing party.

### **3. The Safeguard Measure Is Inconsistent With the WTO**

(a) Introduction

4.14 Korea argues that the United States is in violation of the interrelated obligations imposed by Articles XIII and XIX and Articles 5 and 7, which cumulatively require that all measures be limited to the extent "necessary" and that quantitative restraints in the form of tariff-rate quotas be established in a manner to assure that traditional trade patterns are preserved, that overall quotas are fixed, and that historical shares of principal suppliers are respected. Korea states that the United States also violated the provisions of Articles I, XIII and XIX and Article 2 by discriminatorily excluding Mexico and Canada from the safeguard measure.

(b) The safeguard measure does not comply with Articles XIII or XIX nor does it comply with the requirements of Article 5

(i) *The safeguard measure is a quantitative restraint in the form of a tariff-rate quota*

4.15 The plain meaning of a tariff-rate quota is that it consists of two elements – a quota and a tariff. The remedy ultimately imposed by the US President contained those two elements – a certain tariff-rate was imposed on in-quota imports of 9,000 short tons, and a higher tariff rate was imposed on out-quota imports above this in-quota amount. Thus, the Presidential measure is a quantitative restraint in the form of a tariff-rate quota.

4.16 Quantitative restraints in the form of tariff-rate quotas must comply with the cumulative requirements of Articles XIII and XIX as well as Article 5.

(ii) *The United States failed to set an overall quota in violation of Article XIII and Article 5.1*

4.17 As the first step to the proper administration of a tariff-rate quota, Article XIII:2(a) and Article 5.1 requires that the overall quota amounts be fixed. The establishment of this overall quota amount permits traditional suppliers to determine whether the imposing country has abided by the terms of Article XIII:2(d) and Article 5.2 regarding the proper country allocations of the overall quota. Since the United States did not fix an overall quota and no reliable basis exists to determine the overall quota, the measure is in violation of these provisions and the SA.

(iii) *The United States did not base the total tariff-rate quota on a previous three year representative period*

4.18 The tariff-rate quota imposed by the President, unlike the tariff-rate quota recommended by the ITC, was not limited to the level of the “last three representative years”. (While the ITC base period is confidential, it can be inferred from the public data and the ITC’s determination.) Therefore, the measure violated Article 5.1 because the baseline of the last three years was not applied and the “clear justification” required by Article 5.1 in cases of deviation from the baseline was not provided.

(iv) *The United States failed to allocate the quotas among its Members on the basis of their proportional historical share in violation of Article XIII and Article XIX 1994, and Article 5.2*

4.19 In violation of the cumulative requirements of Articles XIII:2 and XIX and Article 5.2, the President did not negotiate the quotas with all Members having a substantial interest in line pipe trade and did not allocate the quotas based on the suppliers’ proportional market share during a representative period (“historical share”).

4.20 Korea constituted 55 per cent of the total imports (excluding Mexico and Canada and based on the public data) during the period of 1996-98, which was the apparent base period of the ITC recommended measure. Nevertheless, the President’s measure reduced Korea’s imports to the same 9,000 short ton quota level as the smallest or even non-existent suppliers. This failure to respect historical suppliers is precisely the situation prohibited by Articles XIII:2 and XIX and Article 5.2.

(c) **Regardless of the Type of the Safeguard Measure, the Measure Violates Article XIX:1 and Articles 5.1 and 7.1 Because the Measure Was Not Limited to the Extent and the Time Necessary to Remedy the Injury and Allow Adjustment**

4.21 The US President, without any public explanation or justification, disregarded the safeguard remedy recommendation of the ITC and imposed a remedy which was far more severe than “necessary”. While there is no way of determining exactly what overall import level is targeted by

the President's country allocations of 9,000 short tons, any reasonable calculation results in a total quota of significantly less than that recommended by the ITC – 151,124 short tons.

4.22 Furthermore, the ITC's economic analysis specifically rejected as "excessive" a limit of 105,000 short tons and that limit significantly exceeds the President's measure. Since there was no independent analytical basis for the Presidential measure, there was no means or method for the United States to ensure that the measure was limited "only to the extent necessary". The finding by the ITC and the absence of any analytical support for the President's measure constitute *prima facie* evidence that the measure was not "limited to the extent necessary" and consequently violates Article XIX:1 and Article 5.1.

4.23 In addition, Article 7.1 provides that a measure can only be applied for such a period of time as may be "necessary to prevent or remedy serious injury and to facilitate adjustment". Significant evidence in the ITC record confirmed that the temporary downturn in the line pipe industry produced by the crisis in oil and gas prices had reversed by the time of the ITC's determination in October of 1999. Therefore, no remedy, let alone a measure of three years, could be justified as necessary.

(d) The US Exemption of Mexico and Canada from the Safeguard Measure Violated the MFN Requirements Established in Articles I, XIII:1 and XIX and Article 2

4.24 The MFN requirement is a cornerstone of the GATT/WTO system. It is reflected in all the relevant articles of the GATT, including Articles I and XIX and it is specifically incorporated in Article XIII:1 and Article 2.2. All of these provisions require that the safeguard measure and quantitative restrictions be applied to all suppliers. In this case, the United States did not respect this principle or these provisions because it excluded Mexico and Canada from the safeguard measure.

4.25 The parallelism between Articles 2.1 and 2.2 also requires that the measure be applied to all suppliers since the United States could only conduct a legal safeguard investigation on the basis of all imports. Articles 2 and 4 as well as Article XIX speak only in terms of "imports" and, therefore, there is no legal basis for any exclusion of certain imports. Any other interpretation would not comport with the plain meaning of those provisions and could lead to a selective safeguard regime in which a WTO Member could exclude countries arbitrarily from the serious injury analysis so that they could be excluded from the safeguard measure imposed.

4.26 The exemption of Mexico was particularly egregious in this case since Mexico was the second largest supplier to the US market during the ITC's period of investigation. It was clear that Mexico would take market share from the restricted suppliers. In fact, Mexico and Canada together have significantly replaced historical suppliers such as Korea. Mexico is now the largest supplier to the US market and Canada is the number three supplier. Mexico and Canada's imports almost equal the imports from all other suppliers. Their imports clearly have occurred at the expense of the other historical suppliers who are now discriminatorily restricted from the US market.

(e) The United States Failed to Respect the Rights of Developing Countries to be Excluded from the Safeguard Measure if their Individual Imports Were Less Than 3 per cent and Cumulatively Less Than 9 per cent in Violation of Article 9.1

4.27 Article 9.1 provides a special preference for developing countries to allow them to be exempt from a safeguard measure when their imports are at the specified negligible level. In this case, the United States did not exempt the countries who qualified. The United States therefore failed to respect the developing country preference in Article 9.1.

#### 4. The ITC Investigation Was Not in Compliance With WTO Requirements

##### (a) The US Measure Is Inconsistent with Article XIX and Article 2 Because Imports Did Not Increase Absolutely or Relative to Domestic Production

4.28 With respect to the issue of increased imports, the ITC methodology was inconsistent with Article XIX and Articles 2 and 4. The ITC applied a legal standard that was rejected by the Appellate Body in *Argentina – Footwear (AB)* – i.e., “increased imports” requires only a “simple increase” over the most recent five full years. The Appellate Body in *Argentina – Footwear (AB)* held that imports must have increased during “the recent past” and that the increase had to be “sudden and sharp,” in order to meet the requirements of Article XIX and Article 2.1.

4.29 While the public data indicates that imports increased up until the end of 1998, the confidential data shows that, in fact, imports of subject merchandise began to decline in the second half of 1998 and continued to decline for the 12 months immediately preceding the ITC’s determination. Moreover, imports did not increase relative to production but rather declined during the first six months of 1999. The ITC’s determination does not address either of these fundamental facts because an erroneous legal standard was applied.

4.30 The correct legal finding, as enunciated by the Appellate Body in *Argentina – Footwear (AB)* is that “not just any increased quantities of imports will suffice ... [t]he 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’”. Clearly, the ITC did not apply this standard, and just as clearly, the declining subject imports did not meet it.

4.31 The US line pipe industry was not suffering serious injury within the meaning of Article XIX and Articles 2.1 and 4 nor did the ITC satisfy the requirements of Articles 3.1 and 4.2(c) regarding the required findings of fact and conclusions of law

4.32 The case for serious injury was far from compelling – as half the Commissioners recognized. Only three out of the six ITC Commissioners determined that the industry was seriously injured. Two Commissioners determined that the industry had not been seriously injured, but it was threatened with serious injury. Finally, one Commissioner determined that the industry was neither seriously injured nor threatened with serious injury by imports.

4.33 The ITC could not agree that the requirement for safeguard relief had been met and there was no attempt at a reconciliation of the divergent opinions. Therefore, the ITC’s findings and conclusions of fact and law fell short of the requirements of Articles 3.1 and 4.2(c), which require that the authorities set out in sufficient detail their findings and conclusions of law.

4.34 Moreover, in this case, the Panel’s review of Korea’s Article 3.1 and 4.2(c) claims is hampered by the fact that the Panel does not have access to the actual factual record on which these divergent conclusions were reached. The adequacy and reasonableness of the conclusions reached depend upon the facts.

4.35 These fundamental legal disagreements among Commissioners also make it clear that this is not a case of extraordinary circumstances which can justify emergency relief.

4.36 The ITC record confirms that the US line pipe industry was not “significantly impaired”. Industry indicators had declined temporarily for 12 months (between July 1998 and June 1999) and that decline followed a peak performance sustained over the preceding 18 months. In fact, the industry had recorded its best performance ever in 1997 and the first half of 1998. Moreover, even during the brief period of the downturn, capital expenditures by the US industry continued to increase at substantial levels and two new producers began operations.

4.37 Even the declines in profitability in late 1998 and early 1999 were overstated because the ITC failed to isolate the effects on the line pipe industry caused by the collapse of the OCTG market. Although the problems with the industry data went beyond just certain producers, the profitability data was particularly affected by the circumstances of Lone Star Steel and Geneva Steel. Their problems were clearly due to causes other than imports of line pipe.

4.38 The ITC also improperly ignored the fact that no present serious injury existed at the time of the ITC's vote, if it ever had. The ITC explicitly noted that both domestic shipments and prices had recovered substantially at the end of the period when the ITC's determination was made. Those facts should have resulted in a "no serious injury" finding.

(b) No Causal Nexus Existed Between Increased Imports and Serious Injury as Required by Article XIX and Article 4

4.39 Article XIX and Article 4.2(b) mandates that an affirmative injury determination shall not be made, unless objective evidence demonstrates a "causal link between increased imports of the product concerned and serious injury". The Panel in *Argentina – Footwear (Panel)* (subsequently affirmed by the Appellate Body), enunciated an analytical framework for a causal analysis: (i) the coincidence of trends between imports and the performance of the domestic industry; (ii) the conditions of competition between imports and the domestic industry; and (iii) whether other factors were the cause of any injury.

4.40 Assuming *arguendo*, that serious injury existed, the evidence in this case demonstrates that there was no coincidence of trends between imports and the performance of the domestic industry. In fact, the decline in industry performance coincided with a decline in imports, not an increase. The evidence also established that the conditions of competition between imports and the domestic industry, specifically price effects, were the result primarily of a decline in line pipe demand; there was no demonstration that imports led or caused the decline in US prices. Therefore, the ITC majority should have concluded that no causal relationship existed between increased imports and any serious injury suffered by the industry. At a minimum, the ITC majority had to explain how a causal nexus could still exist in spite of the lack of coincidence in trends between increased imports and serious injury.

4.41 The ITC's subsequent analysis of the other factors of serious injury – principally declines in demand for line pipe from the oil and gas industry – was also WTO inconsistent since the evidence established that "but for" the oil and gas crisis, the industry would not have been in a state of serious injury. The ITC's evaluation of the additional "other factors," including low capacity utilization and significant domestic competition among US producers, also failed to meet the standard set out by the Appellate Body in *US – Wheat Gluten (AB)*. The United States failed to establish that it did not "attribute the injury caused by these other factors to increased imports" since the ITC only weighed each individual other factor against increased imports. The required "examination" and "distinguishing" of the other factors was not performed. Thus, the ITC did not establish that the increase in imports had a "genuine and substantial" linkage with serious injury.

4.42 Finally, the US safeguard measure was designed to remedy, in part, serious injury from declining demand when the measure should only have addressed the serious injury caused by imports.

(c) There Was No Threat of Serious Injury from Imports in Accordance With The Requirements Of Article XIX nor Articles 2 and 4

4.43 Two Commissioners determined that although the industry had not been seriously injured, it was threatened with serious injury from increased imports. These Commissioners failed to reconcile their finding of threat with the fact that subject imports had declined over the most recent 12-month period (there was only a "threat" of increased imports), and that decline had actually accelerated

considerably over the final six months of the period. Finally, both domestic pricing and shipments had shown considerable improvement by mid-1999 with the recovery of the oil and gas sector. When the improvement in the industry is combined with the fact that imports continued to decline, it is clear that the affirmative threat determinations were based merely on “conjecture or remote probability,” and not on injury that was clearly “imminent”. Thus, the ITC’s threat of injury determination violated Article XIX and Articles 2 and 4.

(d) No Unforeseen Developments Led to Increased Imports

4.44 Pursuant to the Appellate Body’s Interpretation of Article XIX in *Korea – Dairy Safeguard (AB)* and *Argentina – Footwear (AB)*, there must be unforeseen circumstances that led to the increase in imports that cause serious injury. No such unforeseen circumstances were identified by the United States nor do any such circumstances exist in the record of this case.

(e) The US Decision Did Not Satisfy the Requirements of Emergency Action As Specified by Article 11 or Article XIX

4.45 The US decision did not meet the fundamental conditions of safeguard relief. As the Appellate Body in *Argentina – Footwear (AB)* recognized, safeguard measures were intended to be measures “out of the ordinary, to be matters of urgency, to be, in short, ‘emergency actions’”.

4.46 Such an emergency situation did not exist here – a four-quarter decline in imports is hardly an “emergency” situation requiring “immediate relief”. This is especially true when the decline in domestic industry performance coincides with a decline in imports and the industry is in the midst of an upswing when the ITC’s determination was made. Thus, the US determination on serious injury and causation cannot support this or any other safeguard measure because the strict standards of the SA have not been met.

## 5. Procedural Legal Arguments

(a) The United States Violated Article 12.3

4.47 The United States did not disclose to Korea the measure the President intended to propose prior to or during the consultations as required under Article 12.3. Therefore, Korea was deprived of any meaningful consultations regarding the measure in violation of Article 12.3.

(b) The United States Violated the Compensation Provisions of Article 8.1

4.48 Article 8.1 provides that a Member imposing a measure shall endeavour to maintain a substantially equivalent level of concessions including trade compensation. Articles 8.1 and 12.3 are explicitly linked and require that there be an opportunity for prior consultation with full knowledge of the proposed measure. As the United States did not disclose the measure to Korea prior to the consultations, those consultations could not meet the objectives set out in Article 8.1.

## 6. Conclusion

4.49 The US safeguard measure as well as the ITC’s safeguard investigation were not in conformity with the WTO. Korea respectfully requests that the Panel find that the US safeguard measure should be lifted immediately and the ITC safeguard investigation on line pipe terminated.

### B. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

4.50 The following is the United States’ own executive summary of its first written submission:

## 1. Factual Background

4.51 The ITC determined that line pipe was being imported into the United States in such increased quantities as to be a substantial cause of *serious injury or the threat of serious injury*. Three of the ITC's six Commissioners found that the domestic industry was seriously injured, and two found that the domestic industry was threatened with serious injury. The votes of these five Commissioners constituted the determination of the ITC, which is the "competent authority" of the United States for purposes of the WTO Agreement on Safeguards. One Commissioner dissented from the determination. Under US law, that dissent does not form part of the determination of the ITC or the explanation of the basis of the determination.

4.52 Contrary to Korea's assertions, the ITC's determination is fully consistent with Articles 3 and 4. Korea has presented no grounds for the Panel to conclude that confidential information is necessary to its review of the ITC's findings and conclusions. Furthermore, the fact that the ITC Commissioners were not unanimous in their affirmative injury findings does not render that determination inconsistent with Articles 3.1 or 4.2(c). Articles 3 and 4 impose requirements on the "competent authorities of a Member." The Safeguards Agreement does not address the question of how the "competent authorities of a Member" reach their decisions. This is a matter left to the Member.

## 2. Substantive Argument

### (a) Burdens of Proof

4.53 The United States complied with all its obligations under the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement") when it applied the safeguard measure on line pipe. That measure is presumed to be consistent with the WTO Agreement unless Korea, as the complainant, meets its burden of proof to demonstrate otherwise. It has failed in this task, as its claims are based primarily on unfounded assertions without supporting evidence or legal grounding. Korea attempts to excuse these shortcomings by claiming that it needs large volumes of "confidential information" to advance its claims. However, most of the data underlying the ITC finding of serious injury appear in the ITC Report.<sup>5</sup> Therefore, the deletion of confidential information from the published version of the report does not impair the Panel's ability to examine Korea's claims. Since Korea has failed to present a *prima facie* case on any of its claims, the Panel has no basis to request the United States to provide the confidential information.

### (b) The Proper Application of the Standard of Review: Objective Assessment of Action by the Competent Authorities and Action by Members in Applying a Safeguard Measure

4.54 The Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and past interpretations of the DSU establish that a panel must make an objective assessment of the facts of the case and of the applicability and conformity with the relevant covered agreements. With regard to fact-finding, "the applicable standard is neither *de novo* review as such, nor 'total deference.'" <sup>6</sup> This inquiry may differ depending on the obligation under examination.

4.55 With regard to the ITC's findings, which address US obligations under Articles 2, 3, and 4 of the Safeguards Agreement, the Panel's review is limited to an objective assessment

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<sup>5</sup> *Circular Welded Carbon Quality Line Pipe*, Inv. No. TA-201-70, ITC Pub. 3261 (December 1999) p. I-3, ("ITC Report").

<sup>6</sup> *European Communities – Measures Concerning Meat and Meat Products*, report of the Appellate Body, WT/DS26/AB/R, para. 117, adopted 13 February 1998 ("*EC- Hormones (AB)*").

of whether the domestic authority has considered all relevant facts, including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contains adequate explanation of how the facts support the determination made, and consequently of whether the determination made is consistent with ... the Safeguards Agreement.<sup>7</sup>

4.56 In contrast, a panel's analysis of the Member's application of a safeguard measure is not confined to evidence gathered in the investigation or findings made in the report of the competent authorities. The panel may also consider a Member's *ex post* explanation of why the measure was permissible at the time of application. As the Appellate Body recognized in *Korea – Dairy Safeguard*, the recommendations or determinations in a safeguard proceeding *need not* justify the type or extent of the safeguard measure applied by the Member, except in the limited circumstance of a quantitative restriction that reduces the quantity of imports below the average of imports in the last three representative years.<sup>8</sup>

(c) Korea Has Not Established Any Basis for the Panel to Conclude That the ITC's Determination of Increased Imports Is Inconsistent With Article 2

4.57 Article 2.1 requires increased imports on *either* an absolute basis *or* relative to domestic production. In this case there was a recent, sudden, sharp, and significant increase in imports in the recent past, on *both* an absolute basis *and* relative to domestic consumption.

4.58 In analyzing the import data, the ITC paid particular attention to the most recent part of the period of investigation, the full year 1998 and interim 1999. As the ITC found, after declining between 1994 and 1995, imports on an absolute basis increased each year thereafter, and rose sharply in 1998, the most recent calendar year of the period investigated. Imports rose from about 222,000 tons in 1997 to about 331,000 tons in 1998. Although absolute import levels in interim 1999 were slightly lower than those for interim 1998, they remained very high. Imports in interim 1999 exceeded in just six months the levels of full year 1995 and 1996 imports. Imports relative to domestic production rose each year after 1995. The ratio of imports to domestic production nearly doubled in 1998, and reached its highest level in interim 1999.

4.59 Korea has failed to meet its burden of making a *prima facie* case that the increase in imports required by Article 2.1 did not occur. Korea attempts to refute the ITC's finding of increased imports by asking the Panel to focus exclusively on a comparison of the last six months of 1998 and the first six months of 1999, to the exclusion of all other data, including the most recent full-year data for 1998. Even the import data for this 12-month period used by Korea does not support its argument that imports declined steadily over this period. Rather, monthly import data show that imports actually increased toward the end of interim 1999.

4.60 The ITC customarily gathers and evaluates import data on a calendar year basis with additional data on interim periods, and not on the basis of arbitrarily defined snapshots of time. That the ITC followed its long-standing approach in examining increased imports demonstrates neutrality and lack of bias in its analysis. The use of interim-period-to-interim-period comparisons for 1998 and 1999 was consistent with its long-standing practice and, unlike Korea's proposed alternative methodology, not chosen to achieve a particular result.

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<sup>7</sup> *Argentina – Safeguard Measures on Imports of Footwear Safeguard*, WT/DS121/R, para. 8.124, adopted 25 June 1999 ("*Argentina – Footwear Safeguard*"); *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, para. 7.30, adopted 21 June 1999 ("*Korea – Dairy Safeguard*").

<sup>8</sup> *Korea – Definitive Measure on Imports of Certain Dairy Safeguard Products*, Report of the Appellate Body, WT/DS98/AB/R, paras. 99 and 103, adopted 14 December 1999 ("*Korea – Dairy Safeguard (AB)*").

4.61 Nothing in the Safeguards Agreement compels the use of any particular period, let alone the arbitrarily-defined period advocated by Korea. Under the applicable standard of review pursuant to Article 11 DSU, the Panel should not re-weigh the evidence before the ITC, and should not disturb the ITC's findings so long as they are objective.

(d) The ITC's Determination of Serious Injury Caused by Increased Imports Is Consistent With Article 4

4.62 In determining that the domestic industry was seriously injured, the ITC evaluated all enumerated factors set out in Article 4.2(a) and "other" factors that it found to be relevant, including capacity, shipments, inventories, capital expenditures, research and development expenses, and prices. Virtually all of the factors demonstrated a significant overall impairment in the domestic industry's condition beginning in 1998 and continuing into interim 1999. Korea's submission completely disregards this overwhelming evidence of serious injury.

4.63 The ITC's methods of collecting and evaluating the injury data were reasonable. The ITC recognized that most of the producers of line pipe also made other types of pipe, including oil country tubular goods ("OCTG"). The ITC carefully evaluated company allocation methods in the course of tabulating questionnaire and other data, and it verified the allocations of two of the largest producers. Some allocation issues will always be present in a safeguards investigation involving a product that is made in productive facilities also used to produce other products. The fact that certain allocations are necessary does not mean that a Member has failed to evaluate industry-specific factors "of an objective and quantifiable nature," as required by Article 4.2(a).

4.64 For the large majority of the factors considered by the ITC in its injury analysis, Korea has failed to provide any reason to believe that the production of other pipe products in the US producers' facilities affected the data. The only flaws that Korea alleges go to capacity utilization and profitability.

4.65 The ITC recognized that capacity utilization "may not be as certain a measure of injury in this industry as compared to others, given the ability of domestic producers to shift production among various pipe products." It concluded nevertheless, that "the sharp decline in capacity utilization is consistent with other indicators of poor domestic industry performance in 1998 and interim 1999 and supports an affirmative determination of serious injury."

4.66 The ITC adequately addressed Korea's arguments that declining OCTG sales distorted the profitability data for the line pipe industry because fixed costs were allocated by some domestic producers based on the relative levels of sales of different pipe products. The ITC concluded that increases in such costs, resulting from declines in the production of other pipe products such as OCTG, were not mistakenly or disproportionately attributed to line pipe.

4.67 Korea's argument rests entirely on the faulty premise that OCTG shipments declined much more severely than shipments of line pipe and other pipe products made by the US firms. Based on an examination of the objective evidence in the record, the ITC found that this was not the case. Line pipe shipments declined precipitously, at the same time and virtually to the same degree as OCTG shipments. There is no basis for Korea's argument that a disproportionate share of fixed costs were allocated to line pipe, thereby distorting the financial results of the line pipe industry.

4.68 Furthermore, Korea incorrectly assumes that the largest component of average unit costs consisted of fixed costs. The majority of average unit costs (raw material and direct labour) were, however, variable and therefore could not be directly influenced by changes in production volumes of different pipe products. Thus, even if there had been a disproportionately large decline in OCTG sales – and Korea has produced no record evidence of this – the effect that this could have had on average unit costs for line pipe was nominal.

4.69 Data for the entire US line pipe industry showed that its financial condition deteriorated sharply in 1998 and interim 1999, notwithstanding Korea's arguments concerning events at two firms. Article 4.2(a) requires an examination of the situation of the entire industry, and not of individual firms. Further, with respect to one of the firms singled out by Korea, the evidence of alleged problems presented by Korea rests on a distortion of the statements of the dissenting ITC Commissioner. With respect to the second firm, there was ample evidence in the record that the decline in its line pipe business played a major role in the difficulties that it faced.

4.70 Korea's argument that the industry was not seriously injured because capital expenditures increased is likewise unpersuasive. Virtually all other factors bearing on the state of the industry pointed decisively to serious injury. Also, there was evidence in the record that 1998 capital spending reflected analyses and decisions that preceded the surge in imports in 1998, and that some capital spending had been postponed or cancelled in 1998. Finally, the ITC noted that capital investment projects in the steel industry generally involve long lead times, suggesting that capital expenditure levels may not be a timely and accurate measure of industry conditions.

4.71 Korea's arguments that the domestic industry was not suffering serious injury because of an improvement at the end of the investigated period are also unpersuasive. Contrary to Korea's assertion, imports had actually begun to increase again at the very end of interim 1999. Moreover, Korea relies on announcements of price increases that mostly occurred well after the ITC's investigation was over.

4.72 In assessing causation, the ITC first ascertained the effects of the increased imports to determine whether they were causing serious injury or threat thereof. It separately identified and evaluated the effects of the other factors which could be having an injurious effect. In determining the effects of both increased imports on the one hand and other factors, the ITC properly distinguished the effects of imports from the effects of other factors. The ITC thereby ensured that the effects of other factors were not attributed to the imports, and it established that there was a genuine and substantial relationship of cause and effect between the increased imports and the serious injury to the domestic industry. The ITC's application of the causation standard was consistent with the requirements of the SA as explained by the Appellate Body in *United States – Wheat Gluten*.<sup>9</sup>

4.73 The ITC found that increased imports of line pipe were "an important cause of serious injury." Imports had increased substantially every year since 1996, with the bulk of this increase occurring in 1997 and 1998. Imports' market share rose significantly, especially during 1998 and interim 1999, at the same time that the domestic industry's condition deteriorated. Based on its evaluation of the import levels and industry indicators, the ITC found that the surge in imports and consequent shift in market share from the domestic industry to imports occurred at the same time that the domestic industry went from healthy performance to a very poor performance.

4.74 The ITC properly evaluated "relevant factors having a bearing on the situation of the domestic industry" and concluded that the sharp increase in imports in 1998 and interim 1999 led to losses in all key industry indicators. Through this analysis, the ITC found that increased imports were an important cause of serious injury and properly established the existence of the causal link between the increased imports and the serious injury, as required by Article 4.2(b).

4.75 Contrary to Korea's assertion, there is a coincidence of trends between imports and the performance of the domestic industry. The "negative correlation between import trends and the difficulties of the industry," which is the basis for so much of Korea's argument on causation, simply does not exist.

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<sup>9</sup> *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Report of the Appellate Body, WT/DS166/AB/R, para. 160, adopted 22 December 2000 ("*US – Wheat Gluten (AB)*").

4.76 The ITC considered Korea's argument that import levels were overstated because of dual stencilling of line pipe, but concluded that there was no evidence to support Korea's claim that a substantial portion of Korean imports were dual-stencilled but actually sold as standard pipe.

4.77 Korea's assertion that the ITC failed properly to consider whether declining line pipe prices were caused by imports does not withstand scrutiny. The ITC relied on three different types of evidence in analyzing whether imports depressed domestic prices: average unit values of imports, pricing data that it had collected, and questionnaire responses from a wide range of industry participants. Declining average unit values of imports indicated price depression by imports. The pricing data that the ITC collected showed that underselling by imports was pervasive. Finally, most of the questionnaire responses from industry participants identified import competition as an important cause of price declines and injury to the domestic industry.

4.78 The ITC examined six factors other than increased imports as possible other causes of serious injury. Korea focuses on two of these: a crisis in oil and gas exploration and development in 1998 and 1999, and competition within the domestic industry.

4.79 The ITC distinguished any injurious effects caused by increased imports from the effects of declining demand due to the oil and gas crisis by finding that the decline in demand for line pipe could not explain: (i) the level of financial losses experienced by the domestic industry; (ii) the domestic producers' loss of market share; or (iii) the across-the-board price declines affecting line pipe products not used in oil and gas gathering applications. The ITC also noted the consensus among industry participants that imports had played a major role in the decline of line pipe prices in 1998 and interim 1999. Therefore, the ITC did not improperly attribute to imports injury caused by the decline in oil and gas demand, and its findings demonstrated that the causal link between the increased imports and serious injury was undisturbed by any contribution to injury resulting from reduced oil and gas drilling and production activities.

4.80 Korea's argument with respect to the effects of reduced activity in the oil and gas industry rests in large part on its assertion that there was a coincidence in trends between declining demand due to the oil and gas crisis and the deteriorating condition of the domestic industry, and that there was no coincidence in trends between imports and the condition of the domestic industry. Korea is incorrect. Increased imports *did* coincide with the deteriorating condition of the domestic industry. Moreover, the ITC's analysis of the conditions of competition confirmed the causal link between imports and the injured condition of the domestic industry. The fact that the oil and gas crisis also coincided with the worsening condition of the domestic industry does not prove that the ITC attributed the effects of the oil and gas crisis to imports. The ITC clearly and extensively distinguished the effects of increased imports from those of the oil and gas crisis.

4.81 The ITC also considered competition among domestic producers but found that, since competition among domestic producers had always been a factor in the market, such competition did not explain the sudden and sharp declines in domestic prices and shipments in 1998 and interim 1999. The ITC found the modest increase in domestic capacity over the period investigated (which was indicative of intra-industry competition) was considerably less than the growth in line pipe consumption. Thus, contrary to Korea's assertion, the ITC did not improperly attribute to increased imports injury caused by competition among domestic producers.

4.82 In sum, the ITC properly distinguished the effects of other factors under Article 4.2(b), and properly established the causal link between increased imports and serious injury to the domestic industry, without attributing to imports injury caused by other factors.

- (e) Korea Has Not Provided Any Basis for the Panel to Conclude That Chairman Bragg and Commissioners Askey's Findings Are Inconsistent With Articles 2 and 4

4.83 Contrary to Korea's assertion, the two ITC Commissioners who determined that increased imports threatened serious injury found both an increase in imports that had already occurred, and that subject imports were likely to increase in the future. Both of these findings are supported by the evidence before the ITC. These Commissioners supported their findings regarding likely increased imports in the future with the evidence regarding available capacity in foreign facilities. They also properly relied on objective evidence to find that increased imports contributed to the decline in US producers' prices for line pipe.

4.84 Noting the relatively high substitutability between imported line pipe and the domestic product, as well as the importance of maximizing production in a capital-intensive industry, these Commissioners concluded that domestic line pipe producers were constrained to lower prices in response to the availability of lower-priced imports. They found that domestic prices for line pipe had declined to the point where the domestic industry was clearly threatened with serious injury, and if the low pricing was sustained, would quickly result in serious injury. The two Commissioners made appropriate findings regarding threat of serious injury based on facts and not mere allegation, conjecture or remote possibility.

- (f) Korea Has Not Established Any Basis for the Panel to Conclude That the Safeguard Measure Applied by the United States Was Inconsistent With the Safeguards Agreement or GATT 1994

- (i) *Korea has not met its burden to establish that the line pipe safeguard was applied beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment*

4.85 Article 5.1, first sentence, requires that a safeguard measure be "commensurate" with the goals of remedying serious injury and facilitating adjustment.<sup>10</sup> Thus, the relevant inquiry involves a comparison of the safeguard measure with the serious injury and the need for adjustment. Korea does not even address this question. Instead, it compares the US safeguard measure, as applied, with the *ITC recommendation*.

4.86 In addition to being irrelevant, this comparison does not support Korea's claim that the ITC recommended measure would have restricted imports or assisted the domestic producers less than the measure that the United States actually applied. Korea simply ignores that the line pipe safeguard's three-year duration is a full year less than the ITC recommended. It provides no basis for contending that the 19 per cent duty under the line pipe safeguard would have "a similar effect" to the 30 per cent over-quota duty under the ITC's recommended tariff-rate quota ("TRQ"). But most importantly, Korea's analysis of the separate elements of the safeguard measure fails again to address the relevant question – whether the measure (and not its parts) is commensurate with the goals of Article 5.1, first sentence.

- (ii) *Korea has not met its burden of showing that Article 5.1, Second Sentence, Article 5.2(a), or Article XIII are applicable to the type of safeguard imposed on line pipe*

4.87 The United States and Korea differ over whether to characterize the line pipe safeguard as a supplemental duty or a TRQ. This disagreement is, however, of little consequence, since the measure complies with the relevant WTO obligations in either case.

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<sup>10</sup> *Korea – Dairy Safeguard (AB)* at para. 96.

4.88 If the measure is labelled a supplemental duty, Korea's arguments become irrelevant. The quota rules under Article 5 and Article XIII, which form the basis for Korea's arguments, plainly do not apply to a duty increase.

4.89 If the measure is labelled a TRQ, the analysis takes longer, but leads to the same result. First, Korea claims that the Article 5 prohibitions on the use of quotas and quantitative restrictions apply to the line pipe safeguard because a TRQ is a quota. It provides little support for this view other than to note that the "Q" in "TRQ" stands for "quota." However, panel reports under both GATT 1947 and the WTO Agreement confirm that a TRQ is not a "quota" or "quantitative restriction" for purposes of GATT 1947 and GATT 1994.<sup>11</sup> The text supports this view. Article XIII establishes rules on quotas and quantitative restrictions, which it follows with a statement stating that the rules also apply to TRQs. The addition of this clarification shows that the drafters did not understand TRQs to be "quotas" by their nature. Therefore, Korea fails to present a *prima facie* case that the line pipe safeguard was inconsistent with Article 5.

4.90 Second, Korea claims that Article XIII applies to the line pipe safeguard. However, the object and purpose of the Safeguards Agreement is to "clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX" by creating "a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994."<sup>12</sup> One vital aspect of this clarification was the integration of Article XIII principles into the comprehensive framework of the Safeguards Agreement. Some principles were strengthened, some remained the same, and some were removed. The application to a safeguard measure of Article XIII rules that the drafters of the Safeguards Agreement omitted would do violence to their stated objective that the agreement be "comprehensive."

4.91 Moreover, it does not make sense to apply Article XIII rules to the line pipe safeguard. For example, if Article XIII:2(d) applied to safeguard measures, the identical language included in Article 5.2(a) would become superfluous, a result inconsistent with basic rules of treaty interpretation. The notice requirements under Article XIII:2(a) and XIII:3(b) are redundant of the notification requirements under the Safeguards Agreement. In any event, the Article XIII:2(a) requirement to establish an overall quota amount applies only where "practicable." As Korea itself notes, with an indeterminate number of parties subject to the 9000 ton exemption from the 19 per cent duty, it was not practicable to set an overall quantity of eligible imports.

(iii) *Articles I and XIII:1 and Article 2 do not prohibit a member from excluding its free trade agreement partners from a safeguard measure*

4.92 Article XXIV creates an exception to the MFN principle for Members of a free trade agreement. Footnote 1 of the Safeguards Agreement establishes that no provision of the Safeguards Agreement will nullify the effect of Article XXIV on the interpretation of Article XIX. Therefore, Articles I and XIII:1 and Article 2 do not prohibit the United States from excluding Canada and Mexico, its partners in the North American Free Trade Agreement ("NAFTA"), from a safeguard measure. It is noteworthy that the list of measures that Article XXIV:8 specifically authorizes FTA parties to maintain against each other does not include safeguards measures applied under Article XIX. By implication then, safeguard measures either may or must be made part of the general elimination of "restrictive regulations of commerce" under any FTA.

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<sup>11</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, para. 7.68, adopted 22 May 1997, ("EC – Bananas III"); *EEC – Import Regime for Bananas*, DS38/R, adopted 11 February 1994.

<sup>12</sup> Safeguards Agreement, preamble.

(g) Miscellaneous Arguments Raised by Korea

4.93 Korea's first written submission contains several short arguments. All are invalid. (1) Korea's claims against the ITC's determination and the measure itself are plainly not independent of each other, which leaves the Panel the option of exercising judicial economy with respect to one if it finds the other to be inconsistent with the WTO Agreement. (2) The record establishes the existence of unforeseen developments, as required under Article XIX. (3) Article 11 does not impose a separate requirement to establish the existence of an "emergency situation." (4) The United States complied with Article 12.3 by giving Korea notice of the proposed safeguard measure and providing an adequate opportunity to consult.

**3. Procedural Arguments**

(a) Korea Provides No Basis for the Panel to Request Confidential Business Information from the United States.

4.94 Korea asks the Panel to request immense quantities of confidential information from the United States. However, it has nowhere established that any of the information meets the Article 13.1 DSU requirement of being "necessary and appropriate" to the Panel's evaluation of Korea's claims. In fact, previous panels have recognized the need to avoid the use of confidential information, where possible. In this dispute, the non-confidential information on the Panel record is sufficient. If the Panel considers that it needs anything more, the United States is willing to meet the need with summaries or indexed data.

4.95 Most importantly, Korea has failed to state a *prima facie* case on any of its claims. Therefore, any request for confidential information at this stage would put the United States in the position of proving its measure consistent with the WTO Agreement when Korea has not yet established the existence of an inconsistency. This would entirely reverse the established burden of proof.

(b) Request of the United States for a Preliminary Ruling That Evidence Not Submitted to the ITC or Addressing Events After the Decision to Take a Safeguard Measure Is Not Admissible in This Proceeding

4.96 The United States requests that the Panel issue a preliminary ruling that certain information included in Korea's first written submission is inadmissible. First, several pieces of information in Korea's submission were not submitted to the ITC. If the Panel were to consider that information in its evaluation of the ITC determination, it would be conducting the sort of *de novo* review that the Appellate Body has consistently rejected. Second, Korea submitted and cited to information pertaining to the period *after* the United States took the decision to apply a safeguard measure. Under the Safeguards Agreement, both the determination of serious injury and the decision to apply a safeguard measure must be based on information available to the competent authorities or the Member at the time of the determination or decision. Therefore, that information is irrelevant to any evaluation of the line pipe safeguard measure.

4.97 Accordingly, the United States requests that the Panel rule that the information described in the preceding paragraph is inadmissible, that it request the removal of that information and arguments based on that information from Korea's first written submission, and that the Panel disregard that information and any arguments based on it.

C. FIRST ORAL STATEMENT OF KOREA

4.98 The following is the Korea's own executive summary first oral statement:

## 1. Factual Background

4.99 The US line pipe industry, in the second half of 1998 and early 1999, faced a difficult situation. The industry had just enjoyed a peak demand period for 18 straight months; the industry built substantial new capacity to take advantage of that domestic increase in market demand; but demand plummeted when the oil and gas crisis hit. US line pipe industry performance began its recovery in the second quarter of 1999. Imports, however, continued to fall in the first half of 1999, a decline that had commenced in the second half of 1998.

## 2. Preliminary Issues

### (a) Confidential Information

4.100 The 16 February letter of the United States confirms that Korea was absolutely correct that the public data regarding absolute import trends does not accurately reflect the trends of the confidential data. This is the reason that the Panel also needs the other confidential data identified in Korea's First Written Submission. The Panel is not obliged to frame its review and decision on the basis of the information the United States may choose to provide. The Panel should either apply adverse inferences to complete its review or find that the United States has failed to meet its burden of proof, depending on the issue.

### (b) Judicial Economy

4.101 Korea urges the Panel to reach the issues of the safeguard measure even after the Panel finds errors in the ITC investigation. Otherwise, it would lead to dispute prolongation rather than dispute resolution. This authority is within the Panel's discretion.

## 3. Legal Arguments

### (a) The Safeguard Measure

4.102 For reasons never made publicly available, the US President completely ignored the ITC's recommendations and imposed a remedy which was far more restrictive and in clear violation of many of the basic principles for safeguard remedies. The ITC had recommended a tariff-rate quota of 151,124 short tons with a 30 per cent tariff for over-quota imports. The President imposed a tariff-rate quota of 9,000 short tons per supplying country with a tariff of 19 per cent for over-quota entries. The President's measure was excessive.

4.103 The US measure, a tariff-rate quota, violates Articles XIII and XIX and Article 5. The US claim that Article XIII does not apply to a safeguard measure under the SA must be rejected. The WTO is a single treaty. As such, all provisions of the treaty must apply with full force and effect. Article II:2 of the WTO Agreement expresses the intention of the Uruguay Round negotiators that the provisions of the agreements included in Annexes 1, 2 and 3 must be read as a whole. The General Interpretative Note to Annex 1A of the WTO Agreement provides that "[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement, the provisions of the other agreement shall prevail *to the extent of the conflict*" (emphasis added). Certainly, no conflict exists between the SA and Articles XI and XIII.

4.104 The United States maintains that only the provisions of Article XIII which are specifically incorporated in the SA continue in force and effect and cites for its conclusion that the SA is a "comprehensive" agreement. But "comprehensive" does not mean "exclusive." In *Argentina – Footwear*, the Appellate Body specifically rejected the argument that since the SA did not contain the "unforeseen development" language found in Article XIX, this was an "express omission" from the

SA. The same reasoning applies here. The preamble of the SA states that the object and purpose of the SA is to “clarify and reinforce the disciplines of *GATT 1994*” (emphasis added). While Article XIX is specifically mentioned in the SA, it is not exclusively mentioned – *all* the disciplines of the GATT 1994 are referenced. The object and purpose of the SA, set forth in the preamble, is to “re-establish multilateral control over safeguards and eliminate measures that escape such control.” Yet the United States maintains that the Article XIII requirements regarding tariff-rate quotas were eliminated. If we were to follow the US argument, only tariff-rate quotas have escaped multilateral disciplines.

4.105 In any event, regardless of what form a safeguard measure takes, it must be “necessary to prevent or remedy serious injury and to facilitate adjustment” in accordance with Article 5.1 and Article XIX of the GATT 1994. In *Korea – Dairy Safeguard*, the Appellate Body upheld the Panel’s conclusion that the first sentence of Article 5.1 imposes such a very specific “obligation.”

4.106 The Majority of the ITC explicitly concluded that the Petitioners’ quota recommendation of 105,849 short tons “would exceed the amount necessary to prevent or remedy the serious injury ... . Our economic analysis indicates that such restrictions would be excessive.” The President’s safeguard remedy, under any reasonable calculation, is below that level of restriction and therefore, “excessive.”

4.107 The US position that they do not need to justify the measure *before* it is imposed nor can the import performance be evaluated *after* it is imposed, renders Article 5.1 meaningless.

4.108 No document exists in the record of the ITC investigation or the establishment of the safeguard remedy, which demonstrates that the measure imposed by the US President was “necessary.” To the contrary, the evidence is that the measure imposed is, in the words of the ITC Majority, “excessive.” The United States still has not attempted to point to any evidence to the contrary.

(b) The United States Impermissibly Excluded Mexico and Canada From the Safeguard Measure

4.109 Article 2.2 provides that safeguard measures “shall be applied to a product being imported irrespective of its source.” Footnote 1, which addresses the term “Member,” is a footnote to the text of Article 2.1. It is not a footnote to Article 2.2, which provides for MFN application of the measure. The Appellate Body in *Argentina – Footwear* concluded that, by its very terms, Footnote 1 only applies to (i) a “customs union” (ii) that is acting “as a single unit or on behalf of a Member state.” Korea sees no basis for concluding that Footnote 1 can be read as two separate provisions. In fact, the only logical reading from the text and its context is that this is a self-contained provision, which applies to a customs union.

(c) The ITC Investigation of Increased Imports, Serious Injury and Causation

(i) Introduction

4.110 Safeguard relief is an extraordinary remedy that must be justified by extraordinary circumstances. Another clear lesson from the jurisprudence is that the safeguard measure is an action against fairly traded imports. Therefore, only strict compliance with the requirements of each and every requirement of the SA can justify a safeguard measure. The emergency and extraordinary nature of the remedy must inform the proper analysis and interpretation of all the requirements of the SA and the GATT 1994. The US argument that the emergency nature is limited to the “measure” and does not apply to the situation investigated is inconsistent with the Appellate Body ruling in *Argentina – Footwear*.

(ii) *Increased imports*

4.111 With respect to the increased import requirement in Article 2.1, the Appellate Body in *Argentina – Footwear* articulated that “not just any increased quantities of imports will suffice.” The Appellate Body based its reasoning on the plain meaning of “is being imported,” which, being in the present tense, requires that the increase in imports be “present,” not “past.” It follows directly from this language that the most recent period for which data is available must be examined.

4.112 The United States does not argue that the import data of the last 12 months is not meaningful or that it is not available (after all, the confidential data summarized in the February 16 letter reveals almost a 20 per cent decline over two six-month periods). Rather, the US asserts that US practice is to look at “full years.” Korea submits that US practice must be in accord with the SA, not *vice versa*. Article 4.2(a) provides that “authorities shall evaluate *all relevant factors* of an objective and quantifiable nature.” Clearly, data concerning whether imports increased or declined over the last 12 months of the period is both relevant and quantifiable. Imports had decreased by almost 20 per cent in the most recent 12-month period prior to the ITC determination according to the United States letter of February 16. Relative import trends also *declined* during the first half of 1999.

(iii) *Serious injury*

4.113 The fundamental inconsistencies and contradictions among the Commissioners, in the absence of an adequate explanation and reconciliation in the opinions, undermine the adequacy of the ITC Majority’s determination in terms of Articles 3 and 4.

4.114 Those disagreements about data were so fundamental that only three Commissioners concluded that serious injury occurred by reason of imports. Three concluded otherwise. There must be an adequate explanation of why and how the Commissioners came to these contradictory conclusions. This is all the more true if the ITC relies on confidential data which the United States does not provide to the Panel.

(iv) *Inclusion of data relating to other industries*

4.115 The United States argues that there is no evidence in the record that OCTG declines were more severe. While Korea agrees with the United States that both OCTG and line pipe demonstrate the same downward trends, because both are being pulled down by the decline in oil and gas rigs, OCTG dropped much more dramatically. Exhibit 48C tracks the *per centage relationship* between net shipments of OCTG and net shipments of line pipe. This graph confirms that in 1998 and 1999, OCTG’s share of total shipments (of line pipe plus OCTG) drops more dramatically relative to line pipe. This had a great impact on the profitability of the producers which the ITC did not properly separate and consider.

4.116 The ITC’s own Staff Report recognizes there was a “collective operating leverage effect.” The fact is that the effect does exist and it was documented by the ITC itself.

(v) *The industry only experienced a one-year downturn*

4.117 This industry had a record industry performance in 1997, continuing into the first half of 1998. A temporary downturn from a peak performance period does not demonstrate that the industry is in a state of “significant overall impairment,” particularly in an industry that experiences wide swings in demand and profitability. This industry also kept investing throughout 1998/1999 because it recognized the ebbs and flows of its business and was investing for the next upturn (which had already commenced).

(vi) *The ITC should not have found that the industry is being seriously injured when the industry no longer was suffering injury at the end of the period*

4.118 What is most relevant is that the line pipe industry was fast recovering. As the Panel held in *US – Wheat Gluten*, “we consider it essential that *current* serious injury be found to exist, up to and including the *very end of the period of investigation*.” Korea prepared Exhibit 48D which demonstrates, based on the observations and conclusions of the ITC, the US domestic industry, and industry experts, the strong condition of the US line pipe industry.

(vii) *There was no causal relationship*

(1) Coincidence of trends

4.119 In *Argentina – Footwear (AB)*, the Appellate Body sustained the Panel’s analysis of the causation requirement under Article 4.2(b) “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.”

4.120 The situation in line pipe presents a case of inconsistent trends – imports began to decline at the same time as domestic industry indicators declined. 1998 was composed of a very strong first half during which the domestic industry indicators maintained their peak performance, and a very weak second half during which indicators declined significantly: As all the Commissioners recognized, the industry’s poor health began “in the second half of 1998.” This two-period analysis by all six Commissioners contradicts the statement by the United States that “the ITC did not compare data for the first half and second half of 1998.”

(2) Other Factors

4.121 The US causation decision did not comply with the standard set forth in the AB report on *US – Wheat Gluten*. The United States considered only each individual factor of injury because US law provides that the cumulative effect of *all* the “other” factors or causes of injury cannot be considered.

4.122 This methodology obviously conflicts with Article 4.2(b) because the United States did not consider whether the sum of all the other causes of injury (*inter alia* (1) the oil and gas crisis which caused consumption to drop dramatically from its high in 1997; (2) the build up of significant excess capacity by the domestic industry (on an annualized basis, domestic capacity increased by 25 per cent in 1999 compared to 1998); and (3) the elimination of export markets and consequent ferocious domestic competition) was so great that the effect of imports was diminished to a level that imports had less than a “substantial” effect. Exhibit 48A illustrates the point.

4.123 The United States improperly attributed injury caused by other factors to increased imports in the remedy recommendation as well. The ITC admits that it was the combined effects of both imports and the oil and gas crisis which caused serious injury and that the remedy recommended was also intended to address the effects of both. Therefore, the remedy is not confined to addressing only the injurious effect of imports.

(viii) *Threat of injury*

4.124 The Commissioners who found only threat of injury erred principally because they *assumed* that imports would increase. Since imports had declined for 12 months, such a counterintuitive conclusion had to be substantiated by more than mere “conjecture or remote possibility.”

(ix) *The United States has not demonstrated “unforeseen developments”*

4.125 The ITC was under an obligation to demonstrate in its investigation that the increased imports in this case occurred “as a result of unforeseen developments “and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ... .”

4.126 The ITC Report contains no reference to a determination of the “unforeseen developments” which caused the surge in imports of line pipe. The United States cannot, in the course of a Panel proceeding, rehabilitate a finding that was never made.

#### D. FIRST ORAL STATEMENT OF THE UNITED STATES

4.127 The following is the United States' own executive summary of first oral statement:

##### 1. Increased imports

4.128 There was an increase in imports in this case that was “sudden and recent.” Imports of line pipe increased on *both* an absolute *and* a relative basis. On an absolute basis, imports of line pipe increased in each of the last three years of the period investigated. Imports declined somewhat in interim 1999 (the first six months of 1999), as compared with interim 1998 (the first six months of 1998), but only on an absolute basis. Moreover, imports remained at such high levels in interim 1999 that they exceeded whole-year imports in both 1995 and 1996.

4.129 Imports relative to domestic production followed a similar pattern to absolute import levels, except that there was no decline over the interim periods. On a relative basis imports reached their highest level in interim 1999, when they accounted for 46 per cent of the US line pipe industry's production.

4.130 Korea tries to avoid this clear evidence of a sudden and recent increase in imports by devising its own limited period for measuring imports. By asking the Panel to focus only on the last six months of 1998 and the first six months of 1999, Korea would have the Panel examine a small portion of the import data in a certain way, and ignore the rest of it. Korea can only show a decline in imports in the last six months of 1998 and first six months of 1999 if it examines this period in six-month increments. If the import data for these 12 months are examined in different increments – for example, on a monthly basis – there is no steady decline in imports.

4.131 The facts here are much different from those in *Argentina- Footwear*. The ITC's decision is consistent with the approach of the Appellate Body in that case. The ITC clearly paid special attention to the most recent import levels and trends, those in 1997, 1998 and interim 1999.

4.132 Korea has failed to meet its burden of making a *prima facie* case that the increase in imports required by Articles 2.1 and 4.2 did not occur.

##### 2. Serious Injury

4.133 The evidence of a significant overall impairment in the US line pipe industry's condition beginning in 1998 was overwhelming. Serious injury to the industry was clear from an examination of: domestic production, capacity utilization, sales, market share, financial indicators, employment-related indicators, the ratio of inventories to domestic production, and research and development. Korea ignores most of these indicators of serious injury.

4.134 Korea's claims that the line pipe industry's performance indicators were affected by declining OCTG sales does not hold up to scrutiny. Korea's argument rests on two false assumptions: (1) that the largest component of average unit costs for line pipe consists of fixed costs; and (2) that these

costs were disproportionately allocated to line pipe because OCTG sales fell to a much greater extent than line pipe sales. Both of these assumptions are unsupported by the evidence in the record before the ITC.

4.135 Korea tries to evade the overwhelming evidence of serious injury by arguing that the US line pipe industry was improving at the end of the period examined. Korea is wrong as a factual matter. It mischaracterizes the import data by claiming that there was “a continuing decline in imports” at the very end of the period. This was not so. Imports in May and June 1999 had risen again to the very high monthly levels of 1998. Korea also relies on announcements of price increases that were mostly made in “late 1999 and early 2000” after the ITC injury investigation was finished, and which are not part of the record before the ITC or this Panel.

4.136 The evidence of serious injury was extensive and Korea has failed to make a *prima facie* case that the US line pipe industry was not seriously injured.

### 3. Causation

4.137 The ITC’s causation analysis was fully consistent with Art. 4.2 and the Appellate Body’s decision in *Wheat Gluten*. The ITC examined the effects of the increased imports, and the effects of other relevant factors, on the domestic industry. By examining and then weighing these effects separately, the ITC distinguished between the effects of increased imports and the effects of other factors, thus ensuring that the effects of other factors were not attributed to the imports.

4.138 The ITC found that the surge in imports and consequent shift in market share from the domestic product to imports occurred at the same time that the domestic industry went from healthy performance to a very poor performance.

4.139 The ITC found that increased imports, together with the import-led price declines, caused domestic producers to lose significant sales, market share, and revenue. This led to declines in other key indicators, such as production, shipments, employment, and operating income.

4.140 Through this analysis, the ITC found that increased imports were an important cause of serious injury and properly established the existence of the causal link between the increased imports and the serious injury, as required by Art. 4.2.

4.141 Korea is wrong in asserting that there was no coincidence in trends between imports and the downturn in the line pipe industry’s performance.

4.142 The ITC found that the evidence developed in its investigation suggested that imports had significantly depressed domestic prices. The ITC had three different types of evidence for this: (i) average unit values of imports; (ii) quarterly pricing data which it collected, and (iii) questionnaire responses from a wide range of industry participants. All three of these categories of evidence pointed to the same result. Korea’s critique of this evidence of price depression is unpersuasive.

4.143 The ITC examined the effects of six factors, other than increased imports, as possible other causes of serious injury. In examining these other causal factors, the ITC distinguished the injurious effects of increased imports from the effects caused by these other factors. It examined whether increased imports were a “substantial cause” of serious injury. A “substantial cause” under US law is “a cause which is important and not less than any other cause.” This approach ensures consistency with the guidance on causation provided by the Appellate Body in *Wheat Gluten*. By examining all of the other factors in this way, the ITC identified the effects of these factors alone, therefore distinguishing those effects from the effects of imports, which were separately considered. Thus, the ITC ensured that it did not improperly attribute to imports any injurious effects caused by other causal

factors. Through this process, the ITC also established that the causal link between the increased imports and the serious injury was genuine and substantial.

#### **4. Threat**

4.144 Korea's arguments challenging the determination of the two ITC Commissioners who found a threat of serious injury are based on a misstatement of the facts. The determination of the two Commissioners finding threat was based on facts in the record before the ITC, not on mere allegation or conjecture, as Korea claims.

#### **5. Putting the Safeguard Measure in Context**

4.145 The United States has already described the domestic industry's decline into uniformly poor financial performance. Some additional facts serve to put the line pipe safeguard into perspective. Korea accounted for 70 per cent of the total increase in imports in 1998. Imports from Korea also increased in the first half of 1999, as compared with the same period of 1998, in spite of declining demand in the US market. Korean line pipe was imported at exceptionally low prices – much lower than those charged by US producers and most other import sources.

4.146 These facts demonstrate that the United States complied with Article 5 in that it did not apply the safeguard measure “beyond the extent necessary.” It guaranteed imports a presence in the US market, since the 9000 ton exemption for each country would allow the import of a substantial quantity of line pipe with no supplemental duty. The 19 per cent supplemental duty was at a level commensurate with the decline in US producers' prices in the first six months of 1999. Moreover, even with the addition of the duty, 1999 unit values for imports would not rise to pre-1999 levels.

#### **6. Korea has Failed to Establish that the Measure was Applied Beyond the Extent Necessary**

4.147 Korea has not presented any evidence relevant to determining whether the line pipe safeguard is “commensurate” with the goals of Article 5.1 – remedying serious injury and facilitating adjustment. This text establishes that the condition of *the domestic industry* is the benchmark for the application of a safeguard measure. It is also significant that this limit affects the extent to which a Member may “apply safeguard measures.” Since Article 5.1 applies to “measures,” and not the separate components of a measure, consistency with Article 5.1 can only be analyzed with reference to the measure as a whole.

4.148 Korea compares the line pipe safeguard chosen by the United States with a TRQ recommended by three ITC Commissioners. However, the fact that one potential safeguard measure falls within the Article 5.1 limit does not mean that changing one aspect of the measure would push it beyond the limit. For example, suppose a four-year tariff of 30 per cent was found to be commensurate with the goals of Article 5.1. A 40 per cent tariff might be able to achieve the same goal in three years. Both would be permissible under Article 5.1, first sentence.

4.149 Finally, Korea simply ignores certain aspects of the line pipe safeguard, such as its duration and the size of the supplemental duty. In so doing, it has failed to demonstrate anything about the measure as a whole and, thus, provides no basis to even apply the relevant standard.

#### **7. Korea has Failed to Justify Application of Quota Disciplines to the Line Pipe Safeguard**

4.150 The principles of Article XIII that are incorporated into the Safeguards Agreement are the only provisions that are applicable to safeguard measures. The object and purpose of the Safeguards Agreement is to create a “comprehensive agreement.” In so doing, it incorporates principles – and even one entire block of text – from GATT Article XIII. It omits the provisions of Article XIII that

Korea now relies upon. To conclude now that Article XIII applies to safeguard measures would be to reverse the Members' decision to include only some of those provisions in the Safeguards Agreement. The Panel simply does not have the mandate to do this.

## **8. Exclusion of Canada and Mexico from the Line Pipe Safeguard**

4.151 Korea argues that footnote 1 of the Safeguards Agreement applies only to customs unions. If the drafters had intended this result, the footnote would have cited only to subparagraph 8(a) of Article XXIV. Paragraph 8, covers customs unions under subparagraph (a) and free trade agreements under subparagraph (b). Therefore, it is logical to conclude that the citation to Article XXIV:8 in the last sentence of footnote 1 means that provision applies to both customs unions and FTAs.

4.152 Korea argues that the location of the sentence does not make sense if it applies to free trade areas. The United States disagrees. The first three sentences of footnote 1 deal with the basic question of the relationship between Article XXIV and the Safeguards Agreement, as applied to customs unions. When the drafters chose to address Article XXIV as it affects both customs unions and free trade areas, it made sense to put it with other provisions dealing with that topic.

## **9. Korea's Request for Confidential Information**

4.153 Upon further review of Korea's arguments, it is apparent to the United States that Korea has not shown any need for the Panel to examine additional pricing data to determine the consistency of the ITC's determination with the Safeguards Agreement. To the extent that any comments in the United States' first submission suggest otherwise, the United States wishes to correct the record as to the its view.

4.154 Korea's contention that the Panel needs to examine additional price information is mainly predicated on an isolated statement made in the dissenting views of Commissioner Crawford that underselling was not any more prevalent during 1998 and interim 1999 than in earlier periods. (ITC Report at I-71.) But, regarding the fact upon which the ITC actually relied with respect to prices – even Commissioner Crawford specifically acknowledged that there was persistent and widespread underselling. She simply placed less emphasis on that fact.

4.155 A careful reading of the exact passages in Korea's brief which form the basis for its request for additional pricing data shows that Korea is actually asking the Panel to draw different factual conclusions from those drawn by the ITC. Korea has no basis other than conjecture to assert that the Panel needs to conduct a review of information in the confidential record to ascertain whether Korea's unsupported allegations possess any merit. The complete version of the US oral statement for the second session of the first panel meeting contains a point-by-point refutation of Korea's basis for urging that pricing data from the confidential record is necessary.

4.156 In a final effort to convince the Panel of the need to obtain confidential pricing data, Korea quotes a statement in the post-hearing brief it submitted to the ITC. The statement addresses a disagreement among the interested parties in the administrative proceeding as to whether the size of the margins by which imports undersold domestic products increased during 1998. Korea has not disputed the prevalence of underselling – the specific fact about prices that is relevant to the Commission's findings. The Commission did not mention or rely on any increases in the size of underselling margins as a basis for its finding that imports depressed domestic prices. Thus, Korea has failed to show that the Panel needs to see confidential data to review Korea's challenge to the Commission's findings and conclusions relating to pricing.

E. SECOND WRITTEN SUBMISSION OF KOREA

4.157 The following is Korea's own executive summary of its second written submission:

**1. Preliminary Legal Issues**

(a) Confidential Information.

4.158 Korea and the Panel still lack fundamental information that has been withheld by the United States for reasons of confidentiality.

4.159 The United States consistently has dismissed Korea's requests as unnecessary. However, the fragmentary data actually produced by the United States has confirmed just the opposite:

- (1) The non-confidential summary of imports in the ITC Determination does not accurately reflect the actual import levels in 1998 and 1999, as demonstrated by the US 16 February letter.
- (2) The information provided by the United States concerning Geneva Steel is incomplete and thereby misleading.
- (3) The information provided by the United States in its 23 April letter concerning Lone Star similarly confirms a far different situation than previously described by the United States.

4.160 Finally, the pricing data provided by the United States in its 23 April letter remains fragmentary due to the confidentiality rules employed by the United States. Nonetheless, the data still confirm, that underselling was a market condition.

4.161 The data available confirms the need for the following additional information:

- (1) The confidential Economic Memoranda used to evaluate the remedy proposals and the impact of various alternatives on the *US* industry. (See below).
- (2) The papers used in the deliberative process by the President in reaching the determination regarding the safeguard measure.
- (3) The confidential version of the ITC Staff Report, providing fuller explanations for the condition of the industry.

(b) The Panel Should Reach the Issues Raised by Korea With Respect to Both the US Investigation as Well as the Safeguard Measure

4.162 With respect to issue judicial economy, Korea urges the Panel to exercise its discretion to reach the issues raised regarding the safeguard measure even after finding errors in the ITC investigation, due to a considerable on-going impact of the US measure on trade.

(c) Standard of Review

4.163 Korea is requesting that the Panel, pursuant to Article 11 of the DSU, and the Appellate Body decision in *US – Lamb Meat*, conduct an “objective assessment of the facts.”

- (d) The Panel Should Reject the US Objections to Extra-Record Information Based on the Decision of the Appellate Body in *US – Lamb Meat*

4.164 Korea would like to supplement its earlier arguments on this issue with the recent holding of the Appellate Body in *US – Lamb Meat*, recognizing that a “*WTO Member* is not confined merely to rehearsing arguments that were made to the competent authorities ... .”

## 2. Legal Arguments

- (a) The Safeguard Measure

(i) *The US measure does not comply with Articles XIII or XIX nor does it comply with the requirements of Article 5*

- (1) The requirements of Article XIII and Article 5 must be read as a whole

4.165 The proper interpretation of the Agreement on Safeguards and Article XIII must proceed from the fact that the WTO is a single treaty. As such, all of the provisions of the treaty must apply with full force and effect. Article II:2 of the WTO Agreement expressly manifests the intention of the Uruguay Round negotiators that the provisions of the WTO Agreements and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole. Moreover, as the Appellate Body properly notes in *Argentina – Footwear*, the General Interpretative Note to Annex IA provides that “[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A ... the provision of the other agreement shall prevail *to the extent of the conflict*.” In this case, the United States has not alleged, nor does there exist, a conflict between any of the provisions of Article XIII, which regulates tariff-rate quotas (“TRQs”), and the provisions of Article 5. The Preamble to the SA states that the object and purpose of the SA is to “clarify and reinforce the disciplines of GATT 1994.” While Article XIX is specifically mentioned, it is not exclusively mentioned – all of the disciplines of GATT 1994 are incorporated.

4.166 The United States seeks to make much of the fact that Article 5 does not include each concept contained in Article XIII and essentially argues that the “intent” of the negotiators was to “exclude” certain obligations and rights contained in Article XIII. Korea submits that, the determination of the “intent” of the negotiators is unknowable and equivocal except as to the extent that the negotiators did know, based on the Note to Annex 1A, that the GATT Agreements and GATT 1994 would be read together except in the case of a conflict.

- (2) Article 5.1: TRQs are quantitative restrictions

4.167 Korea observes that the US position has been to rely on one Article of the GATT 1994, Article XI, to define a quantitative restriction, and to dismiss another Article of the GATT 1994, Article XIII, on the grounds that Article XIII has, in essence, been superseded by Article 5. The United States, however, never clarifies why only one Article of the GATT 1994 was superseded, rather than both Articles or neither.

- (3) The US measure is a TRQ: The overall limit should have been set in accordance with Article 5.1 and Article XIII

4.168 It is absurd to suggest, as the United States does, that the determination of whether a measure is a TRQ depends upon whether it has been legally and properly constructed by a Member. This reasoning is circular and would allow a Member to evade all of the requirements of Article XIII by circumventing certain requirements of Article XIII. Moreover, not all TRQs must have a fixed overall amount. Article XIII.2(a) provides for fixing the overall amount of the quota “wherever practicable.”

For example, import licenses are contemplated as an alternative to an overall quota. The United States has not given an adequate justification of why the President concluded it was impracticable when the ITC Majority found it “practicable” to fix an overall limit of the quota element of the TRQ.

(4) Article 5.2(a): TRQs are “quotas” within the meaning of 5.2(a)

4.169 The plain meaning of “quota” applies to both “straight” quotas and tariff quotas.

4.170 When only tariffs are imposed, Article I requires that they be applied on an MFN basis, at the same level for all suppliers. However, when “quotas” are applied, Article XIII.2(d) requires that they be allocated in accordance with a Member’s proportional share during a representative period. In other words, the same quotas cannot be given to each supplier regardless of their historical share. The reason is that “discrimination” takes on a different meaning for quotas than it does for tariffs. For this reason, Article XIII.2 requires that historical trade patterns should not be disrupted.

4.171 Similarly, a tariff combined with a quota does not have the same impact on trade as a straight tariff: the set quantity can enter at the bound rate, which impacts the degree to which trade will be affected by the tariff. There is an implicit cost preference for imports under the “quota” at the bound rates.

(ii) *Regardless of the type of measure, the measure violates Article XIX:I and Articles 5.1 and 7.1 because the measure was not limited to the extent and the time necessary to remedy the injury and allow adjustment*

(1) What the United States really means by *ex post facto* reasoning

4.172 The United States maintains that the Appellate Body decision in *Korea – Dairy Safeguard* permits them to provide: “*ex post* justification of why the measure was permissible at the time of application.” (Korea does not agree with this interpretation. Moreover, Korea submits that the United States has not even provided an “*ex post*” explanation of its remedy.) The absurdity of US speculation about what “might” have justified a 19 per cent TRQ highlights the dangers of a standard which allows Members to “make it up as they go along.” A “requirement” which can be so easily sidestepped is no requirement at all and reads the prescriptions of Article 5.1 (“to the extent necessary”). As discussed below, the US argument hinges on an overly broad reading of *Korea – Dairy Safeguard*.

(2) The meaning of *Korea – Dairy Safeguard* and the obligations of Article 5.1

4.173 Korea believes that the decision of the Appellate Body in *Korea – Dairy Safeguard* should be considered in its proper legal context. The issue before the Appellate Body was whether Article 5.1, by its terms, required a specific finding that the measure, in that case a quantitative restriction, was “necessary.” While the Appellate Body rejected the broad language of the Panel with respect to the obligations of Article 5.1, the holding did not extend past the question presented: the extent of the obligation to justify a quantitative restriction if the relief imposed is consistent or inconsistent with the import average during the representative three years.

4.174 Korea reiterates that the holding in *Korea – Dairy Safeguard* applies to this case because the US measure is a quantitative restriction in the form of a TRQ. Therefore, the United States must demonstrate either that the measure did not reduce imports below the last three representative years or should have demonstrated that such additional import restriction was “necessary.”

(3) Article 5.1 imposes an obligation even if the measure is not a TRQ

4.175 Significantly, the Appellate Body also observed that Article 5.1 imposed an obligation that applies regardless of the particular form of the safeguard measure.

(i) An explicit justification in the determination itself was required in this case

4.176 When the competent authorities make explicit findings that certain levels of relief are “sufficient” and others are “excessive,” the Member has an affirmative obligation to explain why a distinctly harsher measure is “necessary.”

(ii) Korea’s *prima facie* case that the safeguard measure exceeded what was “necessary”

4.177 Even if this obligation is read narrowly – not requiring a separate and explicit justification – the justification nonetheless must be found in the decision-making. Korea sees none. Korea’s inferential evidence of the intended impact of the President’s measure is as follows:

- (1) Total “in-quota” imports were projected to be approximately 63,000 short tons (based on seven significant suppliers). (Current data shows total “in-quota” imports of 64,067 tons.)
- (2) Very limited “out-of-quota” imports could be expected at the 19 per cent tariff level:
  - (i) The duty imposed was 6 to 10 times the level of the bound rate.
  - (ii) Each supplying country could supply 9,000 short tons at bound rates.
  - (iii) Two very significant suppliers (Canada and Mexico) were not controlled.
  - (iv) Imported and domestic line pipe were highly substitutable.
  - (v) The US industry had substantial unused capacity and US capacity exceeded consumption.
- (3) Total imports, excluding Canada and Mexico, equalled 78,671 tons from March 2000-February 2001. Of that total, only 14,604 tons entered at the 19 per cent duty rate. In-quota imports totaled 64,067 tons.
- (4) The only economic analysis undertaken for the purpose of meeting obligations under Article 5.1 were the Economic Memoranda.

4.178 All of these facts demonstrate that the very significant level of import restriction should have been anticipated and that the President’s measure exceeded what the ITC identified as “necessary.”

4.179 If the United States has confidential data to demonstrate that the President’s measure would not have reduced imports below the 151,124-ton level defined by the ITC as “necessary,” the United States should provide it. Korea submits that in the absence of an affirmative demonstration by the United States of its “intended level,” or a US denial accompanied by evidence that the restricted level was below that intended by the measure, the actual level of imports is the best evidence of the import target level of the measure.

(iii) *Burden of proof on the issue of whether the measure was in conformity with the requirements of Article 5.1*

4.180 First, Korea believes that it is the obligation of the United States, in accordance with Article 5.1 and read together with Articles 3.1 and 4.2(c), to demonstrate, in its published report, that the measure was necessary. The US obligation in this respect is freestanding and the US failure to meet it is a violation in itself.

4.181 Neither the Proclamation nor supporting memorandum provide any analysis or justification for the measure. Korea notes, however, that in its letter of 23 April, the United States has conceded that there are additional memoranda and documents of both a confidential and non-confidential nature, which accompanied the President's decision. However, according to the United States, those documents are either "redundant" or can, at the whim of the United States, be withheld on the grounds that they are inconsistent with the President's final decision.

4.182 Based on the inferential evidence discussed above, Korea believes that it has met its burden establishing a *prima facie* case that the President's measure was excessive and in violation of Article 5.1. The United States has not demonstrated (or even attempted to demonstrate) that the measure was necessary, or that the level of import restriction which resulted from the measure was the level intended.

(iv) *Article 5.1 imposes a continuing obligation*

4.183 The obligation only to apply safeguard measures to the extent necessary is an ongoing obligation. This is confirmed by the language of Article 5.1: "shall apply." In this case, actual import data confirm that the measure as imposed is "excessive" since it is far below the level of 151,124 short tons found to be "necessary" by the ITC Majority. Given that the measure as applied exceeds "the extent necessary," it must be withdrawn or liberalized in accordance with Article 7.4. The United States is currently conducting a "mid-term" review in this case under Section 204 of the 1974 Trade Act, which allows the President to "reduce, modify, or terminate" the measure. Korea urges the Panel to provide guidance and instruction to the United States regarding necessary modification or termination.

(v) *The obligations of Article 5.1 have to be read together with the obligations imposed by Articles 3.1 and 4.2(c)*

4.184 Article 3.1 imposes an independent obligation requiring that the investigation, findings, and conclusions of the competent authorities must demonstrate the legal and factual basis for the measure. Also, Article 5.1 is textually related to Article 4.2(c) since the "necessary" level must be to alleviate the serious injury contained in the "detailed analysis."

(vi) *The United States violated Article 2 and provisions of Articles I, XIII:1 and XIX by exempting Canada and Mexico from the measure*

(1) *The proper interpretation of Footnote 1: The Appellate Body in Argentina – Footwear*

4.185 Korea's position is that it is impossible to read the Appellate Body opinion as providing that the last sentence of Footnote 1 is separate from the rest of Footnote, as the United States appears to argue. Footnote 1 does not apply to actions by a single country, such as the United States, rather than a customs union.

4.186 Korea does not understand the US argument to be that Article XXIV, standing alone, provides the United States with a "defense" to the violation of Article 2.2. In any event, this position is not supportable because the "defense" would be "invoked" only on a case-by-case basis under the

structure of NAFTA. Moreover, the United States would have to overcome the hurdles to such a defense presented by the General Interpretive Note to Annex 1A of the GATT 1994: that Article 2.2 prevails over Article XXIV to the extent of any conflict.

(b) The ITC Investigation of Increased Imports, Serious Injury, and Causation

(i) *The US measure is inconsistent with Article XIX and Article 2 because imports did not increase suddenly, sharply and recently*

4.187 The United States maintains that the two six-month periods (the last 12 months) analysis is “arbitrary,” “crafted,” and “contrived.” Further, the United States argues that the ITC did not collect or assess data on a six-month basis in 1998. The US argument fails since the data was available for imports as well as for injury indicators and the legitimacy of such a “two-period” analysis has already been demonstrated by the ITC itself. The most recent data, by definition, are the most relevant data. The US position that “a one year period would hardly suffice” is incorrect and specifically contradicted by the Appellate Body admonition in *Argentina – Footwear* against the use of “any other period of several years.” The “recent period” is the last one-year period of the investigation and a decline in the interim six-month period would constitute the most relevant evidence in the recent period.

4.188 The need for such a precise legal standard was justified by the Appellate Body on the grounds that Article XIX is an extraordinary remedy dealing with fair trade: “when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.” This is not to say that only one year of data should be collected. Rather, in analyzing the data received, the focus of the investigation for purposes of assessing whether imports of subject merchandise entered “in such increased quantities ... and under such conditions as to cause or threaten to cause serious injury,” must be the most recent one-year period.

(1) Absolute increase

4.189 The United States can no longer dispute that absolute import trends showed a decline for 12 months beginning in the second half of 1998. The US 16 February Letter clearly demonstrates that the public data (which includes Arctic and alloy products) does not accurately represent the imports of subject merchandise in the first and second halves of 1998 and 1999.

(2) Relative increase

4.190 The United States repeatedly asserts – incorrectly – that imports relative to production were at their highest in the first half of 1999. Having said this, the United States has not directly disputed that imports relative to production declined in the first half of 1999 relative to the second half of 1998. Indeed, this is an incontrovertible fact.

(ii) *The United States failed to demonstrate that the US line pipe industry was suffering serious injury as required by Article XIX and Articles 3.1, 4.1 and 4.2*

(1) The United States did not satisfy the requirements of Articles 3.1 and 4.2(c)

4.191 The Appellate Body in *Argentina – Footwear* read Articles 3.1 and 4.2(c) to require that the authorities adequately explain how they came to the conclusions that they did and to specify the data relied on to reach those conclusions of fact and law. The Appellate Body in *US – Lamb Meat* confirmed this. Korea is not arguing that the decisions of the ITC must be unanimous, but rather that the data relied on and the conclusions reached were inconsistent and, therefore, had to be reconciled.

4.192 In Korea's view, the US position that the difference between "threat" and current injury is merely a question of "degree" and "timing" is surprising. The industry is either seriously injured and significantly impaired or it is not, as the Appellate Body recognized in *US – Lamb Meat*. The United States simply retorts that "the Commissioners did not reach contrary findings of fact." But the data relied on and the conclusions reached were inconsistent. As these contrary findings were not reconciled, the requirements of Articles 3.1, 4.1 and 4.2 are not met.

(2) The data is flawed since it includes data from other industries

(i) "The line pipe industry"

4.193 Articles 2.1 and 4.1(c) provide that the industry should be defined as the producers of the like or directly competitive products. The ITC's failure to ensure that the effects from the downturns in the OCTG market did not infect the data regarding line pipe made the data unusable for purposes of Article 4.2(a) injury factors.

(ii) Geneva and Lone Star

4.194 In Korea's view, the US statement regarding Geneva is not responsive to the question posed by the Panel for the very reasons observed by Commissioner Crawford. Specifically:

(1) The reference used by the United States that "Geneva did not produce other products in the facilities where line pipe was made" is a reference to the Staff Report in which they are referring to production of other pipe products.

(2) The problem was that Geneva shut down one of its blast furnaces and attributed the shutdown to the line pipe market. That shutdown, however, was driven by circumstances in its principal markets: hot-rolled coil and plate.

4.195 The ITC improperly accepted mere assertions by the domestic industry witnesses regarding Geneva. In the case of dual-stencilled line pipe from Korea, however, the ITC insisted that the precise quantity had to be established. The ITC considered that the less exact data was unusable. Such a difference in standards on two similar issues cannot be justified.

4.196 Moreover, with respect to Lone Star, it turns out that Commissioner Crawford was correct: the result of Lone Star's allocation of SG&A was to "substantially reduce" the operating income of both Lone Star and the industry as a whole.

4.197 Finally, Korea notes that the United States essentially admits that the other Commissioners did not address Geneva or Lone Star issues.

(iii) *The cost allocations artificially lowered the profitability of the line pipe industry*

4.198 The data for Lone Star confirms Korea's position that the data, if properly analyzed for line pipe alone, reveals significantly different financial results for the industry. This issue was not sufficiently investigated and resolved as required by Article 3.1 and 4.2.

4.199 With respect to the question of whether shipments of OCTG fell disproportionately to shipments of line pipe in the period from late-1998 to late-1999, Exhibit 48C presented by Korea at the First Substantive Meeting demonstrates that the US statement is incorrect. With respect to the US position that fixed costs, such as overhead and SG&A, are relatively insignificant, one adjustment by one producer alone – Lone Star – increases industry profitability by as much as 33 per cent according to the United States. The potential impact of "over"-allocated SG&A and fixed overhead for every producer which produced OCTG and line pipe can safely be assumed to be significant.

(c) The Downturn in the Industry's Condition Was Temporary and Improving at the End of the Period

4.200 The United States insists that injury occurred in 1998 and interim 1999. However, Korea notes that the ITC Majority Opinion and Separate Views on Injury relied on the second half of 1998 and the first half of 1999 as the period of injury. Korea believes that the Panel should clarify this point with the United States. In addition, the United States has not responded to Korea's point about the significance of the fact that two new producers entered the line pipe industry. Korea believes that this evidence, together with the evidence on overall industry capital expenditures, confirms that the US industry also understood that the "downturn" was isolated and temporary.

4.201 The United States maintains that the improvement of the industry at the end of the period, does not prevent a finding of serious injury. Korea recalls the decision of the Panel in *US – Wheat Gluten* to the effect that the most relevant period is the end of the period because Article 2.1 requires that the industry must be suffering serious injury when the measure is imposed. The United States maintains that the evidence concerning the upturn in the industry is "only anecdotal." The United States ignores the fact that evidence of this upturn was specifically cited by the ITC Commissioners and formed the basis for the remedy recommendation of both the Majority Opinion and Separate Views on Injury.

4.202 The United States also argues that the price increase data is "extra-record" information. Korea has demonstrated in its written submission in response to the US request to exclude certain data that this information was on the ITC record at the injury stage. The United States is also contradicted by record information with respect to the \$25-\$30 price increase. The price increase was not due to rising raw material prices. Finally, as noted in Korea's First Written Submission, announced price increases totaled \$80/ton by the time of the ITC decision (as noted by Respondents and Commissioner Crawford). This evidence indicates that the industry was no longer suffering injury as required by Articles 2.1 and 4.1(b).

(d) The United States Failed to Demonstrate a Causal Relationship Between Increased Imports and Serious Injury in Violation of Article XIX and Article 4

(i) *There was no coincidence of trends between imports and the performance of the domestic industry*

4.203 The United States argues that a coincidence of trends is not required for a finding of causation. Yet, the Panel and the Appellate Body in *Argentina – Footwear* were quite clear on this point.

4.204 The United States now argues to the Panel that the facts explain why the trends did not coincide, but they get the facts wrong:

- (1) The information on lag-times contradicts the US position. In fact, most of the merchandise is sold before the merchandise enters the United States.
- (2) The United States is incorrect that the ITC did not compare first half and second half 1998 data.
- (3) The difference in trends between imports and the condition of the domestic industry is not minor.

(ii) *Conditions of competition did not demonstrate that there was a causal relationship between increased imports and the performance of the industry*

(1) Dual-stencilled line pipe

4.205 The ITC did not properly consider the market effect of dual-stencilled line pipe: that such pipe was actually sold as standard pipe and thus did not compete with line pipe. The fact that there had been several years of litigation over the proper classification of such pipe strongly supported the conclusion that the effect might be very significant.

(2) Imports did not lead down prices

4.206 The United States did not address Korea's argument that the data confirms that declines in the line pipe industry's profitability were caused principally by the increase in unit costs rather than a decline in prices for line pipe.

4.207 The United States defence of the ITC's finding relies on three levels of proof to demonstrate that imports drove down prices and thereby profitability:

(1) **Statements in questionnaire responses.** However, reliance on such statements cannot take the place of an analysis of the actual pricing data.

(2) **Declines in average unit value ("AUV") data.** Average unit import price data is not reliable because it is based on public data, which includes products other than the "like product" under investigation.

(3) **The ITC's pricing data.** This data did not demonstrate that imports led down prices.

(iii) *The pricing data submitted by the United States*

4.208 As the United States explained at the First Substantive Meeting, the ITC Majority did not evaluate the trends in underselling. The pricing data submitted by the United States confirms that imports did not lead down prices:

(1) Underselling was generally a condition of competition.

(2) In no case did the margin of underselling expand in the period of July 1998 through June 1999 compared to the strongest period of industry health (January 1997 through June 1998).

(3) In the case of Product 5, the data confirms that imports oversold domestic prices, while in the case of Product 6, domestic prices declined even in the absence of import competition.

(e) Other Factors Were the Cause of Any Injury

(i) *The US methodology conflicts with Article 4.2(b)*

4.209 Korea's view is that the focus and sequence of the US evaluation of "other factors" in this case is inconsistent with Article 4.2(b). The ITC begins with an analysis of the combined effects of other factors plus imports and determines whether, all together, they cause "injury." The ITC does not independently evaluate whether increased imports bear a "substantial and genuine" relationship to serious injury. The fact that imports may be a greater cause of injury than a single other factor cannot establish that increased imports caused serious injury.

4.210 The ITC Majority principally relied on a two-period analysis to evaluate causation. They compared the period of 1994-1996 with the period of 1998 and the first half 1999. However, imports did not demonstrate greater growth. Also, the ITC improperly assumed that the effects of the oil and gas crisis could be measured in their totality by reference to the level of apparent consumption in 1999. This analysis ignored the very significant fact that there was a 30 per cent decline in apparent consumption from the first half of 1998 to the first half of 1999. Furthermore, that decline coincided with a 25 per cent increase in domestic capacity (on an annualized basis) due to significant new capacity coming onstream.

4.211 Thus, the ITC failed to properly identify and isolate the effects of all other “differences” between those two periods, *inter alia* increased capacity, declining export markets, and decreasing domestic consumption.

(ii) *The United States does not consider the cumulative effect of all other factors*

4.212 Korea notes that the US defense of its causation decision proceeds from a faulty premise: “the ITC ensures that injury caused by any, or all other factors together is not sufficient to sever the causal link.” The United States, in fact, does not do this because it is statutorily prevented from doing so. The only means to assure that injury from other factors (individually or cumulatively) is not attributed to imports in accordance with Article 4.2(a) is to “cumulatively” consider all other factors. In this case, the overwhelming effect of the oil and gas crisis which caused consumption to drop dramatically from its high in 1997, and the build up of significant “over” capacity by the domestic industry with the addition of two new producers, the elimination of export markets, and consequent ferocious domestic competition were all factors that combined to “so dilute the effects” of imports that imports were no longer a substantial cause of injury.

(iii) *The ITC should have investigated the shift from OCTG to line pipe as an “other factor”*

4.213 With respect to the shift from OCTG to line pipe, the United States has not properly investigated the issue in accordance with its obligations under Articles 3 and 4.2(a).

(iv) *The safeguard measure was intended to remedy injury caused by other factors*

4.214 When several causes result in injury, each factor is only responsible for the actual injury caused. Therefore, injury must be apportioned between each of the causes to assure that the injury from other factors is not improperly “attributed” to imports in violation of Article 4.2. The United States improperly attributed injury caused by other factors to increased imports in the remedy recommendation.

(f) *The ITC’s Threat of Injury Determination Violated Articles 2 and 4 and Article XIX*

4.215 Korea reiterates its argument from its First Written Submission.

(g) *The United States Failed to Demonstrate the Unforeseen Developments Which Lead to the Increased Imports Which Caused Serious Injury*

4.216 There is no indication in the ITC’s determination that the ITC addressed the issue of unforeseen developments. Therefore, the ITC determination does not demonstrate unforeseen developments.

- (h) The US Decision Did Not Satisfy the Requirements of Emergency Action of Article 11 or Article XIX

4.217 The United States seeks to draw an impossible distinction between the legal basis for a remedy and the remedy itself. Obviously, emergency actions require emergency circumstances.

### 3. Procedural Legal Arguments

- (a) The United States Violated the Obligation in Articles 8.1 and 12.3 to Consult Concerning the Measure Before the Measure Is Imposed

4.218 The Press Release relied on by the United States as “notice” preceded the actual imposition of the measure by only a few days. The United States cannot seriously maintain that the Press Release provided Korea with “adequate opportunity” for prior consultation, as stipulated in Article 12.3 and interpreted by the Appellate Body. In Korea’s view, this is an absurd shifting of a US obligation.

### 4. Conclusion

4.219 The Appellate Body on 1 May 2001 in *US – Lamb Meat* reaffirmed the central tenet of *Argentina – Footwear*: “import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.” The United States has not satisfied that standard in this case for the reasons that have been fully developed in this Panel proceeding.

4.220 Moreover, given the breadth and scope of the errors in the ITC serious injury investigation (as well as the safeguard measure), Korea requests that the Panel “suggest[ ] ways in which the Member concerned could implement recommendations.” Specifically, Korea requests that the Panel suggest that the United States comply with its WTO obligations by terminating its safeguard measure.

## F. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

4.221 The following is the United States' own executive summary of its second written submission:

### 1. Introduction

4.222 It is well established that the complainant has the burden of presenting a *prima facie* case of noncompliance with the terms of a covered agreement. Korea has not met this burden with respect to either the ITC’s serious injury determination or the President of the United States’ decision to apply the line pipe safeguard measure.

4.223 In challenging the ITC’s serious injury determination, Korea and the third parties disregard the standard of review applicable to disputes concerning competent authorities’ determinations under the Safeguards Agreement. In particular, they ignore the Appellate Body’s repeated statements that review of competent authorities’ determinations is not to be *de novo* and that panels are not to substitute an alternative view for that of the competent authorities.

### 2. The Increased Imports Requirements of Articles 2.1 and 4.2(a) Were Satisfied

4.224 Neither the SA nor the panel and Appellate Body decisions in *Argentina-Footwear* specify the precise period that should be examined to determine whether there have been imports “in such increased quantities” as to cause or threaten serious injury. In *Argentina-Footwear* the AB did not view the examination of data for two to three years before imposition of the safeguard measure to be inconsistent with its admonition that the investigation period be “the recent past.”

4.225 The ITC's examination of the sharp and significant increase in imports (on both absolute and relative levels) during the last two full years of the period investigated is entirely consistent with the Safeguards Agreement and with Appellate Body Reports in *Argentina – Footwear* and *United States – Lamb Meat*. Nothing in Korea's arguments negates the fact that there was a recent, sudden, sharp, and significant increase in imports, both in absolute and relative terms. The only way that Korea can possibly claim a decline in imports is by manipulating the comparative time segments and then urging that the comparison most favorable to it is the only permissible approach. There is nothing in the Safeguards Agreement, however, that requires competent authorities to examine exclusively the comparative developments between the two halves of the last twelve months for which data were collected.

4.226 Korea's arguments that it was mandatory for the ITC to evaluate only developments in the June 1998-June 1999 period, to the exclusion of all other import data and time periods, is contradicted by, not consistent with, the Safeguards Agreement. The ITC followed its long-standing methodology of examining imports on a calendar year basis with additional data collected for interim periods (in this case the first six months of 1999 and, for comparison purposes, the first six months of 1998). By using the same neutral methodology it routinely uses in its investigations, the ITC ensured that its serious injury determination was based on an objective evaluation, as required by Article 4.2(a) of the Safeguards Agreement. Korea's argument that the ITC should have prejudged the data and manipulated its methodology to reach the result Korea prefers would require the United States to act inconsistently with the objectivity requirement of Article 4.2.

4.227 Examined on the objective basis routinely employed by the United States, imports increased, on an absolute basis, by 67 per cent from 1996 to 1997, and by an additional 44 per cent from 1997 to 1998. Imports relative to US production showed the same sharp increase towards the end of the period of investigation, rising from more than 17.2 per cent in 1996, to more than 23.2 per cent in 1997, to more than 42 per cent in 1998. Relative import levels continued to rise over the interim periods, increasing from more than 36.1 per cent in interim 1998 to more than 43.5 per cent in interim 1999.

### **3. The ITC's Serious Injury Finding Fully Complies with Articles 3 and 4 of the Safeguards Agreement**

4.228 Korea's argument that the ITC determination fails to comply with Articles 3 and 4 because of "fundamental inconsistencies and contradictions" among the Commissioners misconstrues the requirements of the SA and exaggerates the extent of any disagreement among the ITC Commissioners. The Safeguards Agreement does not require unanimity when the determination of a competent authority is made by members of a Commission or other body. The views of a Commissioner who is not part of the competent authority for purposes of the relevant determination carry no evidentiary weight and certainly cannot be considered to bolster whatever argument Korea may otherwise make based on record data.

4.229 Korea greatly exaggerates the extent of any disagreement between the three Commissioners who found serious injury and the two Commissioners who found a threat thereof. The views of a Commissioner who is not part of the competent authority for purposes of the relevant determination should be disregarded by the Panel not only because they are not part of that determination, but because they simply represent an alternative view of the evidence and, therefore, are not entitled to any evidentiary weight.

4.230 Korea has failed to make a *prima facie* case that the ITC's serious injury determination was in any way distorted by the inclusion of data relating to oil country tubular good ("OCTG") production. First, Korea's contention that the decline in OCTG shipments in 1998 was much more severe than the decline in line pipe shipments is simply not correct. The shipment declines for the two types of pipe in 1998 were almost identical. Second, Korea incorrectly assumes that the largest share of average

unit costs consists of fixed costs. Third, the data in the ITC record contradict Korea's assertion that the line pipe industry's performance was affected by disproportionate declines in the production and sale of OCTG in early 1999. Sales of both line pipe and OCTG were in fact flat or rising in this period.

4.231 Korea has not demonstrated any inconsistency between the ITC's finding of serious injury and the Safeguard Agreement's definition of "serious injury" as a "significant overall impairment." Korea incorrectly states that the US line pipe industry experienced only a "one-year downturn." The evidence in the record before the ITC showed that the condition of the line pipe industry deteriorated greatly in 1998 and interim 1999. In addition, this "significant impairment" was widespread and comprehensive.

4.232 There is no merit to Korea's argument that the industry's performance was improving at the end of the period of investigation. The objective and quantifiable data in the ITC record showed a significant deterioration in the condition of the industry from 1997 through June 1999 as well as in interim 1999 as compared with interim 1998. Notwithstanding this, Korea presented a collection of fragmentary statements, often taken out of context, designed to show that the industry was improving at the end of the period of investigation, or at later points. In comparison with the actual "hard data" showing a significant overall impairment in the industry, the collection of self-serving fragmentary statements advanced by Korea is unpersuasive.

4.233 In addition, Korea's characterization of the evidence upon which it relies to argue that the industry was improving at the end of the period is flawed. For example, Korea claimed that imports were falling at the end of the period investigated, whereas they were actually increasing in May and June of 1999.

4.234 The price increase announcements on which Korea relies also do not prove that the industry was no longer in a state of significant overall impairment, for several reasons. There is no evidence in the record that these anticipated price increases by a small number of firms in the industry were actually successful. Moreover, the ITC reasonably found that any such price increases were most likely attributable to an increase in raw material costs due to the imposition of antidumping measures on hot-rolled steel.

#### **4. The ITC's Causation Finding Fully Complied with Article 4 of the Safeguards Agreement**

4.235 Korea incorrectly asserts that there was no coincidence in trends of imports and domestic industry indicators. The SA does not require an exact and overlapping coincidence between imports trends and serious injury to the domestic industry. It is not necessary for increased imports and a deterioration in the industry's condition to occur simultaneously; in fact, some lag between cause and effect is to be expected.

4.236 Korea's effort to show that there was no coincidence in trends depends on its result-oriented approach of dividing 1998 into six-month increments. Nothing in the SA compels or provides for examining data on imports and injury in half-yearly, quarter-yearly or any other increment of time. Instead, Article 4.2 requires that the competent authority reach its determination based on an evaluation of objective evidence. The ITC approach, of adhering to its longstanding practice of making year-to-year comparisons and comparing interim data for the unfinished year to comparable interim data for the previous year, comports with these objectivity requirements. Korea's preferred approach, which would require the ITC to evaluate the evidence based on Korea's results-oriented comparison does not meet these objectivity requirements.

4.237 Korea's contention would mean that competent authorities can stray, after they have received and examined the relevant data, from their usual procedures and practices to perform prejudged

comparisons of part-year data. If that were so, the ITC could just as easily have divided 1998 into quarterly time periods. A comparison by quarters again shows that there is a coincidence between increased imports and the deterioration of the industry. Imports during the third quarter of 1998 were higher than in any other quarter in the entire five-and-a-half year period for which the ITC collected data.

4.238 Korea is wrong in asserting that the Safeguards Agreement requires competent authorities to consider the impact of other causes in the aggregate. The Safeguards Agreement contains no such requirement, and the Appellate Body has recognized this. Korea's contention that the ITC should have considered all other causes of injury in the aggregate is tantamount to the *Wheat Gluten* panel's insistence that increased imports "alone" must be capable of causing serious injury. That is essentially the analysis of the panel that was rejected by the Appellate Body in its reports in both *Wheat Gluten* and *Lamb Meat*.

4.239 Korea and the EC have not shown that the impact of "other factors" severed the causal link between increased imports and serious injury, or that the effects of these "other factors" -- insofar as they produced any injurious effects at all -- were attributed to imports.

4.240 The ITC first found that imports were an important cause of serious injury. It did so by considering the size of the increase in imports (both in actual and relative terms), and the timing of this increase. It also considered the market share held by imports, and information on the pricing of imports and domestic line pipe. It identified imports as a cause of declining prices and concluded that the import-induced price declines resulted in a significant loss of sales, market share and revenues on the part of the domestic industry, as well as declines in other key indicators of industry health such as capacity utilization and employment. In sum, the ITC found that there was a direct, *i.e.*, a "genuine and substantial," causal link between the significant increase in imports and the deterioration of the domestic industry's condition.

4.241 The ITC then analyzed each "other cause" of injury, both to assess its importance and to consider whether it detracted from the importance of increased imports as a cause of serious injury. By examining the "other causes" in this manner, the ITC ensured that it did not improperly attribute to imports injurious effects, if any, caused by the other causal factors. The ITC stated that it was not attributing injury caused by other factors to the imports.

4.242 The ITC distinguished the injurious effects caused by increased imports from the effects of declining demand from the oil and gas sectors in several ways. First, the ITC noted that the domestic industry had operated at lower levels of demand in the past without experiencing the severe financial losses the industry experienced in 1998/1999. Second, the ITC distinguished the injurious effects caused by increased imports from the effects of declining demand from the oil and gas sectors by recognizing the dramatic shift in market share from domestic suppliers to imports. The ITC further distinguished the effects of increased imports from those of the oil and gas crisis by noting the across-the-board price declines in 1998 and interim 1999, even in line pipe grades not sensitive to demand related to the oil and gas industries. Finally, the ITC pointed to a consensus among producers, importers and purchasers that imports played a major role in the decline in US line pipe prices in 1998 and interim 1999. By separately identifying injurious effects of increased imports that were wholly unrelated to the oil and gas market, the ITC ensured that it was not attributing to imports injury caused by the decline in oil and gas demand.

4.243 The ITC considered competition among domestic producers as another factor potentially causing injury, but found that, since competition among domestic producers had always been a factor in the market, such competition did not explain the sudden and sharp declines in domestic prices and shipments. The ITC also noted that two firms began production of line pipe in 1998. It acknowledged that industry capacity increased, but it found the increase in the 1994 -1998 period

(less than 8 per cent) to have been considerably less than the growth in consumption (more than 22 per cent).

4.244 Korea's claim that there was a build up of "significant excess capacity" is both exaggerated and unconvincing. Korea focuses on the excess capacity in interim 1999, and claims that it was attributable to a build up in capacity. In fact, excess capacity in interim 1999 was largely due to a sharp drop in consumption, and not to any significant build up of new capacity. Thus, the ITC did not improperly attribute to increased imports injury caused by competition among domestic producers.

4.245 The ITC found that, while there was some evidence of domestic producers shifting away from OCTG production to other types of pipe, it did not appear that they switched into line pipe production. Citing to the Appellate Body's decision in *Wheat Gluten*, the EC argues in its third party submission that the ITC should have investigated this factor further, and that it could not have avoided attribution of the effects of this factor without quantifying its exact impact. The EC misconstrues the Appellate Body's analysis in *Wheat Gluten*. While the AB ruled that competent authorities may not limit their examination of "'other factors' to those clearly raised before them as relevant by interested parties," it also rejected "the European Communities' argument [in that case] that the competent authorities have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant."

4.246 All of the record evidence before the ITC indicated that there was no substantial switch from OCTG to line pipe production. The petitioners stated at the ITC injury hearing that any diversion of production would have been relatively small. They noted that line pipe production declined at the same time as OCTG production. There was no contrary evidence in the record. The ITC Report shows that production of line pipe declined substantially in 1998 and in interim 1999 (as compared with interim 1998), making it implausible that serious injury was caused by overproduction of line pipe resulting from any shift from OCTG production. Under these circumstances, the ITC properly evaluated this factor, and explained its reasonable conclusion that declines in OCTG production were not substantially responsible for the serious injury experienced by the line pipe industry.

4.247 The ITC also considered allegations that declines in the domestic industry's exports were a more important cause of serious injury than increased imports. It found that although this decline worsened the serious injury caused by the increased imports, the increase in imports was far larger than the decline in exports. Thus, although the modest declines in exports may have affected the producers' bottom line, those effects were not attributed to imports because the impact of the increased imports dwarfed the decline in exports.

4.248 Contrary to the EC's assertions, the ITC did not "mis-attribute" injurious effects to imports of specialty products. During the ITC's injury investigation, a German line pipe producer argued that there was no domestic production of high frequency induction ("HFI") line pipe over 6 inches in diameter, or any domestically-produced substitute for use of this product in deepwater applications, and asked that HFI line pipe be excluded from the scope of the investigation. The ITC recognized that there was some evidence of customers preferring HFI line pipe, but it was not persuaded that the HFI line pipe was sufficiently different from the domestic product to warrant its exclusion from the domestic like product.

4.249 Once the ITC properly determined that HFI pipe was part of the domestic like product, imports of HFI pipe were reasonably included in the subject imports considered by the ITC in its analysis of the impact of increased imports on the condition of the domestic industry. Moreover, it should be noted that even if the ITC had excluded HFI imports from its analysis, the ultimate conclusion regarding the impact of increased imports on the US industry would have been no different. Imports from Germany did not represent a significant proportion of total imports, and there is no suggestion that all, or even most, German imports consisted of HFI line pipe.

**5. The United States Applied the Safeguard Measure on Terms Consistent with Articles 5 and 9 of the Safeguards Agreement and Articles I, XIII, and XIX**

- (a) A TRQ is Not A Quantitative Restriction or Quota Within the Meaning of Article 5 of the Safeguards Agreement or Articles XI and XIII

4.250 Every relevant authority supports the conclusion that tariff rate quotas (“TRQs”) are not quantitative restrictions or quotas. The text of Article XI necessitates this conclusion. If TRQs were quantitative restrictions or quotas, they would be prohibited. They plainly are not. Many Members – including Korea – apply TRQs. The implementation of TRQs was for many Members the basis for complying with the commitment under Article 4.2 of the WTO Agreement on Agriculture to convert quantitative restrictions into “ordinary customs duties.” In addition, Article XIII:5, which specifies that the Article XIII disciplines on quantitative restrictions and quotas apply to TRQs, would not make sense if TRQs were, by their nature, quantitative restrictions or quotas.

4.251 The same conclusion holds true with regard to Article 5. Nothing in that provision gives its terms a meaning different than they have elsewhere in the WTO Agreement. Indeed, Article 5.2(a) duplicates the text of Article XIII:2(d), which indicates that the terms have the same meaning as used in both articles.

- (b) The Line Pipe Safeguard Complied With All of the Requirements of Article 5

4.252 Under Article 5.1, a Member may apply a safeguard measure only to the extent necessary to prevent or remedy serious injury and facilitate adjustment. The Appellate Body has interpreted this text to require that a safeguard measure be “commensurate” with the goals of Article 5.1. Both of these goals relate to the condition of the domestic industry, since the nature and magnitude of serious injury will determine both the need for adjustment and the extent to which it is necessary to apply a safeguard measure. In short, the condition of the domestic industry sets the benchmark for application of any safeguard measure.

4.253 This standard applies regardless of whether the competent authorities characterize the domestic industry as subject to serious injury or the threat of serious injury. The factors listed in Article 4.2(a), which the competent authorities consider in evaluating the condition of the domestic industry, are the same for both serious injury and threat of serious injury. Since these factors delineate the condition of the domestic industry, which in turn forms the benchmark for application of a safeguard measure, the application of the safeguard measure will not depend on whether serious injury is current or threatened.

4.254 Therefore, to ensure that a safeguard measure meets the requirements of Article 5.1, a Member will consider the competent authorities’ determination regarding serious injury, the industry’s plans and efforts to adjust to import competition, and other factors that it considers relevant.<sup>13</sup>

4.255 The Safeguards Agreement contains no requirement that a Member explain or “justify” the application of a safeguard measure at the time of application, except in the case of a quantitative restriction described in the second sentence of Article 5.1.<sup>14</sup> Since the US safeguard measure did not take such a form, the United States was under no obligation to justify the measure. Instead, the burden is on Korea to demonstrate that the US safeguard measure was *not* applied “only to the extent necessary to remedy or prevent serious injury and to facilitate adjustment.” It has in no sense met this burden.

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<sup>13</sup> Paragraph 10 of the US responses to questions from the Panel indicates the factors considered by the President.

<sup>14</sup> *Korea – Dairy Safeguard (AB)*, at para. 100.

4.256 However, if the Panel were to consider whether the line pipe safeguard complied with the requirements of Article 5, the considerations outlined above suggest a multiple step inquiry along the following lines:

- (1) a review of the evidence of serious injury or threat of serious injury identified by the competent authorities;
- (2) an examination of the nature of the safeguard measure, including its product coverage, form, duration, and level;
- (3) an analysis of how the application of the measure addresses the serious injury or threat of serious injury identified by the competent authorities; and
- (4) in light of the first three steps, an assessment of whether application of the measure, in its totality, goes beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

4.257 The US analysis showed that the 19 per cent tariff would result, at most, in an increase of \$62-64 per short ton in the average unit value of imported line pipe. If domestic producers increased their prices by the same amount, their operating profit margin would increase to \$15 to 17 per short ton on average, for an operating income ratio of 3 to 4 per cent.<sup>15</sup> That would represent between 3 and 4 per cent of total revenues, a level closer, but not equal to, the industry's profitable years before the import surge.<sup>16</sup> However, this scenario would likely leave domestic producers' market share – an important aspect of serious injury – unchanged. Moreover, it is questionable whether the US producers *could* increase their prices by such an amount. Thus, it cannot be said that the United States applied the line pipe safeguard beyond the extent necessary as the measure alone would not be likely to reverse the volume and price effects of increased imports.

(c) Article XIII Obligations Regarding Quantitative Restrictions Do Not Apply to TRQs Imposed as Safeguard Measures

4.258 In previous submissions, the United States demonstrated that, under customary rules for the interpretation of treaties, Article XIII cannot be interpreted as applicable to safeguard measures taken pursuant to the Safeguards Agreement and Article XIX. Korea has argued that this interpretation deprives Article XIII of its “full force and effect.” However, it fails to recognize that it is the customary rules of treaty interpretation, which support the US interpretation, that determine the “full force and effect” of any treaty. As the United States has explained, it is precisely those rules that compel the conclusion that safeguard measures taken pursuant to the Safeguards Agreement and Article XIX need not satisfy the requirements of Article XIII.

4.259 Finally, Korea claims that if Article XIII does not apply to safeguard measures, “tariff-rate quotas have escaped multilateral control.” This is plainly untrue. The prerequisite that the competent authorities first make a determination of serious injury or threat of serious injury places a significant limitation on the availability of a safeguard TRQ. In addition, the first and last sentences of Article 5.1 apply to safeguard TRQs, as do Articles 7, 8, 9, 11, and 12.

(d) Nothing in the Safeguards Agreement Disturbs FTA Parties' Authority Under Article XXIV to Exclude Each Other From the Application of Safeguard Measures

4.260 Article XXIV allows FTA parties to decide whether to exclude each other from safeguard measures all of the time, some of the time, or not at all. Under Article XXIV:8, an FTA must

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<sup>15</sup> ITC Report, p. II-28, Table 10.

<sup>16</sup> ITC Report, p. II-27, Table 9.

eliminate restrictive regulations of commerce – like safeguard measures – on substantially all trade among the parties. Thus, the package of trade liberalizing measures that accompanies formation of an FTA need not eliminate all duties and restrictive regulations of trade. If FTA parties, while retaining some duties and restrictive regulations of commerce, can still achieve the Article XXIV:8 threshold (covering “substantially all trade”), they may retain those regulations. If the elimination of other restrictive regulations covers substantially all trade, the parties *may* also eliminate safeguard measures.

4.261 Article 802 of the North American Free Trade Agreement (“NAFTA”) requires the parties to exempt each other from safeguard measures under certain circumstances. The Panel asked whether the formation of the NAFTA would have been prevented if the NAFTA parties had not been allowed to introduce this safeguards exemption. It linked this question to the decision of the Appellate Body in *Turkey – Textiles* that “Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions ... only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed.”<sup>17</sup>

4.262 However, the *Turkey – Textiles* reasoning applied to a measure affecting *external* trade with non-Members of the customs union. Thus, it does not apply to the safeguard exemption, which affects *internal* trade among the parties to the NAFTA, and formed part of the package of trade liberalization that created the FTA.

4.263 In any event, the *Turkey – Textiles* reasoning demonstrates that Article XXIV invalidates Korea’s claims that the NAFTA safeguard exemption was inconsistent with Articles I, XIII, and XIX. Compliance with Article XXIV:8(b) is determined with reference to the entire package of the duties and restrictive regulations of commerce that are eliminated. The safeguard exemption formed part of that package for the formation of the NAFTA. If the GATT 1994 were interpreted to prohibit the NAFTA parties from accepting that obligation, it would prevent adoption of the liberalization package necessary to form an FTA. Thus, by operation of Article XXIV, the safeguard exemption is not inconsistent with Articles I, XIII, and XIX.

#### G. SECOND ORAL STATEMENT OF KOREA

4.264 The following is Korea's own executive summary of its second oral statement:

##### 1. Introduction

###### (a) Appellate Body Precedents

4.265 The Appellate Body in *US – Lamb Meat* reaffirmed the overriding principle that safeguard measures are extraordinary actions and strict adherence to each and every requirement of the SA is essential. Specifically, the Appellate Body reaffirmed the very high standard of injury imposed by the SA. It also reaffirmed the importance of a full and complete analysis of all other factors, as well as the importance of a reasoned and adequate explanation, to ensure that the serious injury attributed to imports was actually caused by imports.

4.266 The US position on most of the issues raised by Korea in this proceeding is exactly the opposite of the body of jurisprudence established by the Appellate Body. The United States seeks to limit the review of the Panel and increase the discretion of the Members in applying safeguards. If the Panel does not address the issue of the measure, the US position will be sustained.

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<sup>17</sup> *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, paras. 46-47, adopted 22 October 1999 (“*Turkey – Textiles (AB)*”).

(b) General Objection to the US Failure to Address the Issue of Subject Imports in the US Second Written Submission

4.267 The United States continues to rely on public import data for many of its arguments despite the fact that such data (1) does not match the like-product in this case and, (2) during the period of investigation, the public data trends do not accurately track the confidential data trends. All arguments based on such data should be rejected by this Panel as unrepresentative of the like-product.

(c) Burden of Proof

4.268 The failure by the competent authorities to conduct a full investigation and publish a decision on all pertinent issues in violation of Articles 3.1 and 4.2(b) and 4.2(c) cannot become the basis for an objection by the Member in violation that the complaining party has insufficient record support for the claims and legal arguments made before the Panel. The Appellate Body appropriately gave no significance to these so-called “burden of proof” arguments by the United States in *US – Lamb Meat*.

## 2. The Safeguard Measure

(a) The Safeguard Measure Was Not Imposed Only to the “Extent Necessary”

(i) *The US justification for the measure should have been contained in the findings and conclusions required by Article 3.1*

4.269 While the United States appears to be offering its new “ex post” theory about why the US measure was imposed “only to the extent necessary,” the Appellate Body in *US – Lamb Meat* confirmed that such an explanation should have been made prior to the imposition of the measure. Thus, in the case of a quantitative restriction adopted as a safeguard measure, which reduced imports below the level of the last 3 representative years, the authorities must justify the level of the measure as necessary in accordance with the requirements of Articles 5.1 and 3.1 inasmuch as this is a “pertinent issue” which must be addressed.

(ii) *The newest ex post reasoning by the United States should be rejected*

4.270 The latest ex post explanation for the measure by the United States that, if a 19 per cent tariff were fully translated into increases in the average unit price of line pipe, the impact on operating profits would be an increase that was close to but not equal to operating profit levels before the import surge has no more validity than its predecessors. This ex post justification ignores the combined improvements on the company’s operating leverage of both price and volume increases and the improving demand situation. Also, the United States ignores the fact that virtually no (14,000 tons) imports entered at the 19 per cent tariff in the first year of the TRQ. In the absence of reasoned and adequate economic analysis, the United States can make no claims as to the estimated impact of the US measure or whether or not they are less than or greater than the extent necessary.

(b) The Safeguard Measure Was Not Confined to Addressing Only the Serious Injury Caused by Imports

4.271 The SA requires that a safeguard measure be confined to address the injurious effect of imports. In the ordinary interpretation of treaty language, “serious injury” in Article 4 and “serious injury” in Article 5 cannot mean two different things. The United States has offered no evidence that the measure was designed only to address the injurious effect of imports.

(c) Exemption of NAFTA Suppliers Was Improper

(i) *Footnote 1 does not apply to the US safeguard action*

4.272 Footnote 1 to Article 2.1 does not apply to the US safeguard measure because the United States is not acting as a customs union but simply in its capacity as a FTA Member State applying national safeguards. In the absence of Footnote 1, Article 2.2 requires MFN treatment, and Article XXIV does not provide a defence for a violation of the SA.

(ii) *Article XXIV does not provide a defence to the US violation of Article 2.2*

4.273 As the Appellate Body ruled in *Turkey – Textiles*, the Article XXIV defence is available only when the Member meets both the definition for an FTA and economic tests required under Article XXIV. Since NAFTA qualifies as an FTA even if safeguards were applied in some cases or even in all cases, the elimination of safeguard measures was not a prerequisite to the formation of NAFTA as an FTA. Moreover, the economic test in the instant case shows that the exemption of NAFTA members from the safeguard measure results in more restrictive regulations of commerce for non-members.

4.274 Finally, the attempt by the United States to escape Panel's review of its actions by subsuming the NAFTA exemption applied in this case within the overall obligations of the NAFTA should be rejected because the two conditions which must be met under Article XXIV should be examined with respect to the particular measure at issue, not the Agreement in its entirety. The United States has presented no evidence or even arguments that the NAFTA would have been prevented if the United States applied the measure on line pipe to Mexico and Canada.

### **3. The ITC Serious Injury Investigation**

(a) The ITC's Investigation and Analysis Failed to Satisfy the Obligations of Articles 3.1 and 4.2

4.275 The ITC failed to satisfy the obligations of Articles 3.1 and 4.2 because it did not reconcile specific findings of the ITC which are in conflict among the ITC Commissioners, nor did it address the issues raised by parties in the ITC proceeding.

(b) No Increased Imports Were Demonstrated

(i) *Imports declined*

4.276 The requirement for increased imports is definitive and requires authorities to look at the last year of the period since the SA uses the present tense – “is being imported” – and the Appellate Body prohibited the use of any period of several years. Moreover, in terms of “context,” import trends followed developments in the demand of the oil and gas sector and the drilling activities. Thus, imports commenced their decline at the same time as domestic industry factors and would continue to decline until drilling activity recovered.

(ii) *The ITC did not adequately examine these significant import declines in its investigation and determination*

4.277 The US failure to examine declining import trends for late 1998 and early 1999 violates the requirements of Articles 2.1 and 4.2(b). The internal practice of the United States cannot justify its failure to perform a treaty obligation.

(c) There Was No Serious Injury in the Line Pipe Industry

(i) *Other Commissioners' opinions provide alternative plausible explanations of the data*

4.278 Observations made in the dissenting views or separate views within the competent authorities are highly relevant and must be considered by the Panel because they call into question the “reasoned and adequate explanations” given by the authorities and present an alternative reading of the record data. The problems presented by the ITC Commissioners’ disagreements over certain fundamental issues in their decisions are significant and cannot be remedied by mere observations which basically constitute a “checklist” of the relevant factors.

(ii) *Some of the data the ITC majority and separate views relied on was fatally flawed*

4.279 Contrary to the characterization made by the United States with respect to Exhibit KOR-48C as a manipulation, it correctly demonstrates that any allocation of costs based on relative sales value of line pipe to total domestic shipments will be distorted because OCTG declined more severely than line pipe in the months between 1998 and 1999. The ITC’s reference to the “collective operating leverage” confirmed this conclusion.

4.280 As the Appellate Body observed in US – Lamb Meat, it would be a violation if a safeguard measure could be imposed based on data from domestic producers of products that are not like and directly competitive products in relation to the increased imports. The ITC did not sufficiently isolated the effects of these OCTG declines as well as the financial data for Lone-Star and Geneva Steel from the data before it evaluated injury to the line pipe industry.

(iii) *The Industry Had a One-Year Downturn and Was Already Rebounding*

4.281 Both the ITC Majority “Findings” and the separate view of threat were premised on an analysis of the domestic industry’s downturn beginning in the second half of 1998. In that context, a one-year decline and subsequent recovery are significant evidence that the industry was not seriously injured since the industry must be in a state of serious injury when the decision of the authorities is made in accordance with Articles 2 and 4.2(b). Also, the one-year downturn in the industry had to be viewed in the context of a peak in 1997. Moreover, this was an industry that was accustomed to these wide swings in profitability and understood that their recovery would come with the recovery in oil and gas prices. Actually, the condition of the domestic industry was improving due to the improvement in oil and gas prices since early 1999, as was recognized in the ITC report.

4.282 In addition, the US Industry continued to invest because it made economic sense to plan for the recovery of the market. However, the United States argues against the significance of increased capital expenditures on the ground that such decisions predated the industry’s difficulties. Without the confidential data on the industry as a whole, the Panel cannot conclude that the ITC sufficiently evaluated the industry as a whole or that the experience of the two producers selected by the Petitioners was representative of the industry as a whole.

4.283 Furthermore, the announcements of price increases by prominent US producers indicated their assessment of the future market at the time the ITC took its decision. The United States arguments on the issues of the relevance of price increases are ex post reasoning which are not found in the ITC determinations. To conclude, the ITC’s analysis of injury factors failed to provide a reasoned and adequate explanation of how the facts as a whole support ITC’s serious injury determination.

(d) The US Causation Decision Neither Properly Analyzed the Effects of Imports nor Sufficiently Isolated the Effects of Other Factors

(i) *There was no coincidence of trends*

4.284 The US causation decision fails because it ignores very significant inconsistencies between the trends of imports and the health of the US industry when half year 1998 and 1999 data are evaluated.

(ii) *The ITC did not properly analyse the effects of imports*

4.285 The US assumptions about the effects of imports were incorrect: (1) the per centage increase in imports was not “significantly different” between 1997 and 1998 compared to 1996 and 1997; and (2) price declines were not caused by import.

(iii) *The ITC’s analysis of “other factors” of injury was inadequate*

4.286 Instead of assessing the nature and extent of the injurious effects of all other factors, and separating such the injurious effects of these other factors in accordance with Article 4.2(b), the ITC simply compared the injurious effect of each individual factor and determined each was not more important than the increase in imports.

4.287 Also, the ITC did not adequately investigate the other factors of injury in violation of Articles 4.2(a) and (b). As the Appellate Body admonished in *US – Wheat Gluten*, competent authorities have an independent duty of investigation and they cannot “remain passive in the face of possible short-comings in the evidence submitted, and views expressed, by the interested parties.” Although the issues such as the shift from domestic production of OCTG to line pipe, the effects of dual-stencilled line pipe, or increased competition among domestic producers had been brought to the ITC’s attention from the beginning of the proceeding, the ITC did not investigate such factors.

4.288 Finally, the United States should have cumulatively analyzed all the other factors of injury to determine that each factor, alone counting for some injury, would not cumulatively account for all injury and thus, demonstrate that increased imports did not bear a substantial and genuine relationship to serious injury. The United States cannot now assert that it is unnecessary to evaluate “all other factors together,” when they have already asserted to this Panel – incorrectly – that they had indeed performed just such an analysis.

## H. SECOND ORAL STATEMENT OF THE UNITED STATES

4.289 The following is the United States' own executive summary second oral statement:

### 1. Burden of Proof and Standard of Review

4.290 There is no question that the burden of proof in a WTO dispute lies with the complaining party. This burden is part and parcel of the assumption that Members act in good faith to conform with their obligations under the WTO Agreement. Contrary to Korea’s arguments, the actions of the responding party do not lower that hurdle.

4.291 The standard of review should also not be in doubt. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) covers all obligations under the WTO Agreement, and requires an objective assessment of the matter before the Panel. In *Lamb Meat*, the Appellate Body enunciated a legal test for *applying* that standard to the obligations under Article 4. By its terms, this test applies only to Article 4 and not to other provisions of the Safeguards

Agreement, such as Article 5. Any application of DSU Article 11 to claims under Article 5 must proceed in accordance with the terms of that Article.

## 2. Increased Imports

4.292 There can be no question that the increased imports requirement was met in this investigation. Imports nearly tripled in the last two full years of the period of investigation. Korea claims erroneously that the Appellate Body in *Argentina – Footwear* established a legal standard requiring an examination of import data only for the last 12 months of the period of investigation. In fact, the Appellate Body's decisions in *Argentina – Footwear* and *United States – Lamb Meat* make clear that there is no such rule.

4.293 Korea attempts to justify its reliance on a comparison of the last six months of 1998 with the first six months of 1999 by claiming that “the ITC itself looked at 1998 as two six-month periods with very distinct trends for purposes of its injury determination.” Korea's characterization of the ITC's analysis is simply untrue. The fact that the ITC collected and examined data on the basis of full years and comparable interim periods – and not for the first and second halves of 1998 – is clear from a review of the discussion of the serious injury factors in the ITC Report and of virtually every table with numerical data in the entire report. The ITC acted consistently with the “objectivity” requirement of Article 4.2 of the Safeguards Agreement by evaluating the data in this case in the same neutral and unbiased manner that it conducts all of its safeguards investigations.

4.294 Even if the Safeguards Agreement required that the period for analyzing imports be limited to the last 12 months of the period investigated – and clearly it does not – Korea's theory that imports declined does not hold up. There was a sharp increase in imports in May and June of 1999.

## 3. Serious Injury

4.295 Commissioner Crawford's views are not part of the determination of the ITC. The Safeguards Agreement does not require competent authorities to respond to the views of a particular Commissioner who is not a part of the competent authorities for purposes of the serious injury determination.

4.296 Korea's assertion that Geneva's decision to close a blast furnace was entirely due to conditions in the hot-rolled sheet and plate markets, and had nothing to do with line pipe conditions, is clearly at odds with the evidence in the record that Geneva lost half of its line pipe volume, and that line pipe production was essential to running the second blast furnace.

4.297 Korea builds its entire argument concerning Lone Star on an unfounded assumption that Lone Star “mis-allocated” part of a SG&A expense to line pipe operations. There is no evidence to support this assumption. ITC accountants conducted a verification of Lone Star's data, which included the partial SG&A allocation to line pipe operations.

4.298 The United States has shown that Korea's theory that the financial performance of the line pipe industry was affected by declining OCTG production is unsupported. Korea's contention that the decline in OCTG shipments in 1998 was much more severe than for line pipe is simply not correct. In addition, the United States has shown that the effect that this could have had on average unit costs for line pipe would have been nominal because the majority of average unit costs were variable. The United States notes that Korea keeps shifting the time period when this alleged effect of declining OCTG sales occurred.

4.299 None of Korea's arguments concerning alleged financial improvements at the end of the period investigated detract from the hard evidence showing a significant overall impairment in the US line pipe industry in 1998 and interim 1999. The ITC recognized that capital investment projects in

this industry have long lead times. Decisions by two firms to begin producing line pipe were likely to have been made years before the 1998 and interim 1999 downturn in the industry. Nor do the statements by ITC Commissioners in their views on remedy detract from the serious injury finding. The Commissioners simply noted, when writing these views in December 1999, that oil and gas prices had increased since early 1999. Announcements by three producers of intended price increases are of little probative value. As two of the three producers explicitly stated in their price increase announcements, these were due to increases in raw material costs.

#### 4. Causation

4.300 Korea's attempts to discredit the evidence of adverse price effects by imports are unpersuasive. Korea is incorrect in claiming that the average import unit values on which the ITC relied are inaccurate because they are based on "public data." Korea's argument that the quarterly pricing data do not prove that imports "led prices down" in the second half of 1998 and the first half of 1999 is irrelevant because the ITC did not make any finding that "imports led prices down" only in this period. Questionnaire responses from industry participants stated that imports played a "very important" or "important" role in causing price declines. There is no support for Korea's suggestion that the observations of those with intimate knowledge of the industry are not objective.

4.301 Korea argues that the "only" means to ensure that injury from other factors is not attributed to imports is to "*cumulatively*" consider all of the other factors. There is absolutely no such requirement in the Safeguards Agreement. The Appellate Body's report in *Lamb Meat* contradicts Korea's argument that the Safeguards Agreement requires a *cumulative* causation analysis. In that report the Appellate Body accepted the ITC's separate identification of individual causal factors, but suggested that to meet the requirements of Article 4.2(b) the ITC should have explained the nature of the injurious effects of each of these other factors.

4.302 Korea is also incorrect in asserting that the Agreement requires a finding that the domestic industry would still have suffered serious injury irrespective of the crisis in oil and gas. In *Wheat Gluten*, the Appellate Body stated that, under the Safeguards Agreement, competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, causes serious injury. In its *Lamb Meat* report, the Appellate Body again confirmed that Article 4.2 of the Safeguards Agreement does not require that increased imports "alone", "in and of themselves" or "per se" must be capable of causing serious injury. Rather, the Agreement contemplates that other factors may be contributing at the same time to the situation in the domestic industry. Where there are several causal factors, the Agreement, as interpreted by the Appellate Body, requires competent authorities to identify and distinguish the effects of the different causal factors by whatever reasonable methodology the Member chooses.

4.303 Distinguishing the effects of the various causal factors is not the same as finding that the imports by themselves would have caused serious injury irrespective of the presence of other causes. The question for the competent authorities is not whether the increased imports would have caused serious injury absent those other factors, but whether there is a "substantial and genuine" causal link between the increased imports and serious injury that occurs as a result of the entry of those imports into the market as it exists.

4.304 In addressing whether each other alleged cause was a greater cause of injury to the domestic line pipe industry than the increased imports, the ITC provided the type of analysis outlined by the Appellate Body in *Lamb Meat*, and thus ensured that there was a "*genuine and substantial relationship of cause and effect*" between increased imports and serious injury. The ITC explained the injurious effects of all other causal factors.

4.305 The ITC determined that there were mainly two circumstances responsible for the decline in the domestic industry – the increased imports and the decline in oil and natural gas prices. The ITC

carefully identified, distinguished and explained the effects of each of those two causes. After distinguishing the effects of the oil and gas declines from those of the increased imports and then examining the effects of each of these two principal causes, the ITC found that the increased imports were the predominant cause of the declining condition of the domestic industry. The ITC then also examined the minor causes of injury, and found either that any injury caused by these other factors was too small to account for the injurious effects attributed to the increased imports, or that the nature of the other cause was such that it had always been a factor in the market in good times as well as bad, and therefore could not be linked to the declines attributed to the increased imports.

## **5. There is no Requirement to Explain how Application of a Safeguard Measure Satisfies the Requirements of Article 5.1**

4.306 Korea claims that the United States violated the Safeguards Agreement by failing to explain in 2000 how it complied with the Article 5.1 requirement to apply the line pipe safeguard only to the extent necessary to remedy serious injury and facilitate adjustment. However, the Appellate Body already considered exactly this argument and rejected it in *Korea – Dairy Safeguard*.<sup>18</sup>

4.307 Korea contends that Articles 3.1 and 4.2(c) independently oblige a Member to explain at the time it takes a safeguard measure how that measure is consistent with Article 5.1. However, Articles 3.1 and 4.2(c) require the *competent authorities* to publish a report on “all pertinent issues of law and fact.” In those same Articles, the competent authorities are charged solely with the investigation and determination of serious injury. Neither Articles 3.1 and 4.2(c) nor Article 5.1 give the competent authorities a role in the decision whether and to what extent to apply a safeguard measure. Thus, there is no basis to conclude that their report need explain how the measure complies with Article 5.1.

4.308 Korea’s argument is also inconsistent with the framework established by the Safeguards Agreement. Under Article 2.1, a Member may apply a safeguard measure only after the determination of serious injury. Under Articles 3.1 and 4.2(a), the competent authorities make that determination only after conducting an investigation. They are also charged with issuing a report containing “findings and conclusions on all pertinent issues of fact and law” and “a detailed analysis of the case under investigation. Article 5 establishes the condition of the domestic industry, as revealed in that investigation, as the benchmark for a Member’s application of the safeguard measure. Since the investigation, determination, and report are a necessary precursor to a Member’s decision under Article 5 on the extent to which it applies a safeguard measure, they cannot themselves explain how the measure complies with Article 5.

4.309 This approach does not prevent review by a panel. As with any other measure taken by a Member, another Member may claim in a dispute that application of a safeguard measure is inconsistent with the WTO Agreement. It then bears the burden of presenting a *prima facie* case of inconsistency. That is only appropriate since in a safeguard measure, as with any other measure, the imposing Member is presumed to have complied in good faith with its obligations.

## **6. Korea’s Claim that the Line Pipe Safeguard Itself Does not Comply with Article 5.1**

4.310 Throughout this dispute, Korea has based its claims of inconsistency with Article 5.1 on allegations that the US line pipe safeguard was somehow more restrictive than recommended measures that the ITC had identified. In its rebuttal submission, for the first time, it attempted to analyze whether the United States actually applied its safeguard measure beyond the extent necessary.

4.311 Its analysis was deeply flawed. The record indicated that up to 19 customs territories would enjoy access at MFN rates, rather than just the seven identified by Korea. The ratio of the

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<sup>18</sup> *Korea - Dairy Safeguard (AB)* at para. 98.

supplemental tariff to the MFN rate is irrelevant, and is high simply because the MFN rate is so low. Finally, data on actual line pipe imports does not demonstrate the "result of the measure." The panel has no information on market conditions after imposition of the line pipe safeguard, and the observed import patterns could result from a number of factors unrelated to the safeguard. Therefore, Korea has presented no basis for the Panel to conclude that the United States applied the line pipe safeguard beyond the extent necessary.

4.312 Korea has also failed to identify any flaw in the US explanation of how the line pipe safeguard was consistent with Article 5.1. Korea assumes that US producers would be able to increase their prices by the full extent of the 19 per cent duty *and* increase their volume of sales at the same time. This is obviously impossible. If the relative price difference between domestic and imported line pipe remains unchanged, there is no reason to expect the volume of domestic products to increase. Korea also assumes that demand was improving rapidly, but the information before the ITC does not support this conclusion. Therefore, Korea provides no basis for the Panel to conclude that the line pipe safeguard was inconsistent with the requirements of Article 5.1.

## **V. ARGUMENTS OF THE THIRD PARTIES**

5.1 The arguments of the third parties, Canada, the European Community, Japan, and Mexico are set out in their submissions to the Panel, as attached to this Report in Annex A (see List of Annexes, page iv). Australia did not make a written submission or an oral statement.

## **VI. INTERIM REVIEW**

6.1 Our interim report was sent to the parties on 31 August 2001. On 14 September 2001, the parties requested review of precise aspects of the interim report, in accordance with DSU Article 15.3. On 21 September 2001, in accordance with paragraph 17 of the Working Procedures of this Panel, we received written comments from the United States on some sections of Korea's request for interim review. Korea did not submit any comments on the US request for interim review. The various issues raised by the parties are addressed below.

### **A. THE UNITED STATES' REQUESTS FOR INTERIM REVIEW**

6.2 The United States requested us to delete paragraphs 7.15 through 7.17 of the interim report. Since these paragraphs addressed a procedural issue of limited significance, we see no reason not to delete them.

6.3 The United States requested the Panel to delete paragraph 7.59 of the interim report, in which some comments were made regarding the US position on Article XIII:2 as reflected in a "US General Counsel Memorandum" submitted by Korea. We have accepted the US request to delete that paragraph.

6.4 The United States asked the Panel to delete footnote 217 of the interim report, on the basis that it took a US comment out of context. We have deleted the relevant footnote.

6.5 The United States directed our attention to an error in paragraph 8.1 of the report, which we have corrected.

### **B. KOREA'S REQUESTS FOR INTERIM REVIEW**

6.6 Korea requests a technical correction to what is now paragraph 7.166 of the report, which we have made.

6.7 Korea asks the Panel to delete the US argument set forth in what is now paragraph 7.167 of the report. Korea asserts that this argument was not made in writing by the United States, and therefore does not constitute part of the record of the dispute. To the extent that the United States made this argument orally, Korea asserts that no written version of that oral argument was provided, contrary to paragraph 9 of the Panel's Working Procedures. In addressing Korea's request, we note that the US argument at issue was made orally, in response to an oral question from the Panel. Paragraph 9 of the Panel Working Procedures provides in relevant part that "[T]he parties to the dispute shall make available to the Panel and the other party a written version of their oral statements not later than the day after the oral statement is presented". Paragraph 9 does not refer in any way to a party's oral answer to an oral question from the Panel. In our view, therefore, paragraph 9 does not require that a party's oral response to an oral question from the Panel can only form part of the record of the Panel proceedings if it has been reduced in writing. Accordingly, we reject Korea's request to delete the US argument set forth in paragraph 7.167 of the report.

6.8 Korea asserts that the Panel's finding on parallelism (set forth in what is now paragraphs 7.164 - 7.171 of the interim report) is flawed. Korea asserts that the Panel neglected its duty of making an objective assessment of facts and assessing the applicability of and conformity with the relevant covered agreements with respect to Korea's claim. Korea also submits that the Panel imposed an exorbitant burden of proof on the party making the claim, while it completely ignored the fact that the other party did not make any efforts to refute the claim. According to Korea, it made sufficient arguments to establish a *prima facie* case in support of its parallelism claim, especially in light of the fact that the United States did not defend that claim.

6.9 Korea focuses on the Panel's treatment of note 168 of the ITC report. Korea asserts that it "does not understand why the establishment of *prima facie* case can be done only through the refutation of the footnote 168, which is a conditional statement. Korea's confusion grows even deeper given the fact that Korea's assessment of the footnote, to the effect that it does not have legal significance, was not challenged by any party, including the Panel, throughout the whole proceedings. ... In the absence of any refutation from the U.S. and in the absence of any related query from the Panel on the issue, in fact against total silence on the footnote 168 other than Korea's assessment that it does not have any legal significance, it is surprising for the Panel report to take one footnote out of the voluminous final report of the ITC and state that the Panel fails to see why the footnote has no legal significance."

6.10 As Korea itself explains, its parallelism claim is based on the argument that "there is a gap in the scope of the investigation and the scope of the measure". In examining Korea's claim, we considered note 168 because it is relevant to the alleged "gap" identified by Korea. Indeed, it is arguably the only part of the ITC report that addresses this issue. During the proceedings, Korea asserted that note 168 "has no legal significance", without explaining why. At the interim review stage, Korea asserted that note 168 has no legal significance "because of the contents of the footnote", and because the first sentence of note 168 "begins with a conditional statement". In our view, however, it is precisely because of the contents of note 168 that it is relevant to the "gap" issue identified by Korea. We do not consider that note 168 is any less relevant in this regard simply because it is allegedly conditional in nature. Whether conditional or not, it addresses the "gap" issue at the heart of Korea's parallelism claim.<sup>19</sup> We fail to see how Korea can establish a *prima facie* case that there is a "gap" between the scope of the ITC investigation and the scope of the line pipe measure without addressing the very part of the ITC report that addresses that issue.

6.11 Regarding the alleged absence of any refutation by the United States of Korea's claim, we refer to paragraph 6.7 above. Regarding the fact that the Panel failed to "challenge[]" Korea's assessment of the footnote, we consider that it was Korea's burden as a complainant to establish a

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<sup>19</sup> As we explained in note 149 of the report, this does not necessarily mean that note 168 is sufficient for the purposes of Articles 2.1 and 4.1.

prima facie case of violation.<sup>20</sup> We note that in the case of *Japan – Measures Affecting Agricultural Products* the Appellate Body further elaborated that:

Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.<sup>21</sup>

Thus, the onus was clearly on Korea to make its own case in support of its parallelism claim. It would appear that Korea may have chosen not to do so because "it d[id] not consider that 'parallelism' resolves the issue in this case given the interpretation by the USITC in its implementation of *US–Wheat Gluten*, that it can exclude NAFTA members from the serious injury determination and then exclude them from the measure."<sup>22</sup>

6.12 We therefore reject Korea's request to review our findings regarding its parallelism claim.

6.13 Korea requests us to make a technical change to what is now paragraph 7.116 of the report, which we have done.

6.14 Korea requests us to clarify what is now paragraph 7.124 of the report. In this regard, we would note that we do not refer to the Appellate Body report in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*<sup>23</sup> in support of our statement that "there is no question of whether or not the legal basis of the claim, or the claim itself, was set forth with sufficient clarity in the Request for Establishment".

6.15 Korea requests a minor change in the last sentence of what is now paragraph 7.136 of the report, in order to better reflect Korea's argument. We have made the change requested by Korea.

6.16 Korea requests that the Panel identify the evidence referred to in the second sentence of what is now paragraph 7.145 of the report. We have included a cross-reference accordingly.

6.17 Korea asks the Panel to clarify certain aspects of what is now paragraph 7.148 of the report. We confirm that this paragraph refers to the nature of the line pipe measure (compared to the nature of the measure at issue in *Turkey – Textiles*), and not the US justification for that measure.

6.18 Korea argues that the Panel was incorrect to state in paragraph 7.157 of the interim report that in *Argentina – Footwear Safeguard*<sup>24</sup> the Appellate Body "was not required to consider the last sentence of footnote" 1 of the Safeguards Agreement. As a result, we have amended the relevant part of what is now paragraph 7.153 of the report.

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<sup>20</sup> The issue of burden of proof has been amply addressed in panel and Appellate Body reports, where it has been established that the initial burden lies on the complaining party which must establish a prima facie case of inconsistency. See, for example, *EC – Hormones (AB)* at para. 98.

<sup>21</sup> *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, para. 129, adopted 19 March 1999.

<sup>22</sup> Note at end of Korea's answers to questions from the Panel, dated 15 June 2001.

<sup>23</sup> *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, report of the Appellate Body, WT/DS122/AB/R, adopted 5 April 2001.

<sup>24</sup> *Argentina – Safeguard Measures on Imports of Footwear*, report of the Appellate Body, WT/DS121/AB/R, adopted 25 June 1999 ("*Argentina – Footwear Safeguard (AB)*").

6.19 Korea asserts that the Panel mischaracterized its arguments in what is now paragraph 7.202 of the report. We have changed the last sentence of paragraph 7.202 accordingly.

6.20 Korea takes issue with the Panel's observation in what are now footnotes 164 and 184 of the report that Korea failed to argue that the ITC could not properly have found that the increase in imports was sudden and sharp enough. In support Korea cites to paragraph 205 of its first submission. We believe that the paragraph cited by Korea confirms our view that the focus of Korea's argument is on the fact that there was no increase at all, and not on the sharpness or suddenness of the increase found by the ITC. We therefore make no changes to footnotes 164 and 184.

6.21 Korea disagrees with the Panel's characterization of Korea's argument on the issue of cost allocation in what is now paragraph 7.228 of the report. In order to better present Korea's argument, we have made a minor amendment in the fourth sentence of that paragraph.

6.22 Korea argues that, contrary to what is expressed by the Panel in what is now footnote 203 of the report, Commissioner Crawford did not rely on testimony by the Geneva Steel executive but rather refuted it. We believe that Korea is not correct in its view that Commissioner Crawford did not rely on testimony by the Geneva Steel executive. In our view, Commissioner Crawford clearly was citing to that testimony to substantiate her statement regarding Geneva Steel. We see no other reason why Commissioner Crawford would have referred to that testimony. We therefore leave footnote 203 unchanged.

## **VII. FINDINGS**

### **A. PRELIMINARY ISSUES**

7.1 In the course of our proceedings both parties raised certain preliminary issues and requested preliminary rulings by the Panel on those issues. The issues raised concerned:

- (1) The release of confidential record information to the Panel;
- (2) The admissibility of evidence not submitted to the ITC, or addressing events after the decision to take a safeguard measure; and
- (3) Information submitted in footnotes to the written version of Korea's second oral statement and not read out loud during the meeting with the parties.

#### **1. Release of confidential record information to the Panel**

7.2 On 30 January 2001 we received a letter from Korea requesting the Panel to seek from the United States certain confidential information.<sup>25</sup> Korea claimed that this information was necessary in

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<sup>25</sup> The parties presented various arguments in connection with the issue of confidential information. Those arguments were summarized in the parties' executive summaries of their submissions and oral statements and have been included in sections IV.A.2(a), IV.B.3(a), IV.C.2(a), IV.D.9 and IV.E.1(a) of this report.

Korea (in its comments to the descriptive part of the report) requested the Panel to include as an annex to the Panel report a copy of their non-summarized closing oral statement made at the second substantive meeting, addressing the issue of confidential information and use of judicial economy. We note that, regarding the issue of submissions and oral statements and executive summaries thereof, paragraph 16 of the Working Procedures of the Panel provides:

The parties shall provide the Panel with an executive summary of the claims and arguments contained in their written submissions and oral presentations. These executive summaries will be used by the Panel only for the purpose of assisting the Panel in drafting a concise arguments section of the Panel report so as to facilitate timely translation and circulation of

order for Korea to prepare its first written submission. Korea requested the Panel to seek the following information:

- The confidential version of the complete ITC decision;
- The Addendum to the dissenting views of Commissioners Crawford's opinion on injury;
- The data concerning imports of subject merchandise, as defined by the ITC, by each country supplier;
- The confidential economic memorandum on which the ITC based its remedy recommendation;
- Any other economic memoranda or other written analysis by the US President to support the President's remedy recommendation; and
- The record of the confidential proceeding before the ITC.

7.3 The Panel provided the United States with an opportunity to respond to Korea's request. On 1 February 2001, we received a letter from the United States commenting on Korea's letter. In short, the US position is that it is neither necessary nor appropriate for the Panel to obtain the information requested by Korea.

7.4 On 8 February 2001, we sent the following letter to the parties:

We are mindful that, in order to make an objective assessment of the matter before us, we may need to view certain confidential information not in the public record of the ITC. However, we are equally aware that the protection of confidential information is an important systemic consideration recognised by Article 3.2 of the Safeguards Agreement. Given these considerations, we consider that a panel should show appropriate restraint in the exercise of its authority under Article 13.1 of the *DSU* to seek confidential information from a party.

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the Panel report to the Members. They shall not serve in any way as a substitute for the submissions of the parties.

Korea's closing statement forms part of their oral statement at the second substantive meeting. Accordingly, any arguments presented therein should have been included in its executive summary of that oral statement. Korea argues in a letter dated 16 July 2001 that they submitted their closing statements pursuant to paragraph 9 of the Working Procedures. Paragraph 9 of the Working Procedures provides:

The parties to the dispute shall make available to the Panel and the other party a written version of their oral statements not later than the day after the oral statement is presented. Any third party invited to present its views shall also make available to the Panel, the parties and third parties a written version of their oral statements not later than the day after the oral statement is presented.

Nothing in the paragraph cited above suggests that the submissions and communications provided to the Panel and the parties pursuant to that paragraph necessarily have to be included in the Panel report. Except for replies to questions and comments thereof, and submissions by third parties (which are not covered by the obligation to provide executive summaries in paragraph 16), none of the submissions of the parties have been annexed to the report. We do not see why we should accord different treatment to Korea's closing statement. Accordingly, we decline Korea's request that the closing statement made at the second substantive meeting be annexed to the report. Nevertheless, we wish to clarify that all the communications and submissions of the parties form part of the record of this proceeding, and were duly considered by the Panel.

In our view, Korea's request that we seek from the United States the full confidential record of the investigation is unduly broad and could encompass confidential information that is without relevance to the claims advanced by Korea in this dispute and which is not necessary in order for us to perform an objective assessment of the matter before us. Thus, we decline Korea's request in this regard. For the same reasons, we decline to seek from the United States the confidential version of the complete ITC decision.

Regarding Korea's requests that we seek (a) the confidential economic memoranda on which the ITC based its remedy recommendation and (b) any economic memoranda or other written analysis by the US President to support the President's remedy recommendation, we are not in a position at this time to assess the need for access to this information. Accordingly, we will give further consideration to this request at the first meeting of the Panel.

We do, however, grant Korea's request that we seek from the United States (a) the Addendum to the dissenting views of Commissioner Crawford's opinion on injury; and (b) data concerning imports of subject merchandise, as defined by the ITC, by each country supplier. Korea has established to our satisfaction that these more targeted requests involve information which is relevant to the claims advanced by Korea and which may prove necessary in order for us to perform an objective assessment of the matter. We request that the United States provide this information to the Panel and to Korea not later than close of business on 16 February.

Our ruling is without prejudice to any further specific requests from Korea that we seek confidential information from the United States. Any such requests should be supported by an explanation as to why the information sought is relevant to Korea's claims and is necessary in order for the Panel to perform an objective assessment of the matter. Moreover, this ruling is also without prejudice to the Panel's establishment of the facts which will be relied upon for purposes of its findings.

7.5 In a letter dated 16 February 2001, the United States responded to our ruling and request for information. In that letter the United States provided us with a table containing indexed figures for the Addendum to Commissioner's Crawford dissenting opinion. It also provided the Panel with indexed data regarding imports of subject merchandise from Japan.<sup>26</sup>

7.6 In its first written submission Korea reiterated its request for certain confidential information, including:

- The confidential staff report;
- Information regarding the relative import trends;
- Price data trends between imports and domestic prices for each quarter;
- Financial information on a per producer basis;
- The ITC's recommendation on remedy, the supporting economic memorandum, and the confidential report sent to the President;

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<sup>26</sup> The United States explains that during the period of investigation the only country that shipped non-subject merchandise, classified under the same tariff heading as line pipe, was Japan.

- All papers used in the deliberative process by the President regarding the safeguard measure imposed; and
- Other confidential information which may bear on arguments subsequently raised by the United States.

7.7 The United States responded to Korea's further request for information in its first written submission. In its submission the United States agreed that additional data on prices of imported and domestic line pipe may be necessary and appropriate to the Panel's consideration of the dispute. Therefore, the United States offered to explore ways in which such data could be summarized for use by the Panel.

7.8 At the first meeting of the Panel with the parties, we consulted extensively with Korea and the United States on which information was still considered necessary for a proper evaluation of the issues before us, and ways in which this information could be provided. In a letter dated 19 April 2001, we requested further information as follows:

In order to assist the Panel in making an objective assessment of the matter before it, the Panel considers that it is necessary and appropriate for the United States to provide aggregate weighted average price data for all imports and domestic products covered by the ITC's *Line Pipe* investigation. This data must be broken down product-by-product, and quarter-by-quarter. The Panel is not requesting confidential data at this stage. Thus, the United States may use asterisks when there was only one supplying company for a given product in a given quarter. The information requested should be made available to the Panel by close of business Monday, 23 April 2001. In order to assist the Panel in determining whether it is necessary and appropriate to request additional data from the United States, the Panel asks that the United States also reply to questions 6, 7 and 8 from the Panel by close of business on Monday, 23 April 2001.

Furthermore, at the first substantive meeting of the Panel with the parties, the United States tentatively proposed that it provide the Panel with two outputs of a computerized model used by the ITC to evaluate the impact of imports on the domestic industry. One output would include imports from Japan, while the other output would exclude imports from Japan. The United States indicated that these outputs would demonstrate that there is very little difference in results, whether imports from Japan are included or not. The Panel looks forward to receiving these outputs by close of business on Monday, 23 April 2001.

The United States also tentatively proposed that it provide the Panel with an output of the aforementioned computerized model based on the measure implemented by the President (using the data before the ITC). The Panel looks forward to receiving this additional output by close of business on Monday, 23 April 2001.

7.9 The United States replied to our request in its letter of 23 April 2001. In that communication the United States provided us with a table containing imports of the subject merchandise both in absolute and in relative terms excluding all imports from Japan. It also provided tables containing quarterly pricing information for imports and domestic production for all types of line pipe covered by the investigation. However, the United States did not provide the computerized models it had tentatively proposed to provide to the Panel. The United States asserted that, with respect to the computerized models evaluating the impact of the ITC proposed measure, the ITC did not rely on, consider nor have available any output from such computerized model. With respect to the computerized models evaluating the impact of the measure implemented by the President, the United States concluded that it could not provide such information.

7.10 In its second written submission Korea reacted to the US letter and stated that it considered that the following additional information was needed:

- The confidential economic memoranda used to evaluate the remedy proposals and the impact of the various alternatives on the US industry;
- The papers used in the deliberative process by the President in reaching the determination regarding the safeguard; and
- The confidential version of the ITC staff report.

7.11 After reviewing the information provided to us in the parties' submissions and communications, we did not consider that it was necessary and/or appropriate to issue further requests for information in response to Korea's second written submission. We are of the view that the information before the Panel allows an objective assessment of the matter before us.

## **2. The admissibility of evidence not submitted to the ITC, or addressing events after the decision to take a safeguard measure**

7.12 The United States requested that the Panel issue a preliminary ruling that certain information included or referenced in Korea's first written submission is inadmissible. The US request relates to information not on the ITC record, and information concerning events that took place after the decision to apply the line pipe measure. The United States considers that this information is irrelevant to the Panel's deliberative process. The United States requested that the Panel: declare the new information to be inadmissible; request Korea to remove the new information from its first written submission and to delete any arguments based on that information; and instruct the parties that the new information, and any arguments based on that information, will not be considered by the Panel.

7.13 Korea requested the Panel to reject the US request for a preliminary ruling that certain information included or referenced in Korea's first written submission is inadmissible. Korea argues that the US request, if granted, would unduly limit the Panel's ability to collect and assess facts and diminish the rights conferred on Members by the WTO Agreement. Furthermore, the US request, if granted, would serve as an ominous precedent for the effective functioning of the WTO dispute settlement system.

7.14 At the first meeting of the Panel with the parties, the Chairman of the Panel issued the following ruling concerning the US request that certain evidence be declared inadmissible:

The United States has asked the Panel to issue a preliminary ruling on the admissibility of certain information submitted by Korea. The relevant information is identified in para. 279 of the US first written submission.

The Panel has decided not to exclude from the Panel's record any information submitted by Korea on the grounds that it is inadmissible. Our decision not to exclude the information does not prejudice in any way the issue of whether the Panel will use the information, nor whether the information is relevant to the matter at hand.

## **B. CLAIMS RELATING TO THE LINE PIPE MEASURE**

7.15 We will begin our review of the substantive issues in this case by examining Korea's claims regarding the conformity of the line pipe measure with GATT 1994 and the Safeguards Agreement. We will then address Korea's claims regarding the ITC investigation leading to the imposition of that measure. We shall begin our examination of the line pipe measure by addressing Korea's claims

under Article XIII. In order to determine the extent, if any, to which the line pipe measure is subject to the disciplines of Article XIII, we must first rule on the nature of the line pipe measure.

## 1. The nature of the measure

### (a) Arguments of the parties

#### (i) *Arguments by Korea*

7.16 Korea asserts that the line pipe measure is a quantitative restriction in the form of a tariff quota. The measure is a tariff quota because it consists of two elements: a quota and a tariff. Normal duties are assessed on in-quota imports, and a higher tariff is imposed on over-quota imports. Korea argues that the measure is a tariff quota because one tariff rate is applied on in-quota imports of 9,000 short tons, while a higher tariff rate is imposed on out-quota imports (once the 9,000 short ton quota is exhausted). Korea notes that the measure is described as a tariff quota in the ITC recommendation, and in US Customs documentation.

#### (ii) *Arguments by the United States*

7.17 The United States argues that the measure is not a tariff quota, but rather a tariff surcharge with a 9,000 short ton exemption for each WTO Member. According to the United States, a tariff quota involves the "[a]pplication of a higher tariff rate to imported goods after a specified quantity of the item has entered the country at a lower prevailing rate".<sup>27</sup> The United States also refers to a finding by the *EC Bananas III - Article 21.5* panel that "a tariff quota is a quantitative limit on the availability of a specific tariff rate".<sup>28</sup> On the basis of these definitions, the United States asserts that a measure is only a tariff quota if it provides for an overall limit on eligibility for the lower tariff rate. The United States asserts that the line pipe measure imposes no overall limit on the volume of imports that may be free of the supplemental duty. According to the United States, the only limit on the volume of imports free from the 19 per cent supplemental duty is the number of customs territories which choose to take advantage of the 9,000 short ton exemption. Since there is no overall limit on eligibility, the measure is not a tariff quota.

### (b) Evaluation by the Panel

7.18 We see no reason to disagree with the United States that a tariff quota involves the "[a]pplication of a higher tariff rate to imported goods after a specified quantity of the item has entered the country at a lower prevailing rate".<sup>29</sup> Nor do we disagree with the *EC Bananas III - Article 21.5* panel that "a tariff quota is a quantitative limit on the availability of a specific tariff rate".<sup>30</sup> However, we do disagree with the United States' argument that the existence of a tariff quota is dependent on the existence of an overall limit on eligibility for the lower tariff.

7.19 The two definitions advanced by the United States focus on the application, or availability, of a specified, and lower, tariff rate. In certain cases, the applicable tariff rate under a tariff quota will depend on whether or not the overall limit on the availability of the lower tariff rate has been met. This will be the case when an overall limit is fixed, without any additional allocation of that limit amongst exporting countries. In other cases, however, the application, or availability, of a lower tariff rate will in no way depend on whether or not any overall limit has been met. In cases in which the overall limit is allocated among exporting countries, the application, or availability, of a lower tariff

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<sup>27</sup> *Dictionary of International Trade Terms*, p. 157 (William S. Hein & Co., Inc. 1996).

<sup>28</sup> See *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by Ecuador* - report of the Panel, WT/DS27/RW/ECU, para. 6.20, adopted 6 May 1999 ("*EC Bananas III - Article 21.5*").

<sup>29</sup> See note 27 above.

<sup>30</sup> See note 28 above.

rate will become dependent on whether or not a given exporting country has filled its allocation, irrespective of whether or not any overall limit has been filled. If a given country fills its allocation, imports from that country will become subject to a higher rate of duty, even if the overall limit remains unfilled. In our view, it makes little sense to establish definitions of tariff quotas that depend on the existence of an overall limit on the application, or availability, of a lower tariff rate, if in certain circumstances the existence of an overall limit will have no bearing on the applicability, or availability, of the lower tariff rate for imports from a specific country.

7.20 Our view that a measure may constitute a tariff quota even if it does not provide for an overall limit on the availability of the lower tariff rate is confirmed by Article XIII:2(a), read in conjunction with Article XIII:5. Article XIII:2(a) provides:

Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3(b) of this Article.

7.21 Article XIII:5 provides:

The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

7.22 By virtue of Article XIII:5, Article XIII:2(a) applies to tariff quotas. Thus, in respect of tariff quotas, a quota representing the total amount of permitted imports shall be fixed, wherever practicable. These provisions at least acknowledge the possibility, therefore, that there may be situations in which it is not practicable to fix an overall limit, or quota, for a tariff quota. In other words, these provisions confirm that a tariff quota may exist, even though no overall limit is provided for.<sup>31</sup>

7.23 Without setting forth an exhaustive definition of tariff quotas, we consider that an accurate definition must include measures which place a quantitative limit on the application, or availability, of a lower tariff rate (and a higher tariff rate applicable once that quantitative limit has been exceeded), irrespective of whether that quantitative limit is (a) "overall", (b) "overall" and further allocated among exporting countries, or (c) country-specific, with no "overall" limit. Such an approach is entirely consistent with the two definitions relied on by the United States. In other words, the

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<sup>31</sup> The United States argues that if a quota is not "practicable", the logical implication is that any measure that is practicable is not a quota. The United States asserts that this conclusion is confirmed by Article XIII:2(b), which provides that "[i]n cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota". According to the United States, therefore, any measure that is not "practicable" under Article XIII:2(a) is not a quota (since it will be an import licence or permit without a quota). In our view, the reference to "quotas" in Article XIII:2(b) should be read in light of Article XIII:2(a). This is because Article XIII:2(a) introduces a possible factual scenario (when it is not "practicable" to fix quotas representing the total amount of permitted imports), and Article XIII:2(b) informs Members what alternative action they may take in that scenario (restrictions may be applied by means of import licences or permits without a quota). We therefore consider that the reference in Article XIII:2(b) to "quotas" should be read to mean "quotas representing the total amount of permitted imports", as envisaged in Article XIII:2(a). Accordingly, the measures referred to in Article XIII:2(b) remain quotas, albeit without overall limits on the total amount of permitted imports having been fixed. In other words, Article XIII:2(b) does not draw a distinction between quotas and "import licences or permits without a quota". Rather, Article XIII:2(b) distinguishes between quotas with overall limits, and quotas without overall limits. We see no reason why a similar approach should not apply in respect of tariff quotas, especially as, consistent with Article XIII:5, the same provisions apply to both quotas and tariff quotas. Thus, failure to fix overall limits on the total amount of permitted imports – whether in respect of quotas or tariff quotas – does not change the nature of the measure. A tariff quota remains a tariff quota even without an overall limit on the availability of the lower tariff rate, if there is some form of limit on the availability of the lower tariff rate.

"specified quantity", or "quantitative limit", referred to in the definitions advanced by the United States, could be overall, overall and further allocated among exporting countries, or simply country-specific. On this basis, we conclude that the line pipe measure at issue is a tariff quota, since there are country-specific limits (9000 short tons) placed on the application, or availability, of the lower tariff rate, and it is these country-specific limits that determine whether or not line pipe from specific countries enters the United States at the lower or higher rate of duty.

7.24 We note that our conclusion as to the nature of the line pipe measure is consistent with the treatment of that measure by the United States' own Customs Service. In particular, the US Customs Service Quota Headquarters sent a memo to all Port Directors on 29 February 2000, referring to the implementation of "*tariff quotas* on certain circular welded carbon-quality line pipe."<sup>32</sup>

## 2. Claims under Article XIII

(a) The applicability of Article XIII

(i) *Arguments of the parties*

(1) Arguments by Korea

7.25 According to Korea, the provisions of Articles XIII and XIX, and Article 5 provide rules for the imposition of quantitative restrictions on imports and thus are directly applicable in this case. The requirements of Article XIII and Article XIX, and Article 5 must therefore be read together to determine the full set of obligations and responsibilities for imposing quantitative restraints including tariff quotas. Article XIII, entitled "Non-discriminatory Administration of Quantitative Restrictions," explicitly states at paragraph 5 that the provisions of Article XIII are applicable to tariff quotas.

7.26 Korea submits that the proper interpretation of the Agreement on Safeguards and Article XIII must proceed from the fact that the WTO is a single treaty. As such, all the provisions of the treaty must apply with full force and effect. Article II:2 of the WTO Agreement expressly manifests the intention of the Uruguay Round negotiators that the provisions of the WTO Agreements and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole. The text of the SA also confirms that it must be read together with Article XIII as well as Article XIX. The Preamble of the SA states that the object and purpose of the SA was to "clarify and reinforce the disciplines of GATT 1994" (emphasis added). While Article XIX is specifically mentioned, it is not exclusively mentioned – all of the disciplines of GATT 1994 are incorporated. It is also logical given, as the United States concedes referring to the GATT Panel Report on *Norway – Restrictions on Imports of Certain Textile Products*,<sup>33</sup> that Article XIII applied to the imposition of safeguard measures under Article XIX.<sup>34</sup> Since they all relate to the same thing, they must "*a fortiori* be read as representing an '*inseparable package*' of rights and disciplines which have to be considered in conjunction ... and read ... in a way that gives meaning to *all* of them harmoniously."<sup>35</sup>

7.27 Korea notes the US argument that Article 5 does not include each concept contained in Article XIII and that the United States essentially argues that the "intent" of the negotiators was to "exclude" certain obligations and rights contained in Article XIII.<sup>36</sup> Korea submits that the

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<sup>32</sup> Memorandum From US Customs Service Quota Headquarters Director, Trade Programs, to All Port Directors, Regarding QBT-2000-508: Presidential Proclamation 7274 – Tariff quota on Certain Circular Welded Carbon-Quality Line Pipe (29 February 2000) ("Customs Memo") at 1 (emphasis supplied).

<sup>33</sup> *Norway - Restrictions on Imports of Certain Textile Products*, report of the panel, C/M/141, adopted 18 June 1980.

<sup>34</sup> See US first written submission, para. 197, n.236.

<sup>35</sup> *Argentina – Footwear Safeguard (AB)* at para. 81 (emphasis in original).

<sup>36</sup> See US first written submission at paras. 196-213; see also *EC – Bananas III (AB)*, at para. 157 where the Appellate Body rejected the concept of "implied exclusions". According to Korea, the issue in that

determination of the “intent” of the negotiators is unknowable and equivocal except to the extent that the negotiators did know, based on Note to Annex 1A, that the WTO Agreements and GATT 1994 would be read together except in the case of a conflict. Such knowledge can safely be assumed from the text of the Agreement itself. Therefore, there was no need for the negotiators to spell out each and every general concept which has been established by GATT. To the contrary, it was only necessary to establish such additional requirements and departures to be specifically applied to WTO safeguard actions.<sup>37</sup>

(2) Arguments by the United States

7.28 The United States asserts that, despite the express language of Article XIII:5, the provisions of Article XIII do not apply to tariff quota safeguard measures. According to the US, safeguard measures are governed exclusively by Article XIX and the Safeguards Agreement. The United States notes that the GATT panel in *Norway – Restrictions on Imports of Certain Textile Products*<sup>38</sup> found that GATT 1947 Article XIII applied to GATT 1947 Article XIX safeguard measures. However, the United States argues that “[t]he addition of the Safeguards Agreement to the GATT text under the WTO Agreement broke any link that may have existed between Articles XIII and XIX under GATT 1947.”<sup>39</sup>

7.29 According to the United States, the Safeguards Agreement creates a “comprehensive agreement” regulating the application of safeguard measures. The explicit references to Article XIX make its provisions part of the Safeguards Agreement, forming an “inseparable package of rights and obligations.” This is because, in the words of the Appellate Body in *Argentina – Footwear Safeguard*, they “relate to the same thing, namely the application by Members of safeguard measures”. That “inseparable package of rights and obligations” contains procedural requirements, a non-discrimination obligation, and a variety of limitations on the application of safeguard restrictions, including provisions that duplicate some of the requirements of Article XIII. Therefore, as a legal matter, the WTO Agreement cannot be interpreted to apply the omitted provisions of Article XIII to measures authorized under the Safeguards Agreement.

(ii) Evaluation by the Panel

7.30 We are required to determine whether or not Article XIII applies to the line pipe safeguard measure. In addressing this issue, we note that the line pipe measure is a tariff quota, and that the provisions of Article XIII are expressly applied to tariff quotas by virtue of Article XIII:5.

7.31 The United States relies heavily on the findings of the Appellate Body in *Argentina – Footwear Safeguard* to argue that Article XIII should not apply in the context of safeguard measures. The Appellate Body's findings in *Argentina – Footwear Safeguard* concerned the application of Article XIX to safeguard measures. In considering this matter, the Appellate Body began its analysis by referring to Article II:2 of the *WTO Agreement*, which provides that:

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case was whether Articles 4.1 or 4.2 of the Agreement on Agriculture permitted “Members to act inconsistently with Article XIII of the GATT 1994”. The Appellate Body concluded that if such an intent had been intended, “they would have said so explicitly”. *See id.*

<sup>37</sup> *See Argentina – Footwear Safeguard (AB)* at para. 88: (“if they had intended to *expressly omit* this clause, the Uruguay Round negotiators would and could have said so in the *Agreement on Safeguards*. They did not.”) (emphasis in original); *see also id.* at para. 81.

<sup>38</sup> See footnote 33.

<sup>39</sup> US first written submission at para. 197.

The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.<sup>40</sup>

7.32 The Appellate Body then stated that:

[t]he GATT 1994 and the *Agreement on Safeguards* are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the *WTO Agreement*, and, as such, are both 'integral parts' of the same treaty, the *WTO Agreement*, that are 'binding on all Members'.<sup>41</sup> (emphasis in original)

7.33 Concerning Article XIX in particular, the Appellate Body found that:

the provisions of Article XIX of the GATT 1994 and the provisions of the *Agreement on Safeguards* are all provisions of one treaty, the *WTO Agreement*. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members.<sup>42</sup> (emphasis in original)

7.34 The Appellate Body added that:

as these provisions relate to the same thing, namely the application by Members of safeguard measures, the Panel was correct in saying that 'Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction.'<sup>43</sup> (emphasis in original)

7.35 The United States does not deny that Article XIII is generally binding on WTO Members. Rather, the United States asserts that Article XIII does not form part of the "inseparable package of rights and disciplines" governing the application of safeguard measures in particular. The United States argues that the Appellate Body's conclusion that Article XIX and the Safeguards Agreement form an 'inseparable package of rights and disciplines' was "based ... on the fact that they relate to the same thing, namely the application by Members of safeguard measures".<sup>44</sup> According to the United States, the Appellate Body based this conclusion on the numerous references to Article XIX in the Safeguards Agreement. Moreover, the United States notes that the Safeguards Agreement adopts certain provisions of Article XIII, but not the others, and asserts therefore that the remaining provisions of Article XIII do not "relate to" the application of a safeguard measure.<sup>45</sup>

7.36 We note that the Appellate Body in *Argentina – Footwear* did indeed refer to certain provisions of the Safeguards Agreement that contain references to Article XIX. In particular, the Appellate Body referred to Articles 1 and 11.1(a):

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<sup>40</sup> See *Argentina – Footwear Safeguard (AB)* at para. 79.

<sup>41</sup> *Id.* at para. 81.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> US first written submission para. 204.

<sup>45</sup> US response to Question 11 from the Panel at the second substantive meeting (*see* Annex B-8).

*Article 1*

*General Provision*

This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

*Article 11*

*Prohibition and Elimination of Certain Measures*

1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

7.37 The Appellate Body found that:

the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards* confirms that the intention of the negotiators was that the provisions of Article XIX of the GATT 1994 and of the *Agreement on Safeguards* would apply *cumulatively*, except to the extent of a conflict between specific provisions.<sup>46</sup> (footnote omitted)

7.38 There is, however, nothing in Articles 1 and 11.1(a), nor in the Appellate Body's reasoning, to suggest that Article XIX applies in the context of safeguard measures to the exclusion of other GATT provisions.<sup>47</sup> The mere fact that Article XIX applies does not prejudice the applicability of other GATT provisions. The starting-point for the Appellate Body's analysis regarding the application of Article XIX was the fact that "the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*".<sup>48</sup> Only after this observation did the Appellate Body consider Articles 1 and 11 of the Safeguards Agreement. Furthermore, in *United States – Lamb Meat* the Appellate Body suggests that its analysis of Articles 1 and 11 merely lent support for its interpretation based on the fact that Article XIX and the provisions of the Safeguards Agreement are all provisions of the same WTO Agreement:

We observed in those two appeals that 'the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*, and we said that these two texts must be read 'harmoniously' and as 'an inseparable package of rights and disciplines'. We **derived support** for this interpretation from Articles 1 and 11.1(a) of the *Agreement on Safeguards*.<sup>49</sup> (bold emphasis supplied)

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<sup>46</sup> See *Argentina – Footwear Safeguard (AB)* at para. 89.

<sup>47</sup> The exclusive application of Article XIX to safeguard measures appears to be precluded by the preamble to the Safeguards Agreement, which recognizes "the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX ..." (emphasis supplied). Thus, although Article XIX is singled out for special mention, reference is made to the "disciplines of GATT 1994" more generally. There is no reason why such "disciplines" should not include those contained in Article XIII.

<sup>48</sup> See *Argentina – Footwear Safeguard (AB)* at para. 81.

<sup>49</sup> See *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Report of the Appellate Body, WT/DS177/AB/R, para. 69, adopted 16 May 2001 ("*US – Lamb Meat (AB)*")

7.39 In our view, the Appellate Body's finding that Article XIX applies in the context of safeguard measures was based primarily on the fact that Article XIX and the provisions of the Safeguards Agreement are all provisions of the same treaty, namely the WTO Agreement. The Appellate Body merely derived support for this interpretation from Articles 1 and 11.1(a).

7.40 WTO Members have contracted a package of rights and obligations, including those set forth in the GATT 1994 and the Safeguards Agreement. A Member may only depart from the provisions of either the GATT 1994 or the Safeguards Agreement if such departure is expressly authorised. In this regard, we note the Appellate Body's finding in *EC- Bananas III (AB)* that "[i]f the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994 [by virtue of the provisions of the Agreement on Agriculture], they would have said so explicitly."<sup>50</sup> We see nothing in the Safeguards Agreement that expressly authorises a Member to act inconsistently with Article XIII. The fact that the Safeguards Agreement does not contain any express reference to Article XIII certainly does not amount to an express authorisation to depart from the provisions of that Article.

7.41 The United States further asserts that the drafters of the Safeguards Agreement incorporated into that Agreement those provisions of Article XIII that they wanted to, and that the remaining provisions of Article XIII should not apply because they were deliberately omitted. In particular, the United States argues that the Safeguards Agreement "incorporates principles – and even one entire block of text – from Article XIII. It omits the provisions of Article XIII that Korea now relies upon. To conclude now that Article XIII applies to safeguard measures would be to reverse the Members' decision to include only some of those provisions in the Safeguards Agreement."<sup>51</sup>

7.42 This argument is very similar to that advanced by the *Argentina – Footwear Safeguard* panel regarding the "unforeseen developments" criterion set forth in Article XIX:1. The panel found that WTO safeguard measures are governed by the Safeguards Agreement, to the exclusion of the unforeseen developments criterion contained in Article XIX. The *Argentina – Footwear Safeguard* panel found that:

"the *express omission* of the criterion of unforeseen developments in the new agreement (which otherwise transposes, reflects and refines in great detail the essential conditions for the imposition of safeguard measures provided for in Article XIX of GATT) must, in our view, have meaning".<sup>52</sup>

7.43 The Appellate Body rejected the panel's reasoning in the following terms:

87. In comparing the language of Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*, we observe that although much of the language in the two provisions is very similar, and, in fact, identical, the initial clause in 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 ... " – does not appear in Article 2.1 of the *Agreement on Safeguards*. After making this same observation, the Panel concluded that the "unforeseen developments" clause was "expressly omitted" by the Uruguay Round negotiators. And, although the Panel conceded at one point in its reasoning that Article XIX and the *Agreement on Safeguards* "legally co-exist" as part of the *WTO Agreement*, the Panel concluded from this supposedly "*express omission*" that the "omitted" phrase has no meaning.

88. We believe that, with this conclusion, the Panel failed to give meaning and legal effect to *all* the relevant terms of the *WTO Agreement*, contrary to the principle

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<sup>50</sup> *EC- Bananas III (AB)* at para. 157.

<sup>51</sup> US oral statement at the first substantive meeting, para. 40.

<sup>52</sup> *Argentina - Footwear Safeguard* at para. 8.58.

of effectiveness (*ut res magis valeat quam pereat*) in the interpretation of treaties. The Panel states that the "express omission" of the criterion of unforeseen developments" in Article XIX:1(a) from the *Agreement on Safeguards* "must, in our view, have meaning." On the contrary, in our view, if they had intended to *expressly omit* this clause, the Uruguay Round negotiators would and could have said so in the *Agreement on Safeguards*. They did not.<sup>53</sup> (footnotes omitted)

7.44 In light of these findings by the Appellate Body, we see no basis for drawing any conclusions from the supposed "express omission" of certain provisions of Article XIII from the Safeguards Agreement. Just because some provisions of Article XIII are replicated in the Safeguards Agreement, that alone does not mean that the remaining provisions cease to be binding on Members.<sup>54</sup> We therefore decline to draw any conclusions from the fact that certain Article XIII provisions are not replicated in the Safeguards Agreement. Like the Appellate Body, we consider that if the Uruguay Round negotiators had intended to expressly omit Article XIII from the safeguards context, "they would and could have said so in the *Agreement on Safeguards*. They did not".<sup>55</sup>

7.45 The United States also argues that Article XIII:2(d) is "identical" to Article 5.2(a) of the Safeguards Agreement.<sup>56</sup> According to the United States, "if Article XIII:2(d) applied independently to a safeguard measure, the inclusion of the same language in Article 5.2(a) becomes superfluous, which would violate the principle of effectiveness in interpretation of treaties".<sup>57</sup> In our view, this argument misrepresents the principle of effectiveness in treaty interpretation. As noted by the panel in *Turkey – Textiles*, "the principle of effective interpretation or 'l'effet utile' or in Latin *ut res magis valeat quam pereat* reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty."<sup>58</sup> An interpretation of Article XIII that applies that provision in the context of safeguard measures does not, in our view, nullify any of the provisions of the Safeguards Agreement. All of the provisions of the Safeguards Agreement remain fully applicable. Although there may be some duplication between Article XIII:2(d) and Article 5.2 of the Safeguards Agreement, duplication is not the same as nullification. Furthermore, we note that the US approach to the principle of effective treaty interpretation would have precluded the Appellate Body from applying Article XIX, as a whole, in the context of safeguard measures, since certain provisions of Article XIX are duplicated by certain provisions of the Safeguards Agreement. The fact that the Appellate Body found that Article XIX, in its entirety, applies to safeguard measures, despite the resultant duplication, confirms our rejection of the United States' argument regarding the principle of effective treaty interpretation.

7.46 In any event, we note that Article XIII:2(d) is not "identical" to Article 5.2(a) of the Safeguards Agreement. In particular, Article 5.2(a) omits the last sentence of Article XIII:2(d), whereby:

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<sup>53</sup> *Argentina – Footwear Safeguard (AB)* at paras. 87-88.

<sup>54</sup> There may be good reasons for replicating only certain Article XIII disciplines in the Safeguards Agreement. For example, only certain Article XIII:2(d) disciplines may have been replicated in Article 5.2(a) because of the introduction through the Safeguards Agreement of quota modulation, which negotiators apparently did not want to apply in respect of all Article XIII:2(d) disciplines. The fact that Article XIII:2(d) is not replicated in its entirety in Article 5.2(a) does not necessarily mean that the non-replicated disciplines no longer apply; on the contrary, it may mean that Article 5.2(b) quota modulation does not allow Members to depart from those non-replicated Article XIII:2(d) disciplines. In other words, since quota modulation may not have been intended to apply in respect of all Article XIII:2(d) disciplines, it may have been necessary to specify in Article 5.2(a) precisely which Article XIII:2(d) disciplines it does apply to.

<sup>55</sup> *Argentina – Footwear Safeguard (AB)* at para. 88.

<sup>56</sup> US first written submission, para. 206.

<sup>57</sup> *Id.*

<sup>58</sup> *Turkey – Textiles* at footnote 327.

No conditions or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

In response to a question from the Panel at the second substantive meeting, the United States asserted:

In accordance with our analysis of the other provisions of Article XIII, the fact that the Safeguards Agreement incorporates the first two sentences of Article XIII:2(d), but not the last sentence, indicates that the last sentence does not apply to safeguard measures. However, the omission of that sentence does not leave Members free to prevent other Members from fully using their share of a safeguard quota. If a Member imposes a safeguard quota and applies it at a level necessary to prevent or remedy serious injury and to facilitate adjustment, any additional conditions or formalities it applies to limit the use of the quota would **likely** result in application of the measure beyond the extent necessary. Therefore, a measure prohibited by the last sentence of Article XIII:2(d) would **likely** also be prohibited by Article 5.1.

Although it is always hazardous to attempt to ascertain the intent of the negotiators from the written text, this analysis suggests that the last sentence of Article XIII:2(d) **may** have been excluded from Article 5.2(a) because it was redundant. With Article 5.1 already prohibiting application of a safeguard measure beyond the extent necessary, there is no need for an additional prohibition on the application of conditions or formalities that would prevent full use of the quota.<sup>59</sup> (bold emphasis supplied)

7.47 We recall our earlier finding regarding the "express omission" of Article XIII provisions from the Safeguards Agreement. We see no reason to adopt a different approach with regard to the last sentence of Article XIII:2(d), especially not on the basis that a violation of the last sentence would also "likely" constitute a violation of Article 5.1, first sentence, or on the basis of speculation as to what "may" have caused negotiators not to expressly include this provision in the Safeguards Agreement. If the Uruguay Round negotiators had intended to expressly omit the last sentence of Article XIII:2(d) from the safeguards context, "they would and could have said so in the *Agreement on Safeguards*. They did not".<sup>60</sup>

7.48 The United States also argues that the public international law presumption against conflicts militates against an interpretation that applies Article XIII:2(d) to safeguard measures, since Article XIII:2(d) would not be subject to the exception created by Article 5.2(b). In our view, however, the issue of conflict between these provisions does not arise in this case, since the implication of our findings on Article 5.2(a) is that Article 5.2(b) quota modulation would not be available for tariff quotas (see below at para.7.75).

7.49 Furthermore, the United States argues that the non-application of Article XIII in the context of safeguard measures "also makes sense as a matter of policy". In particular, the United States asserts that "[t]o import additional restrictions into the Safeguards Agreement – such as the Article XIII restrictions on TRQs – is unnecessary and would limit Members' ability to achieve the objectives of the Agreement." However, we would suggest that it is the paucity of disciplines governing the application of tariff quota safeguard measures in Article 5 of the Safeguards Agreement<sup>61</sup> that supports our interpretation of Article XIII. If Article XIII did not apply to tariff quota safeguard measures, such safeguard measures would escape the majority of the disciplines set

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<sup>59</sup> US reply to Question 11 at the second substantive meeting (see Annex B-8).

<sup>60</sup> *Argentina – Footwear Safeguard (AB)* at para. 88.

<sup>61</sup> See section VII.B.3(a) below.

forth in Article 5. This is an important consideration, given the quantitative aspect of a tariff quota. For example, if Article XIII did not apply, quantitative criteria regarding the availability of lower tariff rates could be introduced in a discriminatory manner, without any consideration to prior quantitative performance.<sup>62</sup> In our view, the potential for such discrimination is contrary to the object and purpose of both the Safeguards Agreement, and the WTO Agreement. In this regard, the preamble of the Safeguards Agreement refers to the "need to clarify and reinforce the disciplines of GATT 1994" in the context of safeguards. We consider that the "disciplines of GATT 1994" surely include those providing for non-discrimination. In any event "the elimination of discriminatory treatment in international trade relations" is referred to explicitly in the preamble to the WTO Agreement. We further note that the preamble of the Safeguards Agreement also mentions that one of the objectives of the Safeguards Agreement is to "establish multilateral control over safeguards and eliminate measures that escape such control". We are of the view that non-application of Article XIII in the context of safeguards would result in tariff quota safeguard measures partially escaping the control of multilateral disciplines. This result would be contrary to the objectives set out in the preamble of the Safeguards Agreement.

7.50 For the above reasons, we find that the line pipe measure is subject to the provisions of Article XIII.

(b) The substance of Article XIII

7.51 Korea raises a number of claims under Article XIII. First, Korea claims that the United States violated the "general overarching requirement"<sup>63</sup> of Article XIII:2 that a Member applying any import restriction "shall aim at a distribution of trade ... approaching as closely as possible the shares which the various [exporting Members] might be expected to obtain in the absence of such restriction[]". Second, Korea claims that the United States violated the Article XIII:2(a) requirement to fix an overall quota wherever practicable, and the Article XIII:3(b) requirement to give public notice of the amount of that quota. Third, Korea claims that the United States failed to negotiate quotas with Members having a substantial interest in the product, contrary to Article XIII:2(d).

7.52 Article XIII:2 provides:

In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:

(a) Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3 (b) of this Article;

(b) In cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;

(c) Members shall not, except for purposes of operating quotas allocated in accordance with subparagraph (d) of this paragraph, require that import licences or permits be utilized for the

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<sup>62</sup> The same concern does not arise in respect of tariff measures – which also appear not to be covered by all Article 5 disciplines – because tariff measures affect all exporting Members equally.

<sup>63</sup> Korea's first submission, para. 124.

importation of the product concerned from a particular country or source;

(d) In cases in which a quota is allocated among supplying countries the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

(i) *Article XIII:2, chapeau*

7.53 Korea claims that the United States violated the general rule set forth in the chapeau of Article XIII:2.<sup>64</sup> According to Korea, the United States could not have "aim[ed] at a distribution of trade ... approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of" the line pipe measure without respecting traditional trade patterns.<sup>65</sup> Besides asserting that Article XIII does not apply to the line pipe measure, the United States has not addressed this argument.

7.54 In our view, Korea is correct to argue that a Member would violate the general rule set forth in the chapeau of Article XIII:2 if it imposes safeguard measures without respecting traditional trade patterns (at least in the absence of any evidence indicating that the shares a Member might be expected to obtain in the future differ, as a result of changed circumstances, from its historical share). Trade flows before the imposition of a safeguard measure provide an objective, factual basis for projecting what might have occurred in the absence of that measure.

7.55 There is nothing in the record before the Panel to suggest that the line pipe measure was based in any way on historical trade patterns in line pipe, or that the United States otherwise "aim[ed] at a distribution of trade ... approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of" the line pipe measure. Instead, as noted by Korea, "the in-quota import volume originating from Korea, the largest supplier historically to the US market, was reduced to the same level as the smallest – or even then non-existent – suppliers to the US market (9,000 short tons)".<sup>66</sup> For this reason, we find that the line pipe measure is inconsistent with the general rule contained in the chapeau of Article XIII:2.

(ii) *Article XIII:2(a)*

7.56 Korea claims that the United States failed to fix a quota "representing the total amount of permitted imports", contrary to Article XIII:2(a). According to Korea, the only exception to the

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<sup>64</sup> In our view, the chapeau of Article XIII:2 contains a general rule, and not merely a statement of principle. This is confirmed by the Note *Ad Article XIII:2*, which refers to "the general rule laid down in the opening sentence of paragraph 2".

<sup>65</sup> Korea's first written submission para. 124.

<sup>66</sup> Korea's first written submission, para. 155.

requirement to fix an overall quota is if "quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota".<sup>67</sup> Since the United States did not adopt import licences or permits, an overall quota should have been established.

7.57 The United States argues that the line pipe measure is not regulated by Article XIII. In addition, the United States argues that neither a tariff quota, nor the quota element of a tariff quota, is a "quota" for the purpose of Article XIII. The United States also asserts that Korea's own arguments establish why it was not "practicable" for the United States to fix the overall quantity of imports eligible for the exemption from the 19 per cent supplemental duty. With every Member subject to the exemption, and an indeterminate number of countries capable of exporting line pipe to the United States, there was no way to determine the total volume eligible for exemption.

7.58 Irrespective of whether or not tariff quotas constitute "quotas" within the meaning of Article XIII:2(a), tariff quotas are necessarily subject to the disciplines contained in Article XIII:2(a) as a result of the express language of Article XIII:5. Thus, Article XIII:2(a) must have meaning in the context of tariff quotas. We believe that, in respect of tariff quotas, Article XIII:2(a) requires Members to fix, wherever practicable, the total amount of imports permitted at the lower tariff rate.<sup>68</sup>

7.59 The United States asserted that "the only limit on the volume of imports free from the 19 per cent supplemental duty is the number of WTO Members who choose to take advantage of the 9000 ton exemption".<sup>69</sup> We asked the United States whether this means "that there is a limit on the volume of imports subject to the lower tariff, and that the limit will be reached if all WTO Members choose to take advantage of the 9000 short ton exemption".<sup>70</sup> The United States replied:

On further reflection, it would be more correct to say that the only limit is the number of customs territories that take advantage of the 9000 ton exemption. For example, China and Russia, which are not WTO Members, are still eligible for the 9000 ton exemption. On the other hand, not all countries have line pipe production facilities, so the practical limit would be less than if all customs territories took advantage of the exemption.

7.60 Although we do not consider that the United States provided a direct answer to our question, there would appear to be at least a theoretical limit on the total amount of imports permitted at the lower tariff rate under the line pipe measure (i.e., the number of customs territories multiplied by 9,000 short tons). However, we do not believe that any such theoretical limit is sufficient to meet the requirement of Article XIII:2(a). Under that provision, Members are required to "fix[]", wherever practicable, the total amount of imports permitted at the lower tariff rate, and to give notice of that amount in accordance with paragraph 3(b). We note that "fix" is defined as "decide, settle, specify"<sup>71</sup>. In our view, the fact that there is a theoretical limit on the total amount of imports permitted at the lower tariff rate does not provide the degree of certainty required by the term "fix[]", particularly in the sense of "specify". An amount cannot be "fixed", or "specified", if it has not even been expressly mentioned.<sup>72</sup>

7.61 The United States asserts that it was not "practicable" to fix the overall quantity of imports eligible for the exemption from the 19 per cent supplemental duty because, "[w]ith every Member subject to the exemption, and an indeterminate number of countries capable of exporting line pipe to

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<sup>67</sup> Korea's first written submission, para. 127.

<sup>68</sup> The obligation cannot extend to fixing the total amount of permitted imports at the higher tariff rate, because that would effectively undermine the distinction between tariff quotas and quantitative restrictions.

<sup>69</sup> United States first written submission, para. 184.

<sup>70</sup> Question 2 from the Panel at the first substantive meeting (see Annex B-2).

<sup>71</sup> *The Compact Edition of the Oxford English Dictionary*, Volume 1 (Oxford University Press, 1971).

<sup>72</sup> *The Compact Edition of the Oxford English Dictionary*, Volume 1 (Oxford University Press, 1971) defines the term "specify" as "name or mention expressly".

the United States, there was no way to determine the total volume eligible for exemption".<sup>73</sup> First, we note that the United States has failed to demonstrate that it determined, at the time of application of the line pipe measure, that it would not be "practicable" to fix the total amount of imports permitted at the lower tariff rate. Second, we find the United States' argument circular and therefore unconvincing. The United States' argument is premised on the fact that it was not practicable to fix the total amount of imports permitted at the lower tariff rate because of the nature of the line pipe measure. However, this does not explain why the United States could not have chosen another type of measure, in respect of which it would have been practicable to fix the total amount of imports permitted at the lower tariff rate.<sup>74</sup>

7.62 For these reasons, we find that the line pipe measure is inconsistent with Article XIII:2(a).

(iii) *Article XIII:2(d) and 3(b)*

7.63 Korea also raises claims under Articles XIII:2(d) and XIII:3(b). Having found that the United States violated Article XIII:2(a) by failing to "fix" the total amount of imports permitted at the lower tariff rate, we see no need to examine Korea's claims under Articles XIII:2(d) and XIII:3(b).<sup>75</sup>

### **3. Claims under Articles 5 and 7 of the Safeguards Agreement and Article XIX of GATT 1994**

7.64 Korea claims that the line pipe measure is inconsistent with the requirements in the first two sentences of the first paragraph of Article 5, with Article 5.2(a) and Article 7.1. We shall first address Korea's claims regarding the second sentence of Article 5.1, and Article 5.2(a). We shall then address Korea's claim under the first sentence of Article 5.1 and Article 7.1.

7.65 Article 5 of the Safeguards Agreement provides:

#### *Article 5*

##### *Application of Safeguard Measures*

1. A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

2. (a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

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<sup>73</sup> United States first written submission, para. 211.

<sup>74</sup> In particular, we see no reason why the United States could not have chosen another type of measure consistent with the general rule set forth in the chapeau of Article XIII:2.

<sup>75</sup> However, once a Member fixes the total amount of imports permitted at the lower rate, these provisions clearly apply.

(b) A Member may depart from the provisions in subparagraph (a) provided that consultations under paragraph 3 of Article 12 are conducted under the auspices of the Committee on Safeguards provided for in paragraph 1 of Article 13 and that clear demonstration is provided to the Committee that (i) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (ii) the reasons for the departure from the provisions in subparagraph (a) are justified, and (iii) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 1 of Article 7. The departure referred to above shall not be permitted in the case of threat of serious injury.

(a) Article 5.1 (second sentence) and Article 5.2(a)

7.66 In substance, Korea's claims under the second sentence of Article 5.1, and Article 5.2(a), are broadly similar to its claims under Article XIII. Before addressing those claims, however, we must first address the threshold issue of whether or not the provisions relied on by Korea apply to tariff quota safeguard measures.

7.67 Korea asserts that tariff quotas are "quantitative restriction[s]" within the meaning of Article 5.1, second sentence. Korea also asserts that tariff quotas are a form of "quota" within the meaning of Article 5.2(a).

7.68 The United States contends that tariff quotas are neither "quantitative restrictions" nor "quotas". According to the United States, tariff quotas are ordinary customs duties.

7.69 We do not consider that tariff quotas are "quantitative restriction[s]" within the meaning of Article 5. We note that the second sentence of Article 5.1 refers to quantitative restrictions in the sense of measures that "reduce the quantity of imports below [a certain] level". Tariff quotas do not necessarily reduce the volume of imports below any predetermined level, since they do not impose any limit on the total amount of permitted imports (whether globally or from a specific country). Tariff quotas merely provide that imports in excess of a certain level shall be subject to a higher rate of duty. Thus, it would appear that tariff quotas are not the sort of measure envisaged by the reference in the second sentence of Article 5.1 to "quantitative restriction[s] [that] reduce the quantity of imports below [a certain] level".

7.70 Furthermore, there would appear to be little sense in applying the second sentence of Article 5.1 to tariff quotas. First, a tariff quota imposes a limit on in-quota imports, but not on out-of-quota imports. The limit on in-quota imports is therefore of less significance relative to the overall limit on imports provided for in a "quantitative restriction" covered by Article 5.1, second sentence. For this reason, there is no need for the second sentence of Article 5.1 to apply in respect of tariff quotas. Furthermore, the application of Article 5.1, second sentence, to tariff quotas could undermine the distinction between tariff quotas and quantitative restrictions. If the in-quota amount of a tariff quota had to be fixed on the same basis, and therefore at the same level, as the overall limit on imports provided for in quantitative restrictions, there would be little incentive for Members to use tariff quotas. This would be most unfortunate, as tariff quotas (applied in a manner consistent with Article XIII) are generally considered to be less restrictive of imports than quantitative restrictions.

7.71 Second, we note that Article 5.1, second sentence, does not appear to impose any disciplines regarding the imposition of safeguard measures taking the form of simple tariff surcharges (with the exception of Article 5.1, first sentence). In other words, if a simple tariff surcharge of 50 per cent were implemented, there would be no obligation (under Article 5.1, second sentence) to ensure that such tariff surcharge would not reduce the quantity of imports below the average of imports in the last three representative years. If Article 5.1, second sentence, were applied to tariff quotas, however, the

imposition of an in-quota limit of zero, and a 50 per cent duty on out-of-quota imports, would violate Article 5.1, second sentence, (assuming the annual average of imports in the last three years is not zero), even though there is no substantive difference between the measures. We cannot imagine that the negotiators of the Safeguards Agreement could have intended such an absurd result.

7.72 In addition, the Appellate Body appears to have distinguished between tariff quotas and quantitative restrictions in *Korea – Dairy Safeguard*. In that case, the Appellate Body stated that a safeguard measure may “take[] the form of a quantitative restriction, a tariff or a tariff rate quota.”<sup>76</sup> If the Appellate Body had considered that tariff quotas were quantitative restrictions, it would not have stated that safeguard measures may take the form of quantitative restrictions or tariff quotas.

7.73 We also do not consider that tariff quotas are “quota[s]” within the meaning of Article 5.2(a). If they were, Article XIII:5 would be superfluous (because Article XIII applies expressly to quotas). Although one could argue that a tariff quota must be a form of quota, one would then be equally able to argue that a tariff quota must be a form of tariff. Such a result is not tenable, however, as a measure cannot be both a quota and a tariff. In addition, the above extract from the Appellate Body’s report in *Korea – Dairy Safeguard* shows that the Appellate Body does not consider tariff quotas to be tariffs (since it distinguishes between tariffs and tariff quotas). In our view, neither the word “tariff” nor the word “quota” is determinative of the nature of a tariff quota.

7.74 In addition, the parties have both argued<sup>77</sup> that a quota is a form of quantitative restriction. We see no reason to disagree. Since we have already found that a tariff quota is not a “quantitative restriction” (a broader category including quota) within the meaning of Article 5.1, it cannot constitute a “quota” (a narrower category of quantitative restriction) within the meaning of Article 5.2(a).<sup>78</sup>

7.75 For these reasons, we find that the line pipe measure, as a tariff quota, is not subject to the Article 5 disciplines on quantitative restrictions (Article 5.1, second sentence) or quotas (Article 5.2(a)).<sup>79</sup> We therefore reject Korea’s claims concerning these provisions.

(b) Article 5.1, first sentence

7.76 Korea asserts that the first sentence of Article 5.1 imposes a specific obligation on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment. Korea claims that the United States failed to respect this obligation because it failed to demonstrate the necessity of the line pipe measure at the time of its imposition. Korea asserts that Article 5.1 “requires that ‘a measure shall not reduce the quantity of imports below the level of ... the last three years ... unless clear justification is given that a different level is necessary to prevent or remedy serious injury’”. In

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<sup>76</sup> *Korea – Dairy Safeguard (AB)* at para. 96. Under GATT 1947, the Contracting Parties characterized tariff quotas imposed pursuant to Article XIX as a subset of “tariff type measure,” rather than quantitative restrictions. Modalities of Application of Article XIX, L/4679, paras. 37-39 (5 July 1978).

<sup>77</sup> Korea’s response to Question 7 from the Panel (9 in Korean submission) (see Annex B-1); US response to Question 4 from the Panel (see Annex B-2).

<sup>78</sup> We are fully aware of the asymmetry between the coverage of Article XIII and Article 5 in respect of tariff quota safeguard measures. However, it is important to note that we have not applied Article XIII:2 to the line pipe tariff quota on the basis of the express wording of that provision. We have done so as a result of Article XIII:5 (“[t]he provisions of this Article shall apply to any tariff quota instituted or maintained by any [Member]”). There is of course no equivalent to Article XIII:5 in the Safeguards Agreement. Thus, any asymmetry in the coverage of Article XIII and Article 5 in respect of tariff quota safeguard measures is a direct result of the express wording of those provisions.

<sup>79</sup> We are fully aware that our finding would mean that Article 5.2(b) “quota modulation” is not available for tariff quotas. We do not consider that this result is contrary to the principle of effective treaty interpretation, as Article 5.2(b) remains fully applicable, and therefore effective, in respect of safeguard measures falling within the scope of Article 5.2(a).

support, Korea relies on the finding by the Appellate Body in *Korea – Dairy Safeguard* that "this 'clear justification' has to be given by a Member applying a safeguard measure *at the time of the decision, in its recommendations or determinations on the application of the safeguard measure*"<sup>80</sup> (emphasis in original). Korea claims that the line pipe measure exceeded what was "necessary to prevent or remedy serious injury and to facilitate adjustment".

7.77 The United States relies on the Appellate Body's findings in *Korea – Dairy Safeguard* to argue that "the recommendations or determinations in a safeguard proceeding *need not* justify the type or extent of [the] safeguard measure applied by the Member, except in the limited circumstance of a quantitative restriction that reduces the quantity of imports below the average of imports in the last three representative years".<sup>81</sup> According to the United States, "a panel's analysis of the Member's application of a safeguard measure is not confined to the investigation or the report, but may include a Member's *ex post* justification of why the measure was permissible at the time of application".<sup>82</sup> Furthermore, the United States asserts that "[a]s the complainant, Korea bears the burden of demonstrating that the US measure went beyond the extent necessary or, stated differently, as not 'commensurate' with the goals of Article 5.1 – to remedy serious injury and facilitate adjustment".<sup>83</sup>

(i) *The obligation of Article 5.1, first sentence*

7.78 Before addressing the specific arguments raised by Korea, we note that in *Korea – Dairy Safeguard* the Appellate Body agreed:

96. ... with the Panel that the wording of [Article 5.1, first sentence] leaves no room for doubt that it imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment. We also agree that this obligation applies regardless of the particular form that a safeguard measure might take. Whether it takes the form of a quantitative restriction, a tariff or a tariff rate quota, the measure in question must be applied "only to the extent necessary" to achieve the goals set forth in the first sentence of Article 5.1.<sup>84</sup> (footnotes omitted)

7.79 Article 5.1, first sentence, therefore obliges a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment.

(ii) *Basis for review of compliance with the obligation of Article 5.1, first sentence*

7.80 Korea asserts that we would only be able to find that the United States complied with its Article 5.1, first sentence, obligation if it had made a determination regarding the necessity of the line pipe measure at the time of imposition. We note that this issue was addressed by the Appellate Body in *Korea – Dairy Safeguard*. In that case, the Appellate Body began its analysis of the issue by referring to:

97. ... paragraph 7.109 of [the Panel's] Report, [where] the Panel stated:

Members are required, *in their recommendations or determinations on the application* of a safeguard measure, *to explain* how they considered the facts before them and why they concluded, *at the*

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<sup>80</sup> *Korea – Dairy Safeguards (AB)* at para. 98.

<sup>81</sup> US first written submission, para. 44.

<sup>82</sup> US first written submission, para. 45.

<sup>83</sup> US first written submission, para. 172.

<sup>84</sup> *Korea – Dairy Safeguard (AB)* at para. 96.

*time of the decision*, that the measure to be applied was necessary to remedy the serious injury and facilitate the adjustment of the industry. It is such reasoning and explanation concerning the measure adopted, essential to evaluate Korea's compliance with Article 5.1, which we cannot discern in Korea's determination to apply a safeguard measure in the present case. (emphasis added)

98. The second sentence of Article 5.1 provides:

If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.

This sentence requires a "clear justification" if a Member takes a safeguard measure in the form of a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years for which statistics are available. We agree with the Panel that this "clear justification" has to be given by a Member applying a safeguard measure *at the time of the decision, in its recommendations or determinations on the application of the safeguard measure*.

99. However, we do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure *other* than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. In particular, a Member is *not* obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with "the average of imports in the last three representative years for which statistics are available".

100. For these reasons, we do not agree with the Panel's broad finding in paragraph 7.109 that:

Members are required, in their recommendations or determinations on the application of a safeguard measure, to explain how they considered the facts before them and why they concluded, at the time of the decision, that the measure to be applied was necessary to remedy serious injury and facilitate the adjustment of the industry.

(...)

103. For these reasons, we uphold the Panel's finding, in paragraph 7.101 of its Report, that the first sentence of Article 5.1 imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is not more restrictive than necessary to prevent or remedy serious injury and to facilitate adjustment. However, we reverse the Panel's broad finding, in paragraph 7.109 of its Report, that Article 5.1 requires a Member to explain, at the time it makes its recommendations and determinations concerning the application of a safeguard measure, that its measure is necessary to remedy serious injury and to facilitate adjustment, even where the particular safeguard measure applied is *not* a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. As to the question whether Korea's safeguard measure is consistent with the second sentence of Article 5.1, we are

unable to come to a conclusion in the absence of relevant factual findings in the Panel Report or undisputed facts in the Panel record.

7.81 According to the Appellate Body, therefore, it would appear that Article 5.1 does not require Members to explain, in their recommendations or determinations on the application of a safeguard measure, how they considered the facts before them and why they concluded, at the time of the decision, that the measure to be applied was necessary to remedy serious injury and to facilitate the adjustment of the industry. According to the Appellate Body, it would appear that such an obligation only arises if a Member imposes a safeguard measure in the form of a quantitative restriction that reduces the volume of imports below the average of imports in the last three representative years.<sup>85</sup> The line pipe measure is not a quantitative restriction that reduces the volume of imports below the average of imports in the last three representative years. On the basis of the findings of the Appellate Body in *Korea – Dairy Safeguard*, therefore, we find that the United States was not required to demonstrate, at the time of imposition, that the line pipe measure was "necessary to prevent or remedy serious injury and to facilitate adjustment".<sup>86 87</sup>

7.82 For these reasons, our review of whether or not the United States complied with its Article 5.1, first sentence, obligation is not confined to any determination on the necessity of the line pipe measure that the United States may have made at the time of imposition.

(iii) *Substantive requirements of Article 5.1, first sentence*

(1) Arguments by Korea

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<sup>85</sup> We considered carefully whether or not the Appellate Body meant to limit its findings to the application of Article 5.1 in respect of quantitative restrictions (since *Korea - Dairy Safeguard* involved the application of a quantitative restriction). In other words, we considered carefully whether the Appellate Body meant that a Member does not need to demonstrate that its safeguard measure is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment if the measure is a quantitative restriction that does not reduce the level of imports below "the average of imports in the last three representative years for which statistics are available". The Appellate Body's findings would then leave open the question of whether a Member must demonstrate that its safeguard measure is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment if that safeguard measure is not a quantitative restriction. Although such an approach may have some merit, on balance it does not reflect a fair reading of the Appellate Body's findings.

<sup>86</sup> In its second written submission, Korea also asserts that "[t]he obligation of the United States to provide an explicit justification independently arose in this case because the President took harsher measures than justified by the ITC decision or the underlying economic analysis. In such a case, where the competent authorities have made explicit findings that certain levels of relief are 'sufficient' and others 'excessive,' the member has an affirmative obligation to explain why a very distinct measure is 'necessary'. An issue existed which had to be affirmatively addressed." We see nothing in the Safeguards Agreement that requires a Member to explain why its safeguard measure is necessary simply because it chooses to adopt a measure that differs from one recommended to it under domestic procedures.

<sup>87</sup> In its oral statement at the second substantive meeting, Korea asserts that the decision of the Appellate Body in *US – Lamb Meat (AB)* "confirms that ... an explanation [of why the line pipe measure is not more excessive than "necessary"] should have been made prior to the imposition of the measure". However, we are not persuaded that the Appellate Body in *US – Lamb Meat (AB)* would have deliberately reversed its findings in *Korea – Dairy Safeguard (AB)*. In *US – Lamb Meat (AB)*, the Appellate Body found that "the existence of unforeseen developments is a prerequisite that must be demonstrated 'in order for a safeguard measure to be applied'" consistently with Article XIX of the GATT 1994, [and] it follows that this demonstration must be made *before* the safeguard measure is applied" (para. 72). In our view, the obligation to ensure that a safeguard measure does not exceed what is "necessary to prevent or remedy serious injury and to facilitate adjustment" (Article 5.1, first sentence) is not a "prerequisite" that must be demonstrated "in order for a safeguard measure to be applied". Rather, it is an obligation that must be respected concerning the extent and nature of a safeguard measure, once the decision to apply a safeguard measure has been taken. Thus, we are not convinced that the Appellate Body's findings in *US – Lamb Meat (AB)* regarding unforeseen developments have any bearing on the issue before us.

7.83 Korea claims that the line pipe measure exceeded what was "necessary to prevent or remedy serious injury and to facilitate adjustment" because the measure "was significantly more restrictive than the ITC's recommendation or even the Petitioners' proposal"<sup>88</sup>. Korea asserts that the NAFTA exemption had a much more negative impact on other suppliers under the line pipe measure than it did under the measure recommended by the ITC.

7.84 In addition, Korea submits that the line pipe measure exceeded what was "necessary" on the basis of the following "inferential evidence of the intended impact"<sup>89</sup> of the line pipe measure:

- (1) Total "in-quota" imports were projected to be approximately 63,000 short tons, based on the fact that the ITC listed only seven significant suppliers other than Canada and Mexico. (Current US import data for March 2000-February 2001, show total "in-quota" imports of 64,067 tons.)
- (2) Very limited "out-of-quota" imports could be expected at the 19 per cent tariff level:
  - (i) The duty imposed was 6 to 10 times the level of the bound rate.
  - (ii) Each supplying country could supply 9,000 short tons at bound rates. It could be presumed that the market would absorb these imports first (and those of Canada and Mexico) before the imports at the 19 per cent additional duty.
  - (iii) Two very significant suppliers were not controlled.
  - (iv) Imported and domestic line pipe were highly substitutable. Moreover, according to testimony before the ITC, consumers preferred domestic products.
  - (v) The US industry had substantial unused capacity and US capacity exceeded consumption.
- (3) Total imports, excluding Canada and Mexico, equalled 78,671 tons from March 2000-February 2001. Of that total, only 14,604 tons entered at the 19 per cent duty rate. In-quota imports totaled 64,067 tons.
- (4) The only economic analysis done for the purpose of meeting obligations under Article 5.1 were the Economic Memoranda. From those analyses, the ITC Majority concluded that 151,124 tons at bound rates would reduce imports to a "sufficient" level. These appear to be the only economic basis for the level of restriction recommended by the ITC. The ITC recommendation – which appeared to be more in line with WTO rules – was rejected in favor of a remedy that did not.

7.85 Korea also submits that the line pipe measure was not confined to only addressing the injurious effects of imports. Korea asserts that the Panel should assume that the line pipe measure was also intended to address the injurious effects of the crisis in the oil and gas industry.

7.86 Korea notes the United States' argument that if a 19 per cent tariff were fully translated into increases in the average unit price of line pipe, the impact on operating profits would be an increase that was close to but not equal to operating profit levels before the import surge. According to Korea, one of the conspicuous flaws in the analysis is that the *ex post* explanation ignores the fact that

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<sup>88</sup> Korea's first written submission para. 144.

<sup>89</sup> Korea's second written submission para. 39.

demand was improving rapidly. It also assumes that the tariff will translate directly into operating profits but downplays the positive effects of the increase in sales volume which would result from the withdrawal of imports from the market. Thus, the analysis ignores the combined improvements on the company's operating leverage of both price and volume increases.<sup>90</sup> According to Korea, the United States also ignores the fact that virtually no (14,000 tons) imports entered at the 19 per cent tariff in the first year of the tariff quota. To obtain an increase in operating profit of \$15-\$17 and an operating ratio of 3-4 per cent, the United States simply added \$62-\$64 to the average unit price of \$412/ton in Table 10 of the ITC Report and the same amount to the negative operating profit of \$47/ton. Thus, with a new unit price of \$474-\$476 and operating profit of \$15-\$17/ton, the United States obtains an operating profit of between 3.2-3.6 per cent. The United States then compares this operating profit level and states that it represents a level closer to, but not equal to, the industry's profitable years before the import surge. However, it must be assumed that one of the purposes of the safeguard measures is to increase the US industry's sales volume as higher priced imports lose market share. If the United States wants to use a reference year for determining the appropriateness of the safeguard measures, then its analysis in reference to Table 10 must be more realistic. For example, the United States should have assumed that operating leverage will result in a decline in various unit costs as volume increases.<sup>91</sup> Moreover, as suggested above, the US reasoning totally ignores the improving market situation, as discerned in the ITC record. According to the ITC, "natural gas and oil prices have increased since early 1999, leading to increased drilling and production activity and hence increased demand for line pipe."<sup>92</sup> The US *ex post* reasoning is at variance with the recommendations found in the ITC Majority and the separate views, which took full account of the improving market situation in their recommendations.<sup>93</sup> For example, the United States does not explain why the ITC Commissioners finding threat of serious injury conclude that only a 12.5 per cent tariff is necessary to return the industry to profitability based on an actual analytical analysis<sup>94</sup> which concluded that such a tariff increase would result in a "modest" price increase "as well as substantially increased revenues . . . due to increased shipment levels."<sup>95</sup>

## (2) Arguments by the United States

7.87 The United States asserts that the Article 5.1 benchmark for the application of a safeguard measure is the condition of the domestic industry. Furthermore, the United States submits that the consistency with Article 5.1 can only be analyzed with reference to the application of the measure as a whole, and not the separate components thereof. The United States submits that Korea's arguments are simply non-responsive to the relevant standard. It does not even attempt to address the line pipe

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<sup>90</sup> According to Korea, the US analysis also fails to take into account the substitutability of imported and domestic products, or the elasticities of demand or the fact that Mexico and Canada were excluded from the measure.

<sup>91</sup> According to Korea, if the US industry's volume of sales returns to 1997 levels and the per unit costs from 1997 for direct labor, other factory costs and SG&A expenses are substituted for the per unit costs for interim 1999. Per unit direct labor costs would decline by \$8, per unit other factory costs would decline by \$19 and per unit SG&A expenses would decline by \$7, for a total decline of \$34. A \$34 per unit cost savings is added to the \$15-\$17 operating profit increase (calculated by the United States as a result of the 19-per cent tariff), the U.S. industry's operating profit increases \$49-\$51, or equal to an operating profit of 10.3-10.7 per cent (using the increased price resulting from the full impact of the 19-per cent tariff). This is far above the 8.1 per cent achieved in the peak year of 1997. *See* ITC Report, at Table 9, II-27).

<sup>92</sup> ITC Report, Views on Remedy of the Commission ("Majority Views on Remedy") at I-76-77.

<sup>93</sup> *See* ITC Report, Majority Views on Remedy at I-76-77.

<sup>94</sup> *See* ITC Report, Views on Remedy of Chairman Lynn M. Bragg and Commissioner Thelma J. Askey ("Bragg and Askey Views on Remedy") at I-87 and I-92. We note that the United States specifically argues that there is no distinction between a threat or present injury finding for purposes of determining the appropriate remedy. *See* US Response to Questions at the first substantive meeting at para. 6.

<sup>95</sup> *See* ITC Report, Bragg and Askey Views on Remedy at I-92 (citing to Commission Remedy Memorandum EC-W-071 (Dec. 1, 1999) with Additional Commission Remedy Memorandum EC-W-074 (7 Dec. 1999)).

safeguard in light of serious injury and the facilitation of adjustment. Instead, it compares the line pipe safeguard chosen by the United States with a tariff quota that three USITC Commissioners found “will address the serious injury found to exist and be most effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition.”<sup>96</sup> Korea characterizes the line pipe safeguard as “more restrictive” than the measure recommended by the three Commissioners and extrapolates that the line pipe safeguard must accordingly be “excessive.” According to the United States, the fact that one potential safeguard measure falls within the Article 5.1 limit does not mean that changing the type, level, or duration of the measure would push it beyond the limit.

7.88 The United States asserts that the line pipe safeguard has two main elements – a supplemental duty of 19 per cent (falling to 15 and then 11 per cent in subsequent years) on subject imports and a 9000 ton exemption. Regarding the effect of the tariff, the United States notes that the average unit value of subject imports in interim 1999 was \$330-337 per short ton. The application of a 19 per cent tariff would be expected to cause the average unit values for imports to increase by \$62-64 per short ton, to \$393-401 per short ton.<sup>97</sup> The 9000 short ton exemption would tend to lessen the increase in average unit values because imports of up to 9000 short tons from each supplying country could enter the United States without additional duties. Thus, one would expect that application of the tariff would, on average, result in price increases somewhat less than 19 per cent and \$62-64 per short ton. Any price effect of the measure would also decline over the course of the measure as the tariff decreased to 15 per cent in the second year and 11 per cent in the third year. According to the United States, the effect of increased import prices on US producers would depend on their reaction. On the one hand, they could choose to increase their prices in a manner similar to increases in import prices, which would result in higher prices. In that case, the relative difference between the prices of subject imports and domestic line pipe would stay roughly the same. Customers would be unlikely to change their purchasing patterns, and the market shares of subject imports and domestic line pipe would be unlikely to change to a significant degree. On the other hand, US producers could raise prices by less than the full amount of the import price increase. In that case, the relative price difference between subject imports and domestic line pipe would decrease, which would likely cause some customers to switch to domestic product. As a result, domestic producers’ market share would increase.

7.89 If the domestic producers were able to increase their own prices by the entirety of the expected \$62-64 average increase in average unit value for subject imports caused by the 19 per cent tariff, their operating profit margin would increase to \$15 to 17 per short ton on average, for an operating income ratio of 3 to 4 per cent.<sup>98</sup> That would represent between 3 and 4 per cent of total revenues, a level closer, but not equal to, the industry’s profitable years before the import surge.<sup>99</sup> However, as noted above, increasing prices to match the increase in import prices would likely leave domestic producers’ market share – an important aspect of serious injury – unchanged. Moreover, as noted above, it is questionable whether the US producers *could* increase their prices by such an amount. Thus, it cannot be said that the United States applied the line pipe safeguard beyond the extent necessary as it would not alone be likely to reverse the volume and price effects of increased imports. This becomes more clear in light of the 9000 ton exemption from the tariff. Since 9000 tons from each source would not pay the tariff, the average increase in prices would be less than the amount expected if the tariff were applied without exemption. Thus, the 9000 ton exemption

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<sup>96</sup> ITC report p. I-5.

<sup>97</sup> Average Unit Value Table, Exhibit USA-21. The calculations in the referenced table are based on the data in Table 3, on page II-15 of the ITC Report, with line pipe from Canada and Mexico excluded. The Average Unit Value Table provides public figures for total imports from subject sources including Japan and a subtotal for subject import sources excluding Japan. Since all nonsubject imports were from Japan, the actual values for any statistic will fall somewhere between the subtotal and total. The United States recognizes that average unit values can be affected by changes in product mix. Line pipe is, however, a fairly standardized product, and this lessens the concern over any such distortions.

<sup>98</sup> ITC report, p. II-28, Table 10.

<sup>99</sup> ITC report, p. II-27, Table 9.

establishes beyond question that the United States applied the line pipe safeguard *less* than the extent necessary.

7.90 According to the United States, Korea's argument that the remedy improperly addresses the injurious effects of factors other than imports is rife with conceptual and factual errors. Korea provides no basis for the Panel to conclude that the Safeguards Agreement requires that a safeguard measure be "confined" to the injurious effect of imports. Korea has not cited any provision of the WTO Agreement that requires that a safeguard measure be "confined" to the effects of increased imports. Thus, it has failed to make a *prima facie* case of an inconsistency with the Agreement. According to the United States, Korea's argument is also factually deficient. Korea asserts that the ITC recommended remedy was "intended to address the effects of both" increased imports and the oil and gas crisis.<sup>100</sup> The United States explains that: first, the ITC recommended remedy is irrelevant to the Panel's analysis, especially since the President did not adopt that remedy.<sup>101</sup> Second, the ITC report does not support Korea's view as to the ITC's intention. Korea cites three portions of the ITC report. The first (p. I-28) merely indicates the ITC majority's finding that a decline in oil and gas drilling reduced demand for line pipe, which contributed to serious injury. The second (p. I-76) recognizes this factor as a condition of demand for line pipe. The third (pp. I-85 - I-86) reflects the finding that the remedy "will address the serious injury" and "does not exceed the amount necessary to remedy serious injury." The United States does not consider that this finding suggests that the ITC recommended remedy attempted to address the effects of declining demand for line pipe. In addition, the text cited by Korea (pp. I-85 - I-86) also reports the majority's expectation that demand for line pipe would "improve." Thus, the ITC majority assumed that demand for line pipe would be a *positive* force in the condition of the industry in the near term. A remedy based on this proposition can scarcely be characterized as remedying *injury* associated with *declining* demand for line pipe. According to the United States, Korea's calculations assume that the US producers increase their prices by the full amount possible *and* obtain an increase in the sales volume. That is economically impossible. In addition, Korea ignored the fact that the 9000 ton exemption would reduce the average price increase of imports, which would further constrain the US producers' ability to increase prices. Another Korean calculation assumes that imposition of a safeguard measure would return the US industry to the conditions of 1997. The US explanation of compliance with Article 5.1 makes no such assumption.

7.91 The United States submits that the record does not support Korea's claim that demand was improving rapidly. The ITC majority noted that 1997 and 1998 were years of unusually high demand, and that demand had by 1999 returned to earlier levels. (ITC report, p. I-28) Other evidence indicated that demand in the largest segment of line pipe consumption was tied to general economic growth, which was forecast to grow at 3-4 per cent annually. US producers projected 4-5 per cent growth.<sup>102</sup> These facts indicate that any future increase in demand was likely to be quite moderate.

### (3) Evaluation by the Panel

7.92 In addressing Korea's claim, we note that the onus is on Korea, as the complaining party, to assert and prove that the line pipe measure exceeded what was "necessary to prevent or remedy serious injury and to facilitate adjustment", contrary to Article 5.1, first sentence.<sup>103</sup>

7.93 Korea's Article 5.1 claim that the line pipe measure exceeded what was "necessary to prevent or remedy serious injury and to facilitate adjustment" is based in part on a comparison of the line pipe measure with the measure recommended by the ITC and the measure proposed by Petitioners. We

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<sup>100</sup> Oral Statement of the Republic of Korea, para. 80.

<sup>101</sup> US first written submission, paras. 173-174.

<sup>102</sup> Petitioners' Posthearing Brief on Remedy, p. 44 (17 November 1999).

<sup>103</sup> *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, report of the Appellate Body, WT/DS33/AB/R, p. 16, adopted 23 May 1997.

have some doubts as to whether any such comparison would be an appropriate basis for assessing compliance with the obligation contained in the first sentence of Article 5.1, primarily because there is no guarantee that the ITC recommendation or Petitioners' proposal are themselves in conformity with Article 5.1, first sentence. At most, these measures provide an indication of what the ITC and Petitioners respectively considered to be necessary for the purpose of Article 5.1, first sentence. In any event, the comparison proposed by Korea would only be determinative if the restrictive effect of either the ITC recommendation or the Petitioners' proposal was set at, or above, the maximum amount "necessary" within the meaning of Article 5.1, first sentence.

(i) ITC recommendation<sup>104</sup>

7.94 In making its remedy recommendation, the ITC stated that the recommended action "will not exceed the amount necessary to remedy the serious injury we find to exist".<sup>105</sup> Even assuming that the ITC correctly analysed the restrictive effect of the measure it recommended, there is nothing in this statement to suggest that the restrictive effect of the ITC recommendation was set at (or above) the maximum amount necessary under Article 5.1. The restrictive effect of the recommendation could have been set below the maximum amount necessary, and still the ITC's assertion (that the recommended action "will not exceed the amount necessary") would be accurate. Nor has Korea adduced any evidence (other than the aforementioned ITC statement) to suggest that the restrictive effect of the ITC recommendation is set at (or above) the maximum amount necessary. Since it is theoretically possible that the line pipe measure could be more restrictive of imports than the ITC recommendation, and yet still not exceed the maximum amount "necessary" under the first sentence of Article 5.1, an assertion that the line pipe measure is more restrictive of imports than the ITC recommendation is not indicative of a violation of the first sentence of Article 5.1.<sup>106</sup>

(ii) Petitioners' proposal<sup>107</sup>

7.95 The ITC found that the quota proposed by Petitioners "would exceed the amount necessary to prevent or remedy serious injury".<sup>108</sup> Thus, assuming that the ITC correctly analysed the restrictive effect of the measure proposed by Petitioners, it is possible that the Petitioners' proposal could constitute an appropriate benchmark for the purpose of assessing the line pipe measure. That is to say, if the line pipe measure were shown to be more restrictive of imports than the Petitioners' proposal, one could perhaps infer from this that the line pipe measure also exceeded what was "necessary" for the purpose of Article 5.1, first sentence.

7.96 In this regard, Korea asserts that "assuming each of the seven individual suppliers (excluding Canada and Mexico) identified by the ITC at the time of the investigation supplies its 9,000 short tons of quota, the seven countries would account for a total quota of 63,000 short tons – far below even the quota requested by Petitioners of 105,849 short tons and rejected by the ITC as overly restrictive".<sup>109</sup>

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<sup>104</sup> The ITC recommended the imposition of a four-year tariff quota excluding imports from Canada and Mexico, with the in-quota amount set at 151,124 short tons for the first year (followed by 10 per cent annual increases thereafter), and with over-quota imports subject to a 30 per cent *ad valorem* duty.

<sup>105</sup> ITC Report at p. I-75.

<sup>106</sup> In any event, we do not consider that Korea has established that the line pipe measure is more restrictive than the remedy recommended by the ITC. Although Korea has focused on the difference between the volume of in-quota imports permitted under the ITC recommendation and line pipe measure, it has failed to take proper account of the facts that the ITC recommendation (1) would have applied for one year more than the line pipe measure, and (2) would have provided for a 30 per cent, rather than a 19 per cent, *ad valorem* tariff surcharge. We find Korea's assertion that a 19 per cent tariff surcharge can have a similar effect to a 30 per cent tariff surcharge especially unconvincing.

<sup>107</sup> Petitioners proposed a four-year quantitative restriction excluding imports from Canada and Mexico, with a 105,849 short ton quota for the first year (followed by 5 per cent annual increases thereafter).

<sup>108</sup> ITC Report at p. I-80.

<sup>109</sup> Korea's first written submission, para. 145, footnotes omitted.

Thus, in order to establish that the line pipe measure is more restrictive of imports than the Petitioners' proposal, Korea focuses on the quantitative element of the line pipe tariff quota, and compares it to the quantitative limit included in the quantitative restriction proposed by Petitioners. In doing so, Korea disregards the fundamental difference in the qualitative nature of the two measures, and more particularly the fact that the line pipe measure allows imports in excess of 63,000 short tons (albeit at a higher rate of duty), whereas the measure proposed by Petitioners would not allow any imports in excess of the 105,849 short ton quantitative limit. Korea also overlooks the fact that the line pipe measure applies for three years, while the quantitative restriction proposed by Petitioners would have applied for four years.

7.97 In our view, in order to demonstrate that the line pipe measure was more restrictive of imports than the measure proposed by Petitioners, Korea should have compared the application of the measures as a whole. Korea should not have compared the application of the separate constituent parts of the measures in isolation. Nor should Korea have ignored certain important qualitative differences between the two measures. In light of these considerations, we believe that Korea has failed to demonstrate that the line pipe measure as a whole is more restrictive of imports than the Petitioners' proposal. Thus, even if one assumes that one could establish a violation of Article 5.1, first sentence, on the basis of a finding that the line pipe measure is more restrictive of imports than the measure proposed by Petitioners, Korea has failed to demonstrate that this is the case.

(iii) Inferential evidence

7.98 In support of its claim, Korea also refers to certain "inferential evidence of the intended impact" of the line pipe measure:

(1) In-quota imports

7.99 Korea asserts that total in-quota<sup>110</sup> imports were projected to be approximately 63,000 short tons. Korea uses this figure as a basis for comparing the restrictive effect of the line pipe measure with that of the ITC recommendation and the Petitioners' proposal. This issue is addressed in the preceding section.

(2) Out-of-quota imports

7.100 Korea argues that very limited out-of-quota imports could be expected at the 19 per cent tariff level. Korea notes that the 19 per cent tariff surcharge is six to 10 times the bound rate, and that the market would absorb in-quota imports before imports subject to the 19 per cent tariff surcharge.

7.101 We note the US assertion that the 19 per cent tariff surcharge would be expected to increase the average unit value of imports by \$62-64 per short ton, to \$393-401 per short ton. Domestic producers could either increase their own prices by the same amount and maintain market share relative to imports, or increase their prices by less than \$62-64 per short ton and increase their market share relative to imports. If domestic producers were to increase their prices by the full \$62-64 per short ton, their operating profit margin would increase to \$15 to 17 per short ton on average, for an operating income ratio of 3 to 4 per cent. This would be close to, but not equal to, the industry's profitable years before the import surge. According to the United States, however, it is unlikely that domestic producers could increase their prices by the full \$62-64 per short ton, as imports benefiting from the 9,000 short ton exemption would mean that the average unit value of imports would be unlikely to increase by as much as \$62-64 per short ton.

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<sup>110</sup> For convenience, the Panel is using terminology employed by Korea. The Panel does not use such terminology to define the nature of the line pipe measure.

7.102 Korea claims that the United States' analysis ignores the combined improvements on domestic producers' operating leverage of both price and volume increases. In our view, however, unless there is a sufficient increase in demand,<sup>111</sup> it is economically impossible for domestic producers to increase their prices by the full amount of the increase in the average unit value of imports and obtain an increase in sales volume. In addition, the effect of the 9,000 short ton exemption would make it unlikely that the average unit value of imports would increase by as much as \$62-64 per short ton. In light of these considerations, we do not consider that Korea has established that the 19 per cent tariff surcharge renders the line pipe measure more restrictive than "necessary".<sup>112</sup>

(3) Import data

7.103 Korea has submitted actual import data for the period March 2000 – February 2001 (i.e., the 12 month period following imposition of the line pipe measure).<sup>113</sup> During this period, 14,604 tons entered at the 19 per cent duty rate, and in-quota imports totalled 64,067 tons. Even if it were appropriate for the Panel to base any findings on this data – a matter which the Panel does not need to resolve – the data does not necessarily establish that the line pipe measure is more restrictive of imports than "necessary". Korea relies on the import data to show that imports under the line pipe measure decreased below the level of imports envisaged by the ITC recommendation or the Petitioners' proposal.<sup>114</sup> As noted above, the ITC recommendation does not constitute an appropriate benchmark against which to analyse the consistency of the line pipe measure with Article 5.1, first sentence.

7.104 Even if the Petitioners' proposal did constitute an appropriate benchmark (and assuming that the ITC was correct to find that the Petitioners' proposal was "excessive"), no reliable conclusions can be drawn by comparing the quantitative limit on imports under the proposed measure (105,124 short tons) with actual imports after the imposition of the line pipe measure. This is because there is no telling what the volume of imports would have been in the absence of the line pipe measure. In other words, it is not certain that imports dropped to their actual level between March 2000 and February 2001 purely as a result of the line pipe measure. Other factors, such as unfavourable economic conditions causing a general slow-down in demand, could have contributed to the decline in

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<sup>111</sup> Korea asserts at para. 17 of its second oral statement that "demand was improving rapidly". However, this assertion is not supported by the ITC's findings. The ITC found that demand for line pipe came from three categories of line pipe usage: gathering, transmission and distribution. The ITC found that increased gathering would lead to "increased demand for line pipe". The ITC also found that demand for line pipe resulting from transmission and distribution is tied to general economic growth. In particular, the ITC found that "if the economy grows at a 3-4 per cent annual rate, line pipe consumption should grow by 4-5 per cent. US economic growth in 1999 is predicted to be approximately 3.8 per cent and 3.1 per cent in 2000" (page I-77, footnotes omitted). Thus, although the ITC found that there would be some increase in demand, the evidence relied on by the ITC – which Korea does not dispute – does not demonstrate that demand was "improving rapidly". Korea has adduced no additional evidence to the effect that the increase in demand for line pipe would be sufficient to allow domestic producers to both increase their prices by the full amount of the increase in the average unit value of imports and obtain an increase in sales volume.

<sup>112</sup> Korea has asserted that "[t]he US analysis also fails to take into account the substitutability of imported and domestic products, or the elasticities of demand or the fact that Mexico and Canada were excluded from the measure" (note 31, Korea's second oral statement). However, Korea has made no attempt to show how consideration of such factors would demonstrate that the line pipe measure is more restrictive than "necessary" within the meaning of the first sentence of Article 5.1. In addition, the fact that the tariff element of the line pipe measure is "six to 10 times the bound rate" is irrelevant, as it simply reflects on the level of the bound rate, and not on the necessity of the measure.

<sup>113</sup> The United States asked the Panel to rule such information inadmissible. Our response to this request is contained in section VII.A.2 above. Since we find it inappropriate to draw any conclusions from the import data submitted by Korea, it is not necessary for us to rule on whether we could base any conclusions on that data, if we considered it appropriate to do so.

<sup>114</sup> Korea's second written submission, para. 41.

imports of line pipe.<sup>115</sup> Although the Petitioners' proposal envisaged imports of 105,124 short tons, one cannot be certain that 105,849 short tons of line pipe would have actually been imported had the United States applied the measure proposed by Petitioners. Since one cannot assume that 105,849 short tons would have been imported under the measure proposed by Petitioners, it makes no sense to compare that figure to actual imports under the line pipe measure. In addition, a simple year-to-year comparison of import volume fails to take into account the fact that the line pipe measure was applied for three years, whereas the measure proposed by Petitioners would have applied for four years. In light of these considerations, it would be highly speculative for the Panel to draw any conclusions (for the purpose of Article 5.1, first sentence) on the basis of a comparison between actual import data and the quantitative limit on imports proposed by Petitioners.

(4) Economic analysis

7.105 We understand Korea to argue that no economic analysis was performed upon imposition of the line pipe measure, and that the only economic analysis available at the time of imposition of the measure was that justifying the ITC recommended measure. As we understand it, therefore, this claim is based on Korea's argument that the United States was required to demonstrate at the time of imposition that the line pipe measure did not exceed what was "necessary to prevent or remedy serious injury and to facilitate adjustment".

7.106 We recall our finding, on the basis of the conclusions of the Appellate Body in *Korea – Dairy Safeguard*, that the United States was not required to demonstrate at the time of imposition that the line pipe measure did not exceed what was "necessary to prevent or remedy serious injury and to facilitate adjustment". Consistent with this finding, we consider that the United States would be entitled to provide an ex post economic analysis of the facts on the record at the time of imposition to demonstrate that the line pipe measure did not exceed what was "necessary to prevent or remedy serious injury and to facilitate adjustment". Although we find it difficult to imagine how a Member could ensure that its safeguard measure does not exceed what is "necessary to prevent or remedy serious injury and to facilitate adjustment" without performing some form of economic analysis at the time of imposition, failure to do so does not constitute a violation of Article 5.1, first sentence, which is the claim raised by Korea.

(5) Injury caused by other factors

7.107 Korea asserts that the ITC recommendation and the ITC's economic memoranda (from which it was drawn) addressed the injurious effects of the crisis in the oil and gas industry. Korea notes the United States' assertion that the line pipe measure was also based on the economic memoranda. According to Korea, safeguard measures should be confined to addressing the injurious effects of imports.

7.108 The United States denies that the line pipe measure was intended to address the injurious effects of the crisis in the oil and gas industry. The United States asserts that, in any event, the Safeguards Agreement does not require safeguard measures to be confined to addressing the injurious effects of imports.

7.109 Korea asserts that, because the United States does not consider that safeguard measures should be confined to addressing the injurious effects of imports, the Panel should assume that the line pipe measure was not so confined.

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<sup>115</sup> Korea has adduced no evidence to the effect that the decrease in imports after the imposition of the line pipe measure was more significant than the increase in domestic shipments. Such evidence may have indicated that the decline in imports was not caused by unfavourable economic conditions.

7.110 First, we note that Korea has failed to identify any aspect of the line pipe measure which would suggest that it was intended to address the injurious effects of the decline in the oil and gas industry. Second, even assuming for the sake of argument that the remedy recommended by the ITC was intended to address the injurious effects of the crisis in the oil and gas industry - and we make no finding to that effect - this does not mean that the line pipe measure was also intended to address the injurious effects of the crisis in the oil and gas industry (especially given the significant differences between the ITC recommendation and the line pipe measure). The fact that the ITC recommendation and the line pipe measure are both based on the same economic memoranda, and that those economic memoranda may have addressed the injurious effects of the decline in the oil and gas industry,<sup>116</sup> does not change this. For these reasons, we are not persuaded by Korea's argument that the line pipe measure was intended to address the injurious effects of the crisis in the oil and gas industry. There is certainly no evidence before us that might prompt us to assume that this was the case. Since Korea has failed to establish any factual basis for its argument, it is not necessary for us to consider the substantive issue of whether or not safeguard measures should be confined to addressing the injurious effects of imports.

(iv) *Conclusion*

7.111 To conclude, we find that Article 5.1, first sentence, imposes a specific obligation on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment. We find that compliance by the United States with this obligation is not to be assessed exclusively on the basis of any determination made by the United States regarding the necessity of the line pipe measure at the time of imposition.<sup>117</sup> We further find that Korea has failed to meet its burden to assert and prove that the United States violated Article 5.1, first sentence, by imposing a measure that exceeds what is "necessary to prevent or remedy serious injury and to facilitate adjustment".

(c) Article 7.1

7.112 Korea claims that the United States failed to comply with the requirements of Article 7.1 concerning the duration of a safeguard measure. According to Korea, "there was significant evidence that the temporary downturn in the industry from the second half of 1998 until the first half of 1999 had reversed by the time of the ITC's decision in October of 1999 and, therefore, no remedy, let alone a measure for three years, was necessary".<sup>118</sup>

7.113 Article 7.1 provides that:

A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment.

7.114 We understand Korea to argue that the duration of the line pipe measure was excessive because the condition of the industry at the end of the period of investigation was such that there was no serious injury, and therefore no safeguard measure was justified, let alone a measure of three years. We therefore understand Korea's Article 7.1 claim to be dependent on a finding that the condition of the industry at the end of the period of investigation precluded a determination of serious injury. We address this issue in section VII.C.2, where we find no basis for any such finding. Since there is no basis for a finding that a determination of serious injury at the end of the period of investigation was

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<sup>116</sup> We make no finding as to whether or not the economic memoranda did address the injurious effects of the decline in the oil and gas industry.

<sup>117</sup> This finding is based on Article 5.1, first sentence. We make no finding as to whether or not Articles 3.1 or 4.2(c) would have required the United States to include a determination as to the necessity of the measure in its published report.

<sup>118</sup> Korea's first written submission at para. 167.

precluded, we reject Korea's Article 7.1 claim that the absence of serious injury at the end of the period of investigation prevented the imposition of any safeguard measure, let alone a measure of three years.

(d) Article XIX:1(a)

7.115 In the context of its claims under Articles 5.1 (first sentence) and 7.1 concerning the extent and duration of the line pipe measure, Korea also alleged an infringement of Article XIX:1(a). This provision authorizes the imposition of safeguard measures "to the extent and for such time as may be necessary to prevent or remedy" injury caused by increased imports. Korea's Article XIX:1(a) claim is based on the same arguments advanced in support of its Article 5.1 (first sentence) and 7.1 claims. Since we have already rejected those claims, we also reject Korea's Article XIX:1(a) claim regarding the duration and extent of the line pipe measure.

#### **4. Claims under Articles 3.1 and 4.2(c)**

7.116 Korea asserts that the United States violated Articles 3.1 and 4.2(a) by failing to demonstrate, at the time of imposition, that the line pipe measure was in conformity with the requirements of Article 5.1, first sentence.<sup>119</sup>

7.117 It is somewhat unclear to us whether this assertion forms the basis of a separate claim by Korea, or whether it forms part of its claim regarding Article 5.1, first sentence. Although the title of the relevant section in Korea's second written submission states that "[t]he obligations of Article 5.1 of the SA have to be read together with the obligations imposed by Articles 3.1 and 4.2(c)", the relevant section concludes with the statement that "the United States has violated its obligations under Articles 3.1 and 4.2(c) as well as under Article 5.1 of the SA" (emphasis supplied). Given Korea's contention that the United States violated Articles 3.1 and 4.2(c) "as well as" Article 5.1, we shall treat Korea's assertion regarding Articles 3.1 and 4.2(c) as a separate claim.

7.118 In our view, Korea's Article 3.1 / 4.2(c) claim falls outside our terms of reference, as defined by the Request for the Establishment of a Panel by Korea contained in document WT/DS202/4.

7.119 In response to a question from the Panel, Korea asserted that the claim is within our terms of reference because it is covered by Claims 3 and 9 in its Request for Establishment:

3. The safeguard measure also violates Articles 5 and 7.1 of the Agreement on Safeguards since the United States did not justify and could not justify that the Measure was imposed only to the extent and for such period of time necessary to prevent or remedy the injury and to facilitate adjustment.

9. The United States failed to provide critical information on which it relied in its decision-making in violation of Articles 3 and 4 of the Agreement on Safeguards. In this regard, the United States has failed to provide an adequate public summary of critical confidential information relied on in reaching its decision.

7.120 In respect of Claim 3, Korea asserts that its Article 5 claim is "integrally linked" to Articles 3.1 and 4.2(c). In respect of Claim 9, Korea asserts that the reference to "critical confidential information" includes "the basis for the President's decision-making documents or any information at all with respect to the justification of the safeguard measure",<sup>120</sup> and that "[t]he obligation to

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<sup>119</sup> See Korea's response to Question 10 of the Panel at the first substantive meeting (see Annex B-1).

<sup>120</sup> Korea's response to Question 4 from the Panel at the second substantive meeting (see Annex B-7).

sufficiently explain why the measure was 'necessary' by reference to the evidence that existed at the time that the Presidential decision was taken is a 'pertinent issue of fact or law'<sup>121</sup> within the meaning of Article 3.1. Korea relies on the Appellate Body's finding in *EC – Bananas III* that "Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint."<sup>122</sup> Korea also asserts that the United States had not made any claims of prejudice prior to the Panel's question, and that the United States responded fully to Korea's claims regarding Article 3.1 as they related to Article 5 since the first substantive meeting.

7.121 With regard to Korea's Claim 3, we are not persuaded that Korea's Article 5.1 claim is "integrally linked" to its Article 3.1 and 4.2(c) claims. There is nothing in Claim 3, nor in the Safeguards Agreement, to suggest such a linkage. Indeed, Korea argued in its second written submission that Article 3.1 contains an "independent obligation", suggesting that there is no linkage between Articles 3.1 and 5.1:

Whether or not Article 5.1 requires an explicit finding or holding regarding the necessity of the measure under Article 5.1, Article 3.1 of the SA imposes an independent obligation that the investigation itself and the findings and conclusions of the competent authorities resulting from such investigation must demonstrate that (*sic*) the legal and factual basis for the measure.<sup>123</sup> (emphasis supplied)

7.122 Korea argues that Article 5.1 "is textually related to Article 4.2(c) of the SA since the 'necessary' level must be to alleviate the serious injury contained in the 'detailed analysis' referred to in SA Article 4.2(c)." Korea may be correct in linking what it calls the "'necessary' level" (Article 5.1) to the serious injury identified in the "detailed analysis" (Article 4.2(c)). However, this does not mean that a reference in the Request for Establishment to a claim under Article 5.1 necessarily implies a claim under 4.2(c), since there is nothing in the text of either provision to suggest that a claim under one necessarily implies a claim under the other.

7.123 With regard to Claim 9, we note that reference is made to an alleged failure to "provide critical information", and to an alleged failure to "provide an adequate public summary of critical confidential information" (emphasis supplied). We fail to see how a claim expressly referring to an alleged failure to provide information could be interpreted to include claims of failing to "publish a report setting forth ... findings and reasoned conclusions reached on all pertinent issues of fact and law" (Article 3.1), and failing to publish "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined" (Article 4.2(c)). Since Articles 3.1 and 4.2(c) call for far more than the simple provision of information, no reasonable reading of Claim 9 could encompass the more detailed requirements of those provisions.

7.124 Korea asserts that its Article 3.1 and 4.2(c) claim should be included in our terms of reference because the United States has not suffered any prejudice in respect of those claims. It would appear that the question of prejudice, or due process, has most commonly arisen in the context of the DSU Article 6.2 requirement to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".<sup>124</sup> We do not consider that the question of prejudice arises in respect of whether or not Korea's Article 3.1 and 4.2(c) claim falls within our terms of reference, since there is no question of whether or not the legal basis of that claim, or the claim itself, was set forth with sufficient clarity in the Request for Establishment. It is patently obvious to us that the language used

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<sup>121</sup> *Id.*

<sup>122</sup> *EC – Bananas III (AB)* at para. 142.

<sup>123</sup> Korea's second written submission, para. 53.

<sup>124</sup> See, for example, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, report of the Appellate Body, WT/DS122/AB/R, para. 88, adopted 5 April 2001.

by Korea in its Request for Establishment, which forms the basis of our terms of reference, simply does not include any such claim. Thus, the issue of whether or not it was specified with sufficient clarity simply does not arise.

7.125 Having found that Korea's claim under Articles 3.1 and 4.2(c) is not in our terms of reference, we note the Appellate Body's finding in *EC – Regime for the Importation, Sale and Distribution of Bananas* that

[i]f a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.<sup>125</sup>

Thus, the inclusion of this claim in Korea's submissions to the Panel is not sufficient to "cure" Korea's failure to include this claim in its Request for Establishment and bring it within our terms of reference.

7.126 Accordingly, we find that Korea's Article 3.1 and 4.2(c) claim regarding the alleged failure of the United States to demonstrate, at the time of imposition, that the line pipe measure was in conformity with the requirements of Article 5.1, first sentence, falls outside our terms of reference.

## **5. The exclusion of Canada and Mexico – Articles I, XIII and XIX, and Article 2.2**

### **(a) Arguments by Korea**

7.127 Korea claims that the United States violated the MFN principle set forth in Articles I, XIII:1 and XIX and Article 2.2 by excluding Mexico and Canada from the line pipe measure.

7.128 Korea argues that, consistent with the MFN principle, safeguard measures must apply to imports from all sources. Korea asserts that the parallelism between Articles 2.1 and 2.2 of the Agreement on Safeguards also requires that the measure be applied to all imports. The United States could only impose a safeguard remedy on the basis of a serious injury analysis which was based on all imports. Articles 2 and 4 of the Agreement on Safeguards as well as Article XIX of the GATT 1994 speak only in terms of "imports." There is no basis on which certain imports can be excluded. Since all imports must be included in the Article 2.1 determination, parallelism requires that the measure be applied to all imports.

7.129 Korea asserts that the exemption of Mexico was particularly egregious in this case since Mexico was the second largest supplier to the US market during the ITC's period of investigation. Mexico is now the largest supplier to the US market, and Canada has increased its imports three-fold to become the number three supplier to the US market.

7.130 Korea asserts that the United States cannot rely on an Article XXIV defence in respect of the MFN violation because the last sentence of footnote 1 of the Safeguards Agreement does not apply to the line pipe measure. According to Korea, the last sentence of footnote 1 only applies in cases where a safeguard measure is applied by a customs union, either as a single unit or on behalf of a member State. In any event, Korea submits that NAFTA has not been demonstrated to be in compliance with Article XXIV:8.

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<sup>125</sup> *EC – Bananas III (AB)* at para. 143.

(b) Arguments by the United States

7.131 The United States asserts that Articles I and XIII:1, and Article 2, do not prohibit a Member from excluding its free-trade agreement partners from a safeguard measure, as a result of the exception to the MFN principle contained in Article XXIV. The United States asserts that no provision of the Safeguards Agreement will nullify the effect of Article XXIV, because of the last sentence of SA footnote 1.

7.132 The United States notes that, by virtue of Article XXIV:5, "the provisions of [the GATT] shall not prevent" the formation of a free-trade area, provided that certain conditions are met. The United States further notes that GATT Article XXIV:8(b) defines a free-trade area as:

a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

The United States remarks that the list of measures that Article XXIV:8 specifically authorizes free-trade area parties to maintain against each other does not include safeguard measures applied under Article XIX. The United States therefore argues that, by implication, safeguard measures either may or must be made part of the general elimination of "restrictive regulations of commerce" under any free-trade area. The United States argues that, under the express terms of Article XXIV:5, no other provision of the GATT 1994, including Articles I, XIII or XIX, can be read to prevent participants in a free-trade area from carrying out their mutual commitments to exempt each other's trade from trade restrictive measures, including safeguard measures.

7.133 With regard to Korea's Article 2.2 claim, the United States acknowledges that Article 2.2 imposes a non-discrimination requirement. However, the United States argues that this requirement does not supersede the Article XXIV authorization for Members to exclude free trade agreement partners from safeguard measures. In this regard, the United States relies on the last sentence of footnote 1, which states that "[n]othing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994." Thus, the United States considers that issues related to free-trade area imports are to be addressed exclusively under the relevant GATT 1994 articles. In particular, the "relationship" between Articles XIX and XXIV:8 addresses the application of safeguard measures in the context of a free-trade area that may prohibit or limit safeguard measures as one way to eliminate duties and other restrictive regulations of commerce. According to the United States, the last sentence of SA footnote 1 means that the provisions of the Safeguards Agreement are not intended to disturb the relationship between the GATT 1994 rules addressing safeguard measures on the one hand and the rights and obligations of the participants in a free-trade area on the other.

7.134 In respect of Korea's argument that the NAFTA safeguards exclusion discriminates against it because the safeguard measure has made Korean line pipe less competitive with imports from Canada and Mexico in the United States, the United States argues that the line pipe safeguard operates no differently from any other duty rate that the United States maintains in conformity with the WTO Agreement. NAFTA trading partners receive an advantage as a result of their agreement to remove restrictions from substantially all trade with the United States.

(c) Evaluation by the Panel

7.135 We shall begin our evaluation by focusing on Korea's claims regarding Articles I, XIII and XIX. We shall then address Korea's claim under Article 2.2. Before turning to the substance, however, we consider it appropriate to clarify the factual basis of Korea's claims.

7.136 Korea's claims rest on the exclusion of imports from Canada and Mexico, i.e., NAFTA imports, from the line pipe measure. Korea asserts that the inclusion of non-NAFTA imports, but the exclusion of NAFTA imports, is discriminatory, and therefore contrary to the MFN requirement set forth in GATT 1994 and the Safeguards Agreement. In other words, Korea's claims of discrimination arise from the fact that the United States accorded more favourable treatment - in respect of the line pipe measure - to its NAFTA partners than to its non-NAFTA partners.

(i) *Articles I, XIII and XIX*

7.137 Korea asserts that the non-discriminatory application of safeguard measures is required by Articles I, XIII:1 and XIX.<sup>126</sup> To the extent that these provisions impose an MFN requirement, the United States relies on the "limited exception" set forth in Article XXIV. We must decide to what extent, if at all, any such Article XXIV defence is available to the United States.

7.138 We begin our analysis with Article XXIV:5, which provides in relevant part:

Accordingly, the provisions of this Agreement shall not prevent, as between the territories of Members, the formation of ... a free-trade area ...; Provided that: ...

By virtue of Article XXIV:5, therefore, Members are entitled to form free-trade areas (provided the conditions set forth in sub-paragraphs (b) and (c) of that provision are met).

7.139 Article XXIV:8(b) defines a free-trade area as:

a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

7.140 In light of this definition of a free-trade area, we understand Article XXIV:5 to mean that Members are authorised, under certain prescribed circumstances, to eliminate "duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) ... on substantially all the trade" between them and their free-trade area partners. This authorisation exists, despite the fact that the formation of a free-trade area will necessarily result in more favourable treatment for free-trade area partners than for non-free-trade area partners (in respect of whom "duties and other restrictive regulations of commerce" are not eliminated).

7.141 As noted above, the alleged violation of GATT 1994 arises from the exemption of imports from Canada and Mexico from the scope of the line pipe safeguard measure. Since the line pipe measure introduces a tariff quota, we consider that the line pipe measure constitutes a "dut[y] [or] other restrictive regulation[] of commerce" within the meaning of Article XXIV:8(b). As the exclusion of imports from Canada and Mexico therefore forms part of the elimination of "duties and other restrictive regulations of commerce" between NAFTA members,<sup>127</sup> it is in principle authorised by Article XXIV:5, provided the relevant conditions are fulfilled. Having regard to paragraphs 5 and 8 of Article XXIV, the relevant conditions are that NAFTA must (1) comply with Article XXIV:5(b)

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<sup>126</sup> The United States does not dispute that Article XIX dictates MFN treatment.

<sup>127</sup> Imports from Canada and Mexico were excluded from the line pipe measure on the basis of Article 802 of NAFTA, which provides for the *elimination* of safeguard measures between NAFTA members in certain circumstances. Accordingly, the application of that provision in a given case (through the NAFTA Implementation Act) should also be treated as the *elimination* of safeguard measures between NAFTA members.

and (c),<sup>128</sup> and (2) eliminate duties and other restrictive regulations of commerce on "substantially all" intra-NAFTA trade.

7.142 As the party seeking to rely on an Article XXIV defence (or "limited exception"), the onus is on the United States to demonstrate compliance with these conditions.<sup>129</sup> In this regard, the United States has argued that:

NAFTA provided for the elimination within ten years of all duties on 97 per cent of the Parties' tariff lines, representing more than 99 per cent of the trade among them in terms of volume. This is the basis for our belief that, wherever the threshold established under Article XXIV:8 for elimination of duties on substantially all trade, NAFTA exceeds that threshold.

With regard to eliminating other restrictive regulations of commerce, NAFTA applies the principles of national treatment, transparency, and a variety of other market access rules to trade among the Parties. The NAFTA Parties also eliminated the application of global safeguard measures among themselves under certain conditions. There is also no question of NAFTA raising barriers to third countries, since none of the NAFTA Parties increased tariffs on trade with non-NAFTA measures. The NAFTA Parties also did not place other restrictive regulations of commerce on other WTO Members upon formation of the free-trade area.

Further explanation of the US views on NAFTA and its compliance with Article XXIV appear in the following documents: L/7176, WT/REG4/1 & Corr.1-2, WT/REG4/1/Add.1 & Corr.1, WT/REG4/5, and WT/REG4/6/Add.1. Since these are voluminous materials, we will not append them, but incorporate them into this submission by reference.<sup>130</sup>

7.143 Korea, on the other hand, has argued that NAFTA is "not in compliance Article XXIV:8 of the GATT 1994".<sup>131</sup> In response to a question from the Panel on this issue, Korea asserted:

Korea's position that NAFTA has not been demonstrated to be in compliance with Article XXIV:8 is based on the preliminary analysis of the Committee on Regional Trade Agreements which is still considering the question and has not yet issued a final decision on the matter.<sup>132</sup>

We understand Korea to argue that NAFTA is not in compliance with Article XXIV:8 because the Committee on Regional Trade Agreements has not yet issued a final decision that NAFTA is in compliance with Article XXIV:8.

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<sup>128</sup> Article XXIV:5 specifies that the "formation" of a free-trade area shall not be prevented. We do not consider that this necessarily restricts the Article XXIV defence to safeguard measures (excluding free-trade area partners) introduced upon formation of a free-trade area. In our view, it is sufficient that the mechanism providing for the exclusion of free-trade area partners from safeguard measures (i.e., providing for the MFN violation for which the defence is required) is established upon formation of the free-trade area. In this regard, we note that imports from Canada and Mexico were excluded from the line pipe measure on the basis of Article 802 of NAFTA, and that this provision was included upon the formation of NAFTA.

<sup>129</sup> In *Turkey – Textiles*, the Appellate Body found that the party claiming the benefit of the Article XXIV defence must demonstrate that the conditions governing the application of that defence are met (paras 58-59).

<sup>130</sup> Response to Panel Question 2 to the United States at the second substantive meeting (see Annex B-8).

<sup>131</sup> Korea's oral statement at the first substantive meeting, note 21.

<sup>132</sup> Response to Panel Question 1 to Korea at the second substantive meeting (see Annex B-7).

7.144 In our view, the information provided by the United States in these proceedings, the information submitted by the NAFTA parties to the Committee on Regional Trade Agreements ("CRTA") (which the United States has incorporated into its submissions to the Panel by reference), and the absence of effective refutation by Korea, establishes a prima facie case that NAFTA is in conformity with Article XXIV:5(b) and (c), and with Article XXIV:8(b). Concerning Article XXIV:8(b), we do not consider that the fact that the CRTA has not yet issued a final decision that NAFTA is in compliance with Article XXIV:8 is sufficient to rebut the prima facie case established by the United States. Korea's argument is based on the premise that a regional trade arrangement is presumed inconsistent with Article XXIV until the CRTA makes a determination to the contrary. We see no basis for such a premise in the relevant provisions of the Agreement Establishing the WTO (including, in particular, the Understanding on the Interpretation of Article XXIV of the GATT 1994).<sup>133</sup> Nor has Korea pointed to any provision that might support such a premise.

7.145 Concerning Article XXIV:5(b) and (c), Korea has not even argued that NAFTA is not in conformity with these provisions. While the United States has placed on the record extensive evidence<sup>134</sup> supporting its right to rely on Article XXIV as a defence, Korea has not disputed any of this evidence, either in terms of its accuracy or its sufficiency. On balance, therefore, there is no basis for us to find that Korea has rebutted the prima facie case established by the United States that NAFTA is in compliance with Article XXIV:5(b) and (c).<sup>135</sup>

7.146 In light of the above, we find that the United States is entitled to rely on an Article XXIV defence against Korea's claims under Articles I, XIII and XIX regarding the exclusion of imports from Canada and Mexico from the scope of the line pipe measure.

7.147 We note that the Appellate Body considered the availability of Article XXIV as a defence in *Turkey – Textiles*. The Appellate Body found that

58. (...) Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this "defence" is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, *both* these conditions must be met to have the benefit of the defence under Article XXIV.<sup>136</sup> (emphasis in original)

7.148 Thus, in addition to the conditions set forth above, the Appellate Body conditioned the availability of Article XXIV as a defence on a necessity test ("[a] party must demonstrate that the formation of a customs union would be prevented if it were not allowed to introduce the measure at issue"). In our view, the Appellate Body's findings in *Turkey – Textiles* were conditioned by the facts of that case. In particular, *Turkey – Textiles* concerned the imposition by a member of a customs union of restrictive measures against imports from a third country, upon the formation of that customs union. Clearly, if members of a customs union seek to introduce restrictive measures against imports from third countries, contrary to GATT 1994, it is entirely appropriate that they should be required to

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<sup>133</sup> We would also note that Article XXIV:7 does not require the CRTA to approve regional trade arrangements, or issue formal decisions on their conformity with the WTO Agreement.

<sup>134</sup> See para. 7.144 *supra*.

<sup>135</sup> This does not mean that the Panel has found NAFTA to be in conformity with Article XXIV:5(b) and 8(b). We simply find that the United States has established a prima facie that NAFTA is in conformity with Article XXIV:5(b) and 8(b), and that Korea has failed to rebut that *prima facie* case.

<sup>136</sup> *Turkey – Textiles (AB)* at para. 58.

demonstrate the necessity of such measures. That being said, we are not at all convinced that an identical approach should be taken in cases where the alleged violation of GATT 1994 arises from the elimination of "duties and other restrictive regulations of commerce" between parties to a free-trade area, which is the very *raison d'être* of any free-trade area. If the alleged violation of GATT 1994 forms part of the elimination of "duties and other restrictive regulations of commerce", there can be no question of whether it is necessary for the elimination of "duties and other restrictive regulations of commerce".<sup>137</sup>

(ii) *Article 2.2 of the Safeguards Agreement*

7.149 Korea claims that the exclusion of imports from Canada and Mexico from the line pipe measure violates Article 2.2, which provides:

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

We must determine whether, given the non-discrimination requirement in Article 2.2, the United States should have included imports from Canada and Mexico in the scope of the line pipe measure.

7.150 Having found that the United States is entitled to rely on the Article XXIV defence in respect of a violation of the non-discrimination requirement in *inter alia* Article XIX, we consider it would be incongruous if the United States were precluded from relying on the Article XXIV defence in respect of a violation of the non-discrimination requirement in Article 2.2. A contrary interpretation would ignore the close interrelation between Article XIX and the Safeguards Agreement. This interrelation is evidenced in particular by Article 1, whereby the Safeguards Agreement

... establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

By virtue of this provision, therefore, safeguard measures subject to the provisions of the Safeguards Agreement are understood to be Article XIX measures. Thus, if an Article XXIV defence is available for Article XIX measures, by definition it must also be available for measures covered by the disciplines of the Safeguards Agreement. To deny this is to deny the fact that, by virtue of Article 1, measures covered by the Safeguards Agreement and measures provided for in Article XIX are essentially one and the same thing. Thus, to the extent that an Article XXIV defence is available against claims brought under Article XIX, it must necessarily also be available against claims brought under the provisions of the Safeguards Agreement.

7.151 We consider that the availability of the Article XXIV defence against claims brought under the provisions of the Safeguards Agreement is also confirmed by the last sentence of footnote 1 of the Safeguards Agreement. Footnote 1 provides

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

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<sup>137</sup> Indeed, the application of a necessity test in such circumstances would give rise to absurd results. For example, assume that an FTA eliminates duties on peanuts, but not cars. In the context of a necessity test, third countries could claim that it was not necessary to eliminate duties on peanuts to meet the "substantially all the trade" threshold of Article XXIV:8(b), as that threshold could have been met by eliminating duties on cars. In such cases, it is difficult to imagine how a necessity requirement could ever be fulfilled.

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.* (emphasis supplied)

7.152 We note that the Appellate Body stated in *Argentina – Footwear Safeguard* (a case concerning the imposition of a safeguard measure by a member of a customs union) that "the ordinary meaning of the first sentence of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'". Korea relies on this finding to argue that the last sentence of footnote 1 does not apply in the present case, which concerns a free-trade area. The United States submits that the Appellate Body "reached [its] conclusion in response to a panel's analysis based on the *first* and *third* sentences of footnote 1. At no point did either the panel or the Appellate Body address the fourth (and last) sentence of the footnote, or how that sentence might affect the meaning of the entire footnote. Consequently, the Appellate Body's finding does not provide any guidance for the Panel's interpretation of the last sentence".<sup>138</sup>

7.153 We agree with the United States regarding the status of the Appellate Body's findings in *Argentina – Footwear Safeguard*. In that case, the Appellate Body did not base its finding regarding the exclusion of customs union members from a safeguard measure on the last sentence of footnote 1. Nor was the Appellate Body called on to address the application of footnote 1 in the context of free trade areas. For these reasons, we do not consider that the Appellate Body's finding that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'" pertains to the application of the last sentence of footnote 1 in the context of free trade areas, which is the issue before us in this case. Indeed, the last sentence of footnote 1 itself indicates that it is not restricted to cases in which a safeguard measure is imposed by a customs union (either "as a single unit or on behalf of a member State"). In particular, the last sentence of footnote 1 refers to paragraph 8 of Article XXIV. Paragraph 8 of Article XXIV has two sub-paragraphs. Sub-paragraph (a) relates to customs unions, whereas sub-paragraph (b) relates to free-trade areas. By referring to paragraph 8 of Article XXIV as a whole, rather than sub-paragraph 8(a) exclusively, the last sentence of footnote 1 clearly also refers to Article XXIV:8(b), i.e., free-trade areas. Thus, even though the first three sentences of footnote 1 address the application of safeguard measures in the context of a customs union, the broader reference in the last sentence to paragraph 8 extends the coverage of that last sentence to include the application of safeguard measures in the context of free trade areas, as defined by Article XXIV:8(b).

7.154 Having found that the last sentence of footnote 1 applies in the context of free trade areas, we must now resolve the disagreement between the parties as to the impact, if any, of the last sentence of footnote 1 on the application of the Article 2.2 non-discrimination requirement. In this regard, Korea argues that footnote 1 addresses the term "Member", and notes that it is included in Article 2.1, rather than 2.2. According to Korea, therefore, the last sentence of footnote 1 does not qualify the application of the Article 2.2 non-discrimination requirement.

7.155 We note that the *Argentina – Footwear Safeguard* panel was

mindful of the fact that the footnote was inserted after the word "Member" in the first paragraph of Article 2. It therefore clearly refers solely to the question of who can impose a measure, and not to the supplier countries that might be affected by it. For the footnote to have a broader meaning, the drafters would have had to place it after

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<sup>138</sup> Response to Question 20 from the Panel at the first substantive meeting (see Annex B-2).

the title of Article 2, or in both paragraphs of that article. The fact that they did not do so must have meaning and has to be taken into account in our interpretation.<sup>139</sup>

7.156 The *Argentina – Footwear Safeguard* Appellate Body also stated that "footnote 1 relates to the word 'Member' in Article 2.1, which is commonly understood to mean a Member of the WTO". However, we note that neither the panel nor the Appellate Body in that case was called on to examine the last sentence of footnote 1. Their findings, therefore, provide no guidance as to whether the last sentence of footnote 1 extends beyond the word "Member" in Article 2.1.

7.157 The last sentence of footnote 1 begins with the phrase "[n]othing in this Agreement". The ordinary meaning of this phrase indicates that the last sentence of footnote 1 concerns the Safeguards Agreement as a whole, and not only Article 2.1 thereof. Indeed, a finding that the last sentence only applies in respect of the word "Member" in Article 2.1, rather than the Agreement as a whole, would render the phrase "[n]othing in this Agreement" meaningless, contrary to the principle of effective treaty interpretation.<sup>140</sup> Such a finding would essentially replace the phrase "[n]othing in this Agreement" with the phrase "[n]othing in the word Member". Accordingly, we find that the last sentence of footnote 1 means that nothing in any provision of the Safeguards Agreement, including Article 2.2 thereof, "prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994".

7.158 We have already found that Article XXIV can provide a defence against claims brought under Article XIX. In effect, this finding touches on "the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994", since it means that Article XXIV may in certain circumstances prevail over Article XIX. We have also found that, consistent with the last sentence of footnote 1 of the Safeguards Agreement, Article 2.2 does not prejudice the interpretation of the relationship between Articles XIX and XXIV:8. Taken together, these findings lead us to conclude that Article XXIV can provide a defence against claims of discrimination brought under Article 2.2. Any other conclusion would mean that 2.2 disturbs the relationship we have identified between Articles XIX and XXIV, as it would effectively mean that an Article XXIV defence against a claim of discrimination resulting from the exclusion by a Member of its free-trade area partners from its safeguard measure would no longer be available, as a result of Article 2.2. As noted above, the last sentence of footnote 1 excludes the possibility of Article 2.2 having this effect. Thus, just as we found that the United States is entitled to rely on Article XXIV as a defence against Korea's claims under *inter alia* Article XIX, so too the United States is entitled to rely on Article XXIV as a defence against Korea's claim under Article 2.2 of the Safeguards Agreement.<sup>141</sup>

7.159 Korea also asserts that Article XXIV cannot operate as a defence to a claim under Article 2.2 as a result of the conflict provision contained in the general interpretative note to Annex 1A:

In the event of a conflict between the provisions of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization ..., the provision of the other agreement shall prevail to the extent of the conflict.

7.160 To the extent that Article 2.2 could be perceived to be in conflict with the availability of an Article XXIV defence against claims of non-discrimination, that conflict is resolved through the last

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<sup>139</sup> *Argentina – Footwear Safeguard* at para. 8.84.

<sup>140</sup> As the Appellate Body found in *Argentina – Footwear Safeguard*, "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." (footnote 76)

<sup>141</sup> In making this finding, we express no view as to whether Article XXIV is available as a defence to claims under Multilateral Agreements on Trade in Goods more generally.

sentence of footnote 1 of the Safeguards Agreement (whereby Article 2.2 shall not disturb the fact that Article XXIV may in certain circumstances provide a defence to claims under Article XIX).

7.161 Korea also argues that the exclusion of imports from Canada and Mexico from the line pipe measure has made Korean line pipe less competitive with imports from Canada and Mexico in the United States. This may be so. However, this is the very essence of a free-trade area. By virtue of Article XXIV:8(b), a free-trade area will always result in positive discrimination in favour of the members of that free-trade area in respect of "duties and other restrictive regulations of commerce ... on substantially all the trade" between them. Other WTO Members are taken to accept such positive discrimination, provided all the relevant conditions of Article XXIV are met.

7.162 Korea has further argued that "[t]he parallelism between Articles 2.1 and 2.2 of the Agreement on Safeguards also requires that the measure be applied to all imports. ... Therefore, since all imports must be included in the Article 2.1 determination, parallelism requires that the measure be applied to all imports".<sup>142</sup> In light of our findings above regarding the ability of the United States to exclude imports from Canada and Mexico from the line pipe measure, we are unable to accept Korea's argument that, on the basis of parallelism, Article 2.1 requires all imports to be included in the determination, and that any resultant measure must also cover all imports. Our understanding of the principle of parallelism is that if the United States were, on the basis of Article XXIV, to exclude imports from Canada and/or Mexico from the scope of its safeguard measures, the United States must establish explicitly that imports from sources other than Canada and/or Mexico satisfied the Article 2.1 conditions for the application of a safeguard measure.<sup>143</sup> In other words, while there must be a parallelism between the scope of the investigation and the scope of any resultant measure, the principle of parallelism does not determine the scope of the investigation.

(iii) *Conclusion*

7.163 To conclude, we find that the United States is entitled to rely on Article XXIV as a defence to Korea's claims under Articles I, XIII and XIX of GATT 1994, and Article 2.2 of the Safeguards Agreement, regarding the exclusion of imports from Canada and Mexico from the scope of the line pipe measure.

## **6. The exclusion of Canada and Mexico - Parallelism**

7.164 Korea's Request for Establishment of a panel includes the following claim:

7. The United States also violated Articles 2 and 4 of the Agreement on Safeguards by including Mexico and Canada in the analysis of injurious imports but by excluding Mexico and Canada from the application of the safeguard measure.

7.165 Since it did not appear to us that Korea had pursued Claim 7 in its written or oral submissions to the Panel, we asked Korea at the second substantive meeting to clarify the status of this claim. In particular, we asked "has Korea dropped this claim or does this claim stand"? Korea replied:

[r]eturning to whether Korea is standing by paragraph 7, yes, we certainly are and if we read Korea's first submission we were making arguments then in that connection, in the sense that the US measure is in violation of MFN as well as in violation of parallelism.

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<sup>142</sup> Korea's first written submission, paras 172 and 173.

<sup>143</sup> See *US - Wheat Gluten (AB)* at para. 98.

7.166 The Panel then asked Korea to specify where in its submission Korea had pursued Claim 7. Korea referred the Panel<sup>144</sup> to paragraphs 172-173 of its first written submission, and paragraph 61 of its second written submission. We consider it useful to set these paragraphs out in full:

172. The parallelism between Articles 2.1 and 2.2 of the Agreement on Safeguards also requires that the measure be applied to all imports. The ITC's footnoted analysis of imports, separating out the imports from Canada and Mexico, has no legal significance. The United States could only impose a safeguard remedy on the basis of a serious injury analysis which was based on all imports. Articles 2 and 4 of the Agreement on Safeguards as well as Article XIX of the GATT 1994 speak only in terms of "imports." There is no basis on which certain imports can be excluded. Therefore, all imports must be examined.

173. Any other interpretation of Article 2 would not comport with its plain meaning. Further, it would lead to a "selective safeguard" regime in which countries could arbitrarily pick and choose which countries to exclude from the serious injury determination in order to exclude those countries from the measure. This is precisely what has happened here. Therefore, since all imports must be included in the Article 2.1 determination, parallelism requires that the measure be applied to all imports.

61. In conclusion, the United States must comply with Article 2.2 of the SA and apply the measure to all sources or remove the measure. As Korea previously argued, this result (that the measure should be applied to NAFTA Members) also is confirmed by the "parallelism" analysis. That being said, Korea believes that the obligation of Article 2.2 is clear on its face. No additional support or alternative basis is necessary.

7.167 The United States argued at the second substantive meeting that "Korea has not prosecuted that claim, and has not raised any real arguments about it". The United States asserted in particular that Korea had failed to address note 168 on pages I-26/27 of the ITC determination during the course of these proceedings.

7.168 We have significant reservations as to whether the abovementioned extracts from Korea's submissions support Korea's claim that "[t]he United States also violated Articles 2 and 4 of the Agreement on Safeguards by including Mexico and Canada in the analysis of injurious imports but by excluding Mexico and Canada from the application of the safeguard measure."<sup>145</sup> We consider that these arguments were more likely intended to support Korea's claim that "[t]he United States violated Article 2.2 of the Agreement on Safeguards and Articles I, XIII and XIX of GATT 1994, by not applying the safeguard measure on an MFN basis to all line pipes being imported, including Mexico and Canada".<sup>146</sup> Nevertheless, it could be argued that there is probably sufficient detail in Claim 7 for us to understand it, and rule on it, even in the absence of additional argumentation by Korea during the course of these proceedings.

7.169 During the course of these proceedings, the United States referred the Panel to note 168, on pages I-26/27 of the ITC determination. This note provides:

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<sup>144</sup> See Note to the Panel, attached to Korea's replies to questions from the Panel at the second substantive meeting.

<sup>145</sup> Korea only refers to Articles 2 and 4 jointly to argue that a safeguards investigation should cover all imports. As noted above in para. 7.162, we do not understand the principle of parallelism to require the inclusion of all imports in the scope of the investigation.

<sup>146</sup> Hence our treatment of this argument in the preceding section (at para. 7.162).

We note that we would have reached the same result had we excluded imports from Canada and Mexico from our analysis. Imports from non-NAFTA sources increased significantly over the period of investigation, in absolute terms and as a per centage of domestic production. Non-NAFTA imports fell from \*\*\* tons in 1994 to \*\*\* tons in 1996, but then rose sharply to \*\*\* tons in 1997 and \*\*\* tons in 1998. While non-NAFTA imports fell from \*\*\* tons in interim 1998 to \*\*\* tons in interim 1999, they remained at a very high level in interim 1999, exceeding in just 6 months the level of *full year* 1995 and 1996 imports. These imports also increased significantly in terms of market share at the end of the period of investigation, rising from \*\*\* per cent in 1996 to \*\*\* per cent in 1998, and from \*\*\* per cent in interim 1998 to \*\*\* per cent in interim 1999. Moreover, the non-NAFTA imports were among the lowest-priced imports. Except for 1994, the average unit value of imports from Canada exceeded the average import unit value throughout the period of investigation, and the volume of imports was relatively small. The average unit value of imports from Mexico exceeded the average for all imports in 1998 and interim 1999, the period in which the serious injury occurred, and the volume of imports from Mexico declined during this period. Moreover, in the 244 possible product-specific price comparisons, non-NAFTA imports undersold domestic line pipe in 194 instances (about 80 per cent), and Korean product accounted for by far the largest number of instances of underselling (95 of the 194). Data are based on those in Table C-1 adjusted to exclude certain imports of Arctic-grade and alloy line pipe.

7.170 Korea's only argument regarding note 168 is that it "has no legal significance".<sup>147</sup> Korea did not explain why, in its view, note 168 has no legal significance. For our part, we fail to see why note 168 has no legal significance; it clearly forms part of the ITC's published determination, and contains findings by the ITC. In particular, note 168 contains a finding by the ITC that imports from non-NAFTA sources increased significantly over the period of investigation, in absolute terms and as a per centage of domestic production. Note 168 also contains the basis for a finding that non-NAFTA caused serious injury to the relevant domestic industry.

7.171 In *United States – Wheat Gluten*, the Appellate Body upheld the panel's finding that the United States had violated Articles 2.1 and 4.2 because it had excluded imports from Canada from its safeguard measure, without "establish[ing] explicitly that imports from these *same* sources, excluding Canada, satisfied the conditions for the application of a safeguard measure".<sup>148</sup> Accordingly, we would only be in a position to uphold Korea's Claim 7 if it had established a prima facie case that the United States had excluded imports from Canada and Mexico from the line pipe measure, without establishing explicitly that imports from sources other than Canada and Mexico satisfied the conditions for the application of a safeguard measure. To do so, at a minimum Korea would have had to specifically address, and rebut, the contents of note 168. We recall that Korea has made no attempt to do this. Instead, Korea limited itself to arguing that note 168 has no legal significance, without making any attempt to substantiate that argument. On balance, therefore, and particularly in light of the contents of note 168, we are unable to find that Korea has established a prima facie case that the United States "also violated Articles 2 and 4 of the Agreement on Safeguards by including Mexico and Canada in the analysis of injurious imports but by excluding Mexico and Canada from the application of the safeguard measure." We therefore reject Korea's Claim 7.<sup>149</sup>

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<sup>147</sup> Korea's first written submission at para. 172.

<sup>148</sup> *US – Wheat Gluten (AB)* at para. 98, emphasis in original.

<sup>149</sup> In doing so, we do not find that note 168 is sufficient for the purposes of Articles 2.1 and 4.1. We merely find that Korea has failed to establish a prima facie case that the United States violated those provisions.

## 7. The exclusion of developing countries under Article 9 of the Safeguards Agreement

7.172 Korea claims that the United States violated Article 9.1 because it did not determine which developing countries were to be exempted from the measure. Rather, the United States treated developing countries, regardless of their prior import levels, as equal to all suppliers, and assigned them each the same 9,000 short tons quota applied for other suppliers.

7.173 The United States argues that the 9000 short ton exemption from the supplemental duty satisfied the requirements of Article 9.1 to exclude developing country Members from application of safeguard measures. It also asserts that the 9000 short ton exemption from the supplemental duty would have represented 2.7 per cent of total imports in 1998, before application of the line pipe safeguard. As the United States expected the measure to result in a decrease in the total volume of imports, any country reaching the 9000 ton limit of the exemption would account for more than three per cent of total imports. Thus, a developing country would only become subject to the 19 per cent tariff in conditions under which it was permissible under Article 9.1 for the United States to impose such relief.

7.174 As a starting-point of our analysis we note that the text of Article 9.1 provides:

Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.<sup>2</sup>

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<sup>2</sup> A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards.

7.175 Article 9.1 is clear in its mandate that a safeguard measure "**shall not be applied**" to imports of developing countries accounting for not more than 3 per cent of total imports. Thus the first question for us to resolve is whether the line pipe measure "applies" to developing countries within the factual circumstances described in Article 9.1. In our view, if a measure is not to apply to certain countries, it is reasonable to expect an express exclusion of those countries from the measure.<sup>150</sup>

7.176 In order to determine whether the line pipe measure contains an express exclusion of developing countries which comply with the conditions of Article 9.1, the Panel has carefully examined the documents whereby the measure was imposed and notified to the WTO. The first document examined was Presidential Proclamation 7274 of 18 February 2000.<sup>151</sup> In this document, there is no specific mention of compliance with the provisions of Article 9.1 concerning developing countries. Neither could we find a list of developing countries to be excluded from application of the measure for reason of their imports not exceeding 3 per cent of total imports of the subject product. This lack of a specific exclusion from the measure of certain developing countries under Article 9.1

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<sup>150</sup> We find support for our view in the Committee on Safeguards' format for notifications under Article 9, footnote 2 on the non-application of a safeguard measure to developing countries under Article 9.1 (G/SG/1). While we note that the notification formats are without prejudice to the interpretation of the relevant provisions in the Agreement on Safeguards by the competent bodies (*see*, G/SG/1 at p. 1), we consider that the notification format in this case provides guidance as to what is expected from Members in fulfilling their obligations under Article 9.1, footnote 2. The format requires Members to "specify the developing countries to which the measure is not applied under Article 9.1 of the Agreement on Safeguards, and the import shares of these countries individually and collectively". In our view "the developing countries to which the measure is not applied under Article 9.1" cannot be "specif[ied]" if they are not specifically and expressly identified.

<sup>151</sup> Presidential Proclamation No. 7274, To Facilitate Positive Adjustment to Competition From Imports of Certain Circular Carbon Welded Steel Line Pipe (18 February 2000), 65 Fed Reg. 9193 ("Presidential Proclamation").

contrasts with the exclusion of line pipe imports from Mexico and Canada: "Such imported line pipe that is the product of Mexico or Canada shall not be subject to the increase in the duty...".<sup>152</sup>

7.177 Two other documents pertaining to the application of the measure also seem to indicate that it applies to all developing countries regardless of whether they fulfil the conditions of Article 9.1. The President's Memorandum to the Secretary of the Treasury and the United States Trade Representative of 18 February 2000<sup>153</sup> instructs the Secretary of the Treasury "to publish or otherwise make available, on a weekly basis, import statistics that will enable importers to identify when imports from each supplying country approach and then exceed the 9,000 short ton threshold".<sup>154</sup> There is no distinction made in those instructions between those developing countries to which the measure would not apply by virtue of Article 9.1 and those which exceed the Article 9.1 threshold. The Treasury Memo makes it clear that in implementing the measure all supplying countries<sup>155</sup> will receive the same treatment regardless of whether the supplier is a developed country, a developing country or a developing country which fulfils the conditions of Article 9.1.

7.178 The Memorandum from the Customs Service Director of Trade Programs to all Port Directors<sup>156</sup> also supports the view that no allowance was made in the application of the measure for countries under the conditions outlined in Article 9.1. In the Customs Memo the Director of Trade Programs notifies all Port Directors of the adoption of a safeguard measure on imports of line pipe and instructs that "the following tariff rate quota limits ... will apply to certain line pipe from the following countries". The Customs Memo then proceeds to list all supplier countries of line pipe to the United States, among them several WTO developing country Members.<sup>157</sup> Again, the Customs Memo would indicate that the line pipe measure applies to all countries including those which, by virtue of fulfilling the conditions of Article 9.1, should be excluded from the measure.

7.179 Turning to the US notification pursuant to Article 9, footnote 2,<sup>158</sup> we observe that it too does not "specify" the developing countries to which the measure is not applied.

7.180 After a careful analysis of the Presidential Proclamation, the Treasury Memo, the Customs Memo and the WTO notification, we find that these documents do not contain any express exclusion of developing countries below the 3 per cent of imports individual or 9 per cent cumulative threshold for application of a measure to developing countries prescribed in Article 9.1. In the absence of any other relevant documentation, we therefore conclude that the line pipe measure also applies to those developing countries. Given the specific language used in Article 9.1, which mandates that a measure "shall not be applied" to developing countries that fulfil the conditions of that provision, we find that the United States has not complied with its obligations under Article 9.1.

7.181 We also note the US argument that "a developing country would only fall subject to the 19 per cent tariff in conditions under which it was permissible under Article 9.1 for the United States to impose such relief". In making this argument, the United States relies on its expectations that the measure will result in a decrease in the total volume of imports, and that any country reaching the

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<sup>152</sup> Id. at 9194.

<sup>153</sup> Presidential Documents, *Action Under Section 203 of the Trade Act of 1974 Concerning Line Pipe*, Memorandum for the Secretary of the Treasury and the United States Trade Representative, 65 Fed. Reg. 9197 (23 February 2000) ("Treasury Memo").

<sup>154</sup> We note that with respect to imports from Canada and Mexico the Secretary of the Treasury is only instructed to monitor these imports and report quarterly to the USTR on their relevant volumes.

<sup>155</sup> Except Mexico and Canada.

<sup>156</sup> Memorandum From US Customs Service Quota Headquarters Director, Trade Programs, to All Port Directors, Regarding QBT-2000-508: Presidential Proclamation 7274--Tariff-Rate Quota on Certain Circular Welded Carbon-Quality Line Pipe (29 February 2000) ("Customs Memo").

<sup>157</sup> The developing WTO Members included in the list are: Bangladesh, Brazil, Colombia, Egypt, India, Indonesia, Korea, South Africa, Turkey and Venezuela.

<sup>158</sup> G/SG/N/10/USA/5.

9000 ton limit of the exemption would account for more than three per cent of total imports. We note that the measure imposed does not set an overall limit on the quantity of imports of line pipe, and if importers are willing to pay the 19 per cent duty for over quota imports there is no restriction on the total volume of imports which may enter from any particular country. Moreover, given that Mexico and Canada are completely excluded from the measure there is no impediment for those countries' exports to continue their increase.<sup>159</sup> Given these conditions it is possible to envisage a scenario where total imports grow to a level where imports from developing countries above the 9,000 short tons exemption constitute less than 3 per cent of the total imports. In this situation a portion of the imports from a developing country would be subject to the 19 per cent tariff surcharge, even though its share of total imports did not exceed 3 per cent. The United States argues that "historical import patterns demonstrate the unlikelihood that any developing country Member would export more than 9,000 short tons of line pipe to the United States in a single year and yet remain below a three per cent share of total exports". Although we agree with the United States that the situation described may be unlikely to materialize, the Appellate Body has repeatedly stated that a trade effects test is irrelevant if the measure has been found to violate the provisions of the WTO.<sup>160</sup> We would also note that there is a clear difference between an obligation that a measure not **affect** imports from certain developing countries and an obligation that a measure not be **applied** to imports from certain developing countries. Article 9.1 contains an obligation not to apply a measure, and we find that the line pipe measure "applies" to all developing countries in principle, even though it may not have any impact in practice. Therefore, for the reasons described above we find that the United States has not complied with its obligations under Article 9.1 of the Agreement on Safeguards.

### C. CLAIMS RELATING TO THE INVESTIGATION

7.182 Korea makes a number of claims relating to the investigation leading up to the imposition of the line pipe measure. These claims question the ITC's determination of increased imports, serious injury, threat of serious injury and causation. Korea also claims that the United States failed to demonstrate the existence of unforeseen developments and the need for emergency action. In addition Korea makes two claims on procedural issues regarding the opportunity for adequate consultations and compensation. We shall begin our examination of Korea's claims relating to the investigation by addressing Korea's claim regarding the ITC's finding of increased imports.

#### 1. Increased imports

##### (a) Arguments by Korea

7.183 Korea claims that the ITC erred in finding any increase in imports within the meaning of Article XIX and/or Article 2, either in absolute terms, or relative to domestic production.

7.184 Korea asserts that the ITC found an increase in imports on the basis of the trend in imports from 1994 to 1999. Korea asserts that the ITC violated Article XIX:1(a) and Article 2.1 by failing to base its December 1999 determination on "the very recent past". In support, Korea cites the Appellate Body in *Argentina - Footwear Safeguard*. In that case, the Appellate Body disagreed with the panel's finding that, for the purpose of determining whether there was a requisite increase in imports, an investigating authority could reasonably examine the trend in imports over a five-year historical period. In particular, the Appellate Body concluded that:

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<sup>159</sup> Although Canada and Mexico have been excluded from the measure, the language of Article 9.1 is clear that in calculating the shares of developing countries this calculation should be done on the basis of "imports of the product concerned" and "total imports of the product concerned". Therefore, in our view when calculating the developing country share of imports in this particular case imports from Mexico and Canada must also be included as part of the total imports.

<sup>160</sup> See, *Japan - Taxes on Alcoholic Beverages*, report of the Appellate Body, WT/DS8/AB/R page 16, adopted 1 November 1996; *Korea - Taxes on Alcoholic Beverages*, report of the Appellate Body, WT/DS75/AB/R, paras. 128 - 133, adopted 17 February 1999.

the use of the present tense of the verb phrase 'is being imported' in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years - or, for that matter, during any other period of several years. In our view, the phrase 'is being imported' implies that the increase in imports must have been sudden and recent.<sup>161</sup>

In a footnote, the Appellate Body also disagreed with the panel's finding that, whatever the starting point of the investigation period, "it has to *end* no later than the recent past"<sup>162</sup> (emphasis in original). According to the Appellate Body, "the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the very recent past". Korea also argues that a five-year period of investigation is in conflict with the decision of the Appellate Body in *Argentina – Footwear Safeguard* and does not meet the requirements of Article 2.1 or Article XIX:1(a) of GATT 1994.

7.185 Korea notes that the ITC found that "[a]lthough imports declined from \*\*\* tons in interim (January-June) 1998 to \*\*\* tons in interim 1999, (footnote omitted) they remained at a very high level in interim 1999, exceeding in just 6 months the level of *full* year 1995 and 1996 imports" (emphasis in original). On the basis of the indexed import data submitted by the United States to the Panel on 16 February 2001, Korea asserts that there was actually a decline in the absolute volume of imports in the recent past (as at the time of the ITC determination). According to Korea, the indexed data demonstrates that there was a steady, sustained pattern of decline in the absolute volume of imports starting in the second half of 1998, and therefore in the four quarters preceding the ITC determination. Korea asserts that the ITC could not properly have found a sudden, sharp, and recent increase in the absolute volume of imports, as there was no increase at all.<sup>163</sup> Korea asserts that the ITC failed to take proper note of the lengthy period over which imports had actually declined, because it only compared interim periods covering the first half of 1998 and 1999 respectively, without comparing the volume of imports in the second half of 1998 to the volume of imports in the first half of 1999.

7.186 Korea notes that the ITC also found that relative imports (the ratio of imports to domestic production) increased during the period of investigation:

[the ratio] was at its highest level in January-June 1999. Like actual imports, the ratio declined from 1994 to 1995 and then rose each year thereafter. The ratio was \*\*\* per cent in 1994 and fell to \*\*\* per cent in 1995; it then increased to \*\*\* per cent in 1996 and \*\*\* per cent in 1997, and then nearly doubled to \*\*\* per cent in 1998. It rose to its highest level, \*\*\* per cent, in interim 1999 (as compared to \*\*\* per cent in interim 1998). (footnotes omitted)

7.187 Korea asserts that the ITC erroneously compared interim 1998 with interim 1999, without taking into account a decline in relative imports in the recent past, *i.e.*, between the second half of 1998 and the first half of 1999. Korea's argument is based on the dissenting view of Commissioner Crawford, who stated that the ratio declined between the second half of 1998 and the first half of 1999. Korea points out that the ITC was inconsistent in its analysis of the increased imports as there were instances when analysing serious injury where the ITC compared the second half of 1998 with the first half of 1999.

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<sup>161</sup> *Argentina – Footwear Safeguard (AB)* at para. 130.

<sup>162</sup> *Argentina – Footwear Safeguard (AB)* at footnote 130.

<sup>163</sup> See Korea's first written submission at para. 205.

## (b) Arguments by the United States

7.188 The United States asserts that there was a recent, sudden, sharp, and significant increase in imports, both in absolute and relative terms, so that the ITC's findings are consistent with the decisions of the panel and Appellate Body in *Argentina - Footwear Safeguard*.

7.189 The United States resists Korea's attempt to compare imports in interim 1999 with imports in the second half of 1998. The United States explains that the ITC, consistent with its longstanding practice in safeguards investigations (as well as antidumping and countervailing duty investigations), collected import and domestic industry data enabling it to make year-to-year comparisons. The ITC customarily gathers and evaluates import data on a calendar year basis with extra data on interim periods, and not on the basis of arbitrarily defined snapshots of time. That the ITC followed its long-standing approach in examining increased imports demonstrates neutrality and lack of bias in its analysis. The use of interim-period-to-interim-period comparisons for 1998 and 1999 was consistent with its long-standing practice and, unlike Korea's proposed alternative methodology, not chosen to achieve a particular result. Korea's method of breaking out annual import data in such a way as to capture a brief and slight decline in imports is as arbitrary and results-oriented as the end-point-to-end-point comparison that the Panel found lacking in *Argentina-Footwear Safeguard*. The United States argues that a comparison of "mismatched" interim periods could create distortions because of seasonal changes in market conditions.

7.190 With regard to the absolute increase in imports, the United States asserts that there was a "sudden and sharp increase" in the "recent past", i.e., in 1998. While the United States acknowledges a "modest" decline in absolute imports from interim 1998 to interim 1999, it argues that imports still remained at high levels (interim 1999 imports higher than full year 1995 or 1996), such that the decline between interim 1998 and interim 1999 did not negate the sudden and sharp increase that immediately preceded it. The United States also rejects Korea's argument that absolute imports declined continuously for the full 12 months prior to the ITC determination; monthly data show that imports actually increased toward the end of interim 1999 (in May, June and July).

7.191 In any event, the United States notes that a safeguard measure may be imposed on the basis of an increase in imports relative to domestic production, even if there is no increase in absolute terms. The United States asserts that relative imports nearly doubled in 1998, and continued to increase in interim 1999.

## (c) Evaluation by the Panel

7.192 Three main questions need to be addressed in resolving this matter. The first question pertains to whether the ITC used an appropriate methodology in making its finding of increased imports. More specifically the appropriateness of the methodology hinges on the question of whether the ITC was entitled to compare interim 1998 with interim 1999 in performing the analysis or whether it was, in addition, required to compare the second half of 1998 with interim 1999. The second question is whether the ITC could properly conclude that there was an increase in imports despite the fact that imports in absolute terms declined at the end of the investigation period. The third question is whether the ITC could properly conclude that there was a relative increase in imports.<sup>164</sup>

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<sup>164</sup> Following a careful review of Korea's submissions, we do not understand Korea to argue that, on the basis of the methodology applied by the ITC (*i.e.* a comparison of first semester 1998 with first semester 1999), the ITC could not properly have found that the increase in the imports was "sudden enough [and] sharp enough" for the purposes of Article 2.1 or Article XIX. Rather, we understand Korea to argue that, on the basis of a comparison between the level of imports for the second half of 1998 and the first half of 1999, there was no increase in imports either in absolute or relative terms, but instead a decline in both instances. In its first submission Korea states: "In this case, imports did not increase suddenly and sharply during the recent past. To

7.193 We shall conduct the examination described above in light of the provisions in Article 2.1 and Article XIX:1(a). In *Argentina – Footwear Safeguard*, the Appellate Body made the following findings regarding those provisions:

[T]here 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".<sup>165</sup> (emphasis in the original)

(i) *The methodology used by the United States in its analysis of increased imports*

7.194 Turning first to the appropriateness of the methodology used by the ITC in evaluating the increase in the imports, we note that the *US - Wheat Gluten* panel stated that the standard of review for an increased imports determinations is:

[W]hether the published report on the investigation contains an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports.<sup>166</sup>

We concur with the standard of review established by that panel. However, the standard of review was formulated for the purpose of examining the factual, rather than the methodological, issues in an increased imports determination. Since the question immediately before us concerns the methodology chosen by the ITC, it is necessary to expand on the standard formulated by the panel in *US – Wheat Gluten*, in order to identify the appropriate standard for reviewing the methodological issue before us. Therefore, in determining whether the US methodology for the analysis of the existence of increased imports complied with its obligations under the Agreement on Safeguards and the GATT 1994, our review will consist of an objective assessment, pursuant to Article 11 of the DSU, of whether the methodology selected is unbiased and objective, such that its application permits an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports.

7.195 The ITC describes the methodology applied to evaluate the increased imports in the line pipe investigation in the following terms:

The Commission considers imports from all sources in determining whether imports have increased over the most recent 5 full years, and partial data for the most recent current year if available. There is no minimum amount by which imports must have increased. A simple increase is sufficient.<sup>167 168</sup>

7.196 Korea argues that the ITC's period of investigation of five years is in conflict with the requirements of Article 2.1 and Article XIX:1(a). We note that the Agreement contains no requirements as to how long the period of investigation in a safeguards investigation should be, nor

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the contrary, imports declined." Thus, Korea's emphasis is on whether imports decreased or increased, not on whether the increase was sudden and sharp.

<sup>165</sup> *Argentina – Footwear Safeguard (AB)* at para. 131.

<sup>166</sup> *US – Wheat Gluten* at para. 8.5.

<sup>167</sup> ITC Report, p. I-14.

<sup>168</sup> We are not convinced that the standard applied by the ITC whereby "[a] simple increase [in imports] is sufficient", complies with the requirements of the Agreement. However, we do not have to decide this issue in this case as Korea provides no argumentation on the question of whether the increase in imports was sudden and sharp enough for purposes of Article 2.1 and Article XIX. (see footnote 164 above).

how the period should be broken down for purposes of analysis. Thus, the period of investigation and its breakdown is left to the discretion of the investigating authorities.

7.197 In the case before us, the ITC, consistent with its past practice, examined a five-year period covering 1994-1998, and also collected data for the first semester of 1999. In order to evaluate the existence of increased imports, the ITC compared the figures for each full year with the preceding year, and the figures for interim 1999 with those of the first semester of 1998.

7.198 Regarding the length of the period of investigation, Korea argues that the period selected by the ITC did not meet the requirements of Article 2.1 and/or Article XIX:1(a). Korea relies on the following findings of the Appellate Body in *Argentina – Footwear Safeguards*:

[W]e do not agree with the Panel that it is reasonable to examine the trend in imports over a five-year historical period. In our view, the use of the present tense of the verb phrase "is being imported" in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years – or, for that matter, during any other period of several years.<sup>130</sup>

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<sup>130</sup>The Panel, in footnote 530 to para. 8.166 of the Panel Report, recognizes that the present tense is being used, which it states "would seem to indicate that, whatever the starting-point of an investigation period, it has to *end* no later than the very recent past." (emphasis added) Here, we disagree with the Panel. We believe that the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past.

7.199 In the case before us the period selected by the ITC was five years and six months, which is a period similar in length to the one used by the Argentine investigating authority in *Argentina – Footwear Safeguards*. However, we note that the Appellate Body, in the findings relied upon by Korea to argue the question of the length of the period of investigation, emphasized not the length of the period *per se*, but that there should be a focus on recent imports and not simply trends over the period examined. In the case of the line pipe investigation the ITC did not merely compare end points, or look at the overall trend over the period of investigation, (as Argentina had done in the investigation at issue in *Argentina - Footwear Safeguard*). It analysed the data regarding imports on a year-to-year basis for the 5 complete years, and also considered whether there was an increase in interim 1999 as compared with interim 1998.<sup>169</sup> In the absence of any specific obligation in the Agreement regarding the period of investigation, we are not prepared to make a ruling of inconsistency based merely on the length of the period of investigation actually used. Of course, the analysis and determination based on the information for that period of investigation may be inconsistent with the requirements of the Agreement, but for reasons other than or additional to the length of the period of investigation *per se*.

7.200 The Appellate Body has recently stated, regarding its findings in *Argentina – Footwear Safeguard* cited above, that:

We note that, at footnote 130 of our Report in *Argentina – Footwear Safeguard*, [ ], we said that "the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past." In this Report, we comment on the relative importance, within the period of investigation, of the data from the end of the period, as compared with the data from the beginning of the period. The period of investigation must, of course, be sufficiently long to allow

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<sup>169</sup> We will deal with the appropriateness of this "matched" semester analysis *infra*.

appropriate conclusions to be drawn regarding the state of the domestic industry.<sup>170</sup>  
(emphasis added)

We concur with the Appellate Body's finding regarding the length of the period of investigation. Although this finding refers to the period of investigation for a serious injury determination, it appears that the Appellate Body does not distinguish between the factors governing the appropriate length of the period of investigation with respect to increased imports and the length of the period of investigation for the serious injury factors. Our conclusion is based on the fact that, although the quote pertains to "the state of the domestic industry", it refers to a footnote in the *Argentina – Footwear Safeguard* report that pertains to the period of investigation for the increased imports.

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

7.202 Regarding the breakdown of the period of investigation for purposes of analysing trends in the level of imports, Korea questions the appropriateness of comparing the first semester of 1999 to the first semester of 1998, rather than to the second semester of 1998. The United States argues that the ITC was not required to compare the second half of 1998 with the first half of 1999, and it could not do so as it did not collect data for the second half of 1998 in isolation (it collected data for 1998 as a whole). Korea responds that data for the second half of 1998 could have been easily derived from subtracting the figures for the first half of 1998 from the yearly total for 1998. Korea further argues that not only could the ITC have easily done a second half of 1998 to first half of 1999 comparison, but that it did so for the purpose of its injury analysis.<sup>171</sup> According to Korea this inconsistency in the analysis of data for serious injury/threat thereof and increased imports violates the requirements of Articles 2.1 and 4.2(b).

7.203 We recall that there are no provisions in the Safeguards Agreement which give any guidance on how the period of investigation should be broken down for purpose of analysis by the investigating authorities. In the case before us the period selected by the ITC would have allowed it to find that there was a decrease in the imports if the facts in the case supported such a finding. We do not believe that the methodology chosen by the ITC for the purposes of analysing whether or not there was an increase in imports was inherently biased or would have precluded it from performing a reasonable evaluation of the facts in the investigation. The United States asserts that the ITC acted according to its past practice, and that this shows that the methodology was objective and unbiased. We agree with the United States. The United States responds that a comparison of matching interim periods, in this case January-June, of different years, is the standard ITC practice.<sup>172</sup> According to the United States this standard practice helps eliminate the possible effect of any seasonal or cyclical distortions which may affect the comparison. Although the ITC concedes that line pipe is not a seasonal product, we are of the view that the methodology applied in the comparison was not chosen in order to manipulate the data and show a particular result. Nor is there any evidence of manipulation or bias resulting from an alleged inconsistency with the ITC's serious injury analysis.

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<sup>170</sup> *US-Lamb Meat (AB)* at footnote 88.

<sup>171</sup> In support of their argument Korea cites certain paragraphs in pages I-19, I-22 and I-28 of the serious injury and causation analysis sections of the ITC Report. Korea also refers to pages I-38-41, I-43-44, and I-46 in the separate views on injury by Commissioners Bragg and Askey section of the ITC Report.

<sup>172</sup> The fact that the ITC conformed to its previous practice does not necessarily mean that the methodology used, or that such past practice, is in conformity with the Agreement. Nevertheless, it has not been established that the usual ITC practice regarding the period of investigation was not appropriate for the line pipe investigation.

Although the ITC did make some observations that include or make reference to the second half of 1998 in its determination on serious injury or threat of serious injury, we do not consider that the ITC was comparing the situation in the first half of 1999 to that in the second half of 1998. The ITC was simply describing factual circumstances that existed in the second half of 1998 and the first half of 1999. The ITC was not drawing conclusions based on a comparison of those periods.

7.204 Korea further questions whether an analysis that compares interim 1999 with the first half of 1998, as opposed to the second half of 1998, permits a finding that there was a recent increase in imports, as it considers the "recent period" to be the last one-year period, with particular emphasis on the last six months. In this regard, we note that the Appellate Body in *Argentina-Footwear Safeguard* found that "the phrase 'is being imported' implies that the increase in imports must have been sudden and recent". According to Korea, the phrase "is being imported ... in such increased quantities" refers to "the period immediately preceding the authority's decision".<sup>173</sup> The word "recent" – which was used by the Appellate Body in interpreting the phrase "is being imported" – is defined as "not long past; that happened, appeared, began to exist, or existed lately".<sup>174</sup> In other words, the word "recent" implies some form of retrospective analysis. It does not imply an analysis of the conditions immediately preceding the authority's decision. Nor does it imply that the analysis must focus exclusively on conditions at the very end of the period of investigation. We consider that an analysis that compares the first semester of 1998 with the first semester of 1999 is not inconsistent with the requirement that the increase in imports be "recent".

7.205 Based on the above considerations, we uphold the methodology applied by the ITC as being unbiased and objective, such that its application permitted an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports. Having upheld the methodology applied by the ITC for determining the existence of increased imports, we shall review the ITC's findings on absolute and relative import increase in light of that methodology.

(ii) *Absolute imports*

7.206 With respect to absolute imports, the ITC found that when comparing import volumes on a yearly basis, imports rose steadily from 1996 to 1998. When the ITC compared import volumes for the first semester of 1998 and first semester of 1999, it found that imports had declined. Although there was a decline in imports for interim 1999 when compared to interim 1998, the ITC still found that there were increased imports, on the basis that imports remained at "a very high level".<sup>175</sup> Korea claims that given that absolute imports declined as of first semester of 1998 there was no recent increase in the volume of imports.

7.207 We have already found that the methodology applied by the ITC was appropriate. However, there remains the question of whether the finding of increased imports can be maintained in light of the decline in absolute imports from the first semester of 1998 to the first semester of 1999. In order to answer this question we recall our discussion regarding the meaning of "recent", and our finding that "recent" does not imply an analysis of the present. We are also of the 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. We find support for our view in Article 2.1, which provides "that such product is being imported ... in such increased quantities". The Agreement uses the adjective "increas**d**", as opposed to "increas**ing**". The use of the word "increas**d**" indicates to us that there is no need for a determination that imports are presently still increas**ing**. Rather, imports could have "increas**d**" in the recent past, but not necessarily be increasing up to the end of the period of investigation or

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<sup>173</sup> Korea's reply to Question 1 from the Panel at the first substantive meeting (see Annex B-1).

<sup>174</sup> *The Compact Edition of the Oxford English Dictionary*, Volume 1 (Oxford University Press, 1971).

<sup>175</sup> ITC Report at p. I-14.

immediately preceding the determination. Provided the investigated product "is being imported" at such increased quantities at the end of the period of investigation, the requirements of Article 2.1 are met.<sup>176</sup>

7.208 Korea, on the question of the use of the word "recent" in the *Argentina – Footwear Safeguard* Appellate Body report, argues that "[r]ecent imports' are those that occurred in the last year of the period with the most recent trends being the most significant trends".<sup>177</sup> However, we are of the view that it is not necessarily the case that "the most recent trends [are] the most significant trends", since this would imply that a decrease in imports in the most recent period is necessarily of greater significance than a prior increase in imports. As noted above, the word "recent" need not require that imports be increasing right up to the date of the determination. There can still be a "recent" increase even if that increase has ceased prior to the date of the determination, provided imports remain at a sharply increased level. Under Korea's approach, which would afford greater significance to the decrease at the time of the determination than to the earlier increase evidenced in the yearly comparison, the earlier increase would cease to be "recent" for the purpose of Article 2.1, even though imports remain at an increased level. We therefore reject Korea's interpretation of the *Argentina - Footwear Safeguard* Appellate Body report. We find support for our views in the Appellate Body's report in *US – Lamb Meat* where the following finding was made with respect to which part of the period of investigation was the most relevant in evaluating the state of the industry when making a threat of serious injury determination:

The likely state of the domestic industry in the very near future can best be gauged from data from the most recent past. Thus, we agree with the Panel that, in principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry.

However, although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation.<sup>178</sup>

We believe that the same considerations apply when it comes to which part of the period of investigation is the most relevant in a determination of increased imports.

7.209 In a safeguard investigation, the period of investigation for examination of the increased imports tends to be the same as that for the examination of the serious injury to the domestic industry. This contrasts with the situation in an anti-dumping or countervailing duty investigation where the period for evaluating the existence of dumping or subsidization is usually shorter than the period of investigation for a finding of material injury. We are of the view that one of the reasons behind this difference is that, as found by the Appellate Body in *Argentina – Footwear Safeguard*, "the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination."<sup>179</sup> The Appellate Body noted that when it comes to a determination of increased imports "the competent authorities are required to consider the *trends* in imports over the period of investigation".<sup>180</sup> The evaluation of trends in imports, as with the evaluation of trends in the factors relevant for determination of serious injury to the domestic industry, can only be carried out over a period of time. Therefore, we conclude that the considerations that the Appellate Body has expressed with respect to the period relevant to an injury determination also apply to an increased imports determination.

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<sup>176</sup> We observe that an increase in imports before the date of a determination, but not sustained at the date of the determination, could still cause actual serious injury at the time of the determination.

<sup>177</sup> Korea's reply to Question 1 from the Panel at the first substantive meeting.

<sup>178</sup> *US-Lamb Meat (AB)*, at paras. 137-138.

<sup>179</sup> *Argentina – Footwear Safeguard (AB)* at para. 131.

<sup>180</sup> *Id.* at 129.

7.210 In view of the considerations expressed above we do not believe that the analysis of data for the first semester of 1999 should be considered in isolation. We find the analysis of whether imports had increased on a yearly basis from 1994 to 1998 very relevant to the question of whether there were increased imports. Although we are aware that imports decreased for the first semester of 1999 when compared to the first semester of 1998, we note that regardless of the decrease for the first half of 1999, the ITC in their report found that imports of line pipe "remained at a very high level in interim 1999".<sup>181</sup> This high level of imports for 1999 supports a finding that imports were still entering the United States "in such increased quantities" as prescribed in Article 2.1.<sup>182</sup> In other words, although Korea may be correct in arguing that absolute imports declined, this does not preclude a finding of imports "in such increased quantities" for the purpose of Article 2.1. Based on the above considerations we conclude that the ITC was correct in its finding of an absolute increase in imports of line pipe.<sup>183 184</sup>

7.211 Even if we had found that the United States was not correct in finding an absolute increase in imports, we note that Article 2.1 provides that a Member may apply a safeguard measure on a product after a determination that such product is "being imported ... in such increased quantities, absolute or relative to domestic production ... as to cause or threaten to cause serious injury" (emphasis supplied). Therefore, a determination of either an absolute or relative increase in imports causing serious injury is sufficient to authorize a Member to adopt safeguard measures. We conclude in the next section of our report that, on the basis of the methodology applied by the ITC, there was a clear increase in imports relative to domestic production. Accordingly, the increased imports requirement would have been met regardless of whether there was or there was not an absolute increase in imports.

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<sup>181</sup> ITC Report, p. I-14.

<sup>182</sup> Additionally, we are of the view that a temporary change in the behaviour of the imports may not be sufficient to reverse an overall trend indicating existence of increased imports. Indeed, regarding the temporary nature of the interim 1999 decrease we note the US argument that "monthly import data show that imports actually increased toward the end of interim 1999". However, we wish to clarify that this increase in imports towards the end of interim 1999 is not determinative of our finding that there was an overall trend indicating increased imports.

<sup>183</sup> In its second submission Korea mentions that data for interim 1999 is public data, which includes imports of Arctic-grade line pipe, a product not subject to the safeguards investigation. The United States responds by asserting that there were no imports of Arctic-grade line pipe during interim 1999. At the second meeting, the Panel requested confirmation from the United States on this assertion. The United States reiterated their assertion that there were no imports of Arctic-grade line pipe for interim 1999, and regretted that they could not provide the Panel with a letter from the Japanese respondents from which the ITC inferred this information, as it had been designated as confidential by those respondents (we note that the only imports of Arctic grade line pipe during the period of investigation came from Japan). Korea later questioned why the fact that there were no exports of Arctic-grade line pipe was not itself confidential, and if this was not the case why was all data concerning imports of Arctic-grade line pipe not non-confidential as well.

The Panel notes that the United States has effectively provided the Panel with public information which would be no different than the confidential data on imports of line pipe for interim 1999. The fact that the United States has failed to provide the Panel with the confidential letter confirming the absence of imports of Arctic-grade line pipe in interim 1999, is of no consequence to a finding of whether on the basis of the data relied upon by the ITC there were absolute increased imports. Rather, the provision of the letter is pertinent only to a question of whether the data relied upon by the ITC is accurate. We do not understand Korea to be arguing that the data relied upon by the ITC on the issue of increased imports is inaccurate. Therefore, we consider that it is not necessary for us to draw any conclusions from the refusal of the United States to provide the documentary support for their assertion that there were no imports of Arctic-grade line pipe for interim 1999.

<sup>184</sup> As noted above in footnote 164, Korea provides no argumentation on the question of whether the absolute increase in the imports was sudden enough and sharp enough for the purposes of Article 2.1 and Article XIX. Korea focuses its arguments on whether or not there was an increase in imports and if so whether this increase was recent. Therefore, we do not need to consider whether the absolute increase in imports found by the ITC was sudden enough and sharp enough.

(iii) *Relative imports*

7.212 Regarding relative imports, the ITC found that the ratio of imports to domestic production rose steadily from 1996 to 1998. It also found that this ratio rose to its highest level in interim 1999 as compared to interim 1998.

7.213 Korea's basic argument is that the ITC was precluded from finding that there was a "recent" increase in imports relative to domestic production because relative imports decreased in the last six months of the period of investigation (Jan-Jun 1999), as compared to the previous six-month period (July-Dec 1998). This comparison put forward by Korea was not performed by the ITC in their analysis of the relative increase in the imports. Therefore to uphold Korea's view, we would have to find either, 1) that such a comparison would be obligatory as a legal matter, or 2) that it was unreasonable to reach the conclusion that relative imports increased based on a comparison of the first half of 1998 with the first half of 1999. We have already found that the ITC's methodology of making a comparison between the first semester of 1999 and the first semester of 1998 is consistent with the Agreement on Safeguards. Application of that methodology led the ITC to the conclusion that there was an increase in the ratio of imports to domestic production, not only on a year-to-year basis from 1996 to 1998, but also between interim 1998 and interim 1999. It is indisputable that the data supports the finding by the ITC that there was an increase in imports relative to domestic production from the first half of 1998 to the first half of 1999. Having upheld the methodology, and in the absence of a challenge by Korea to the conclusion drawn by the ITC from its methodology, we also uphold such a conclusion. Therefore, we uphold the ITC's finding that there were increased imports relative to domestic production.<sup>185</sup>

(iv) *Conclusion*

7.214 For the above reasons, we reject Korea's claim that the United States' finding of increased imports was inconsistent with Article 2.1 and Article XIX.

## 2. **Serious injury**

7.215 Korea asserts that the USITC serious injury determination is inconsistent with Article XIX, and Articles 3 and 4. In particular, Korea submits that the injury data on which the ITC relied was flawed because it contained data from other industries; the US domestic industry was experiencing only a one-year downturn from a historical high and the condition of the domestic industry was improving at the end of the period of investigation; and the ITC's decision does not contain an adequate demonstration of factors and conclusions of law and fact to support its serious injury determination.

7.216 In addressing these claims, we take careful note of the standard of review to be applied by panels when reviewing claims under Article 4.2(a). In particular, we note that

in examining a claim under Article 4.2(a), 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

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<sup>185</sup> As previously noted in footnote 164, Korea provides no argumentation on the question of whether the relative increase in imports was sudden enough and sharp enough for the purposes of Article 2.1 and Article XIX, focusing instead only on whether there was or there was not an increase. Therefore we do not need to pronounce ourselves as to whether the relative increase in imports found by the ITC was sudden enough and sharp enough.

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. Thus, in making an "objective assessment" of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.<sup>186</sup>

(a) The injury data on which the ITC relied was flawed because it contained data from other industries

(i) *Declines in the sale and production of OCTG; collective operating leverage*

(1) Arguments by Korea

7.217 Korea claims that the US violated Article 4.1(c) and Article 4.2(a), (b) and (c) because the data relied on by the ITC was flawed since it contained data from other industries. In particular, certain performance factors for the line pipe industry (especially regarding capacity utilisation and profitability) were severely distorted by a disproportionately large decline in the production and sales of oil country tubular goods ("OCTG").

7.218 Korea notes that 14 of the 15 welded line pipe producers that responded to ITC questionnaires also produced other types of pipe (such as OCTG) in their line pipe production facilities. Korea argues that this resulted in a collective operating leverage effect, in the sense that when sales of one type of pipe are down, a manufacturer's production levels and capacity utilization overall are directly affected unless increases in the production of other pipe products can fully compensate for the reduction in that product. If the other products cannot fully compensate, then production levels fall, capacity utilization falls and all fixed costs on a per unit basis rise and net revenue declines.<sup>187</sup> In this way, negative profitability for one segment of production, if the product and the decline in this product are significant enough, can negatively affect overall profitability. Declines in overall profitability necessarily affect the profitability of each product. Korea claims that the US failed to take this into account when allocating overall production (including OCTG) costs to line pipe. Korea asserts that the declines in OCTG were much more severe than line pipe, and had a greater impact on the producers' profitability. Furthermore, Korea notes that the Staff Report itself refers to the existence of collective operating leverage:

"[c]hanges in operating income during the period of investigation generally followed sales revenue, but also reflected the presence of some form of collective operating leverage. For example, the 101-per cent increase in operating income in 1997 significantly exceeded the 26-per cent increase in 1997 sales revenue. In the opposite direction, the 1998 14-per cent decline in sales revenue was accompanied by a 69-per cent drop in operating income. In the first half of 1999, operating income declined even further to a loss of \$12.8 million."<sup>188</sup>

(2) Arguments by the United States

7.219 The United States submits that Korea has provided neither a legal nor a factual basis that would compel the Panel to conclude that Article 4.2(a) requires the use of data that excludes all products other than line pipe.<sup>189</sup> As a legal matter, the provision requires the consideration of

<sup>186</sup> *US – Lamb Meat (AB)*, at para. 106.

<sup>187</sup> See ITC Report, Crawford Dissenting Views on Injury, at I-69 n.68 ("Despite only a modest (\$5, or 0.9 per cent) decrease in per-ton net sales in fiscal year 1998, per-ton operating income fell by \$26, as unit labour, factory overhead, and SG&A expenses increased by 10-20 per cent.").

<sup>188</sup> ITC Report, p. II-26

<sup>189</sup> Korea's first written submission paras. 226-236.

“factors” – that is, categories of data like import volume and profitability – and requires that they be “relevant” as well as “objective and quantifiable.” However, it does not speak to how the competent authorities may quantify these factors. It certainly does not prevent the use of statistics that reflect, in part, products other than those under investigation, as long as they serve to quantify the factor in question with respect to the product in question.

7.220 In collecting and evaluating the injury data with respect to line pipe, the USITC recognized that most of the producers of this product also made other types of pipe, including OCTG, standard pipe, and structural pipe.<sup>190</sup> Some allocation issues will always be present in a safeguards investigation involving a product that is made in productive facilities also used to produce other products. The fact that certain allocations are necessary does not imply that a Member has failed to evaluate industry-specific factors “of an objective and quantifiable nature,” as required by Article 4.2(a) of the Safeguards Agreement. As noted above, the USITC carefully evaluated company allocation methods and verified the allocations of two of the largest US producers.

7.221 The United States also argues that the ITC specifically addresses Korea’s arguments that low production quantities and sales of OCTG distorted the profitability data on the line pipe industry. The USITC explained:

We are satisfied that increases in per-unit allocated overhead and SG&A resulting from declines in the production of other pipe products such as OCTG were not mistakenly or disproportionately attributed to line pipe. Increases in per-unit overhead and SG&A were allocated by the domestic producers in proportion to their sales of end products or based on other acceptable allocation methodologies. As indicated above, the Commission verified the data furnished by two of the largest domestic producers of line pipe and found the allocations made to be reasonable.<sup>191</sup>

7.222 The United States also argues that Korea’s claim rests entirely on the faulty premise that OCTG shipments declined much more severely than shipments of line pipe and other pipe products made by the US firms.<sup>192</sup> These disproportionate declines in OCTG shipments were significant, according to Korea, because US producers allocated fixed costs to the various products they produced in proportion to their sales of the end-product. In other words, if sales of OCTG declined to a much greater degree than sales of line pipe, a disproportionate share of costs would be attributed to line pipe.<sup>193</sup>

7.223 According to the United States, Korea’s only evidence for the proposition that OCTG sales fell disproportionately is Commissioner Crawford’s statement (which is not part of the determination of the competent authorities of the United States) that net shipments of welded OCTG products “collapsed altogether between September 1998 and March 1999.”<sup>194</sup> In fact, the US argues, line pipe shipments declined precipitously, at the same time and virtually to the same degree as OCTG shipments, in late 1998 and early 1999.<sup>195</sup> OCTG shipments stayed at depressed levels for slightly longer than line pipe shipments, but the two products showed similar and nearly simultaneous trends. There is thus no basis for Korea’s argument that a disproportionate share of fixed costs were allocated to line pipe, thereby distorting the financial results of the line pipe industry. Furthermore, Korea’s argument assumes that the largest component of average unit costs consisted of fixed costs. Operating leverage (as discussed on p. II-26 of the USITC Report) generally refers to the ability to

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<sup>190</sup> ITC Report, p. II-25.

<sup>191</sup> ITC Report, p. I-31.

<sup>192</sup> Korea’s first written submission para. 229 (quoting from USITC Report, Crawford Dissenting Views on Injury, p. I-69 n.67) (footnote omitted).

<sup>193</sup> Korea’s first written submission, para. 234.

<sup>194</sup> ITC Report, p. I-69 n.67.

<sup>195</sup> US shipments of welded line pipe declined from 752,824 tons in 1997 to 640,061 tons in 1998, and from 388,844 tons in interim 1998 as compared to 265,757 tons in interim 1999. ITC Report, p. C-4, Table C-1.

increase profitability by an amount that is more than proportionate to the increase in sales volume. This is achieved by spreading fixed costs over a larger volume of products. Because raw material and direct labour are generally variable costs, the most significant contributors to operating leverage are the fixed portions of factory overhead and selling, general, and administrative expenses. Despite operating leverage explaining a portion of the changes in profitability during the period examined, the majority of average unit costs (raw material and direct labour) were ultimately variable and therefore could not be directly influenced by changes in production volume.<sup>196</sup> Thus, even if there had been a disproportionately large decline in OCTG sales – and Korea has produced no record evidence of this – the effect that this could have had on average unit costs for line pipe was nominal.

(3) Evaluation by the Panel

7.224 In essence, Korea's claim is based on the fact that company-wide fixed costs were allocated to domestic producers' line pipe and OCTG operations on the basis of turnover. According to Korea, as turnover in OCTG declined more than turnover in line pipe, a disproportionately large amount of fixed costs were allocated to line pipe.

7.225 As a preliminary matter, we see nothing in the Safeguards Agreement that would preclude the allocation of company-wide fixed costs to the specific product under investigation. Nor is there any provision in the Safeguards Agreement that would preclude the allocation of company-wide fixed costs on the basis of turnover.

7.226 Article 4.2(a) requires competent authorities to evaluate all relevant factors "having a bearing on the situation of" the relevant domestic industry. In our view, company-wide fixed costs have a bearing on the situation of the relevant domestic industry because of their impact on the relevant domestic industry's profits and losses. If the relevant domestic industry is defined as producers of a narrow category of product, company-wide fixed costs (such as general overhead) must be allocated to that narrow category of product. Failure to make such an allocation would mean that a relevant factor, namely fixed costs, which necessarily "ha[s] a bearing on the situation of" the relevant domestic industry because of its impact on profitability, would not be evaluated by the competent authorities.

7.227 A failure to evaluate company-wide fixed costs would defy economic reality. Company-wide fixed costs are necessarily incurred in respect of a number of products,<sup>197</sup> and must therefore be absorbed by the totality of those products. If a competent authority were only to take into account costs incurred specifically in respect of the product under investigation, it would not comply with the Article 4.2(a) requirement to evaluate all relevant factors "having a bearing on the situation of" the relevant domestic industry.

7.228 We note that investigating authorities commonly allocate company-wide fixed costs between specific product categories on the basis of turnover. Since there must be some form of allocation of company-wide fixed costs, we would only consider condemning the United States' resort to turnover allocation if Korea were able to propose an allocation methodology that removed the alleged distortion resulting from allocation on the basis of turnover, while still providing for full absorption of all company-wide fixed costs. Korea has failed to do so. By challenging the ITC's use of a turnover allocation, but by failing to propose any suitable alternative form of allocation, Korea effectively argues that company-wide fixed costs should not have been allocated to domestic producers' line pipe operations at all. As noted above, however, failure to take into account company-wide fixed costs would constitute a violation of Article 4.2(a).

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<sup>196</sup> ITC Report, p. II-28, Table 10.

<sup>197</sup> Assuming that the company at issue produces more than one product.

7.229 The above analysis is based on a mandatory requirement set forth in Article 4.2(a). Korea's claim is based on Articles 4.1(c), and 4.2(a), (b) and (c) read together. Since we have found that Korea's Article 4.2(a) claim must fail, the remaining provisions relied on by Korea clearly cannot be read so as to result in a finding inconsistent with the mandatory requirement set forth in Article 4.2(a). Accordingly, we reject Korea's claim that the United States violated Articles 4.1(c), and 4.2 (a), (b) and (c) because the data relied on by the ITC was flawed since it contained data from other industries.

(ii) *The profitability of some major producers was affected by factors not related to line pipe production*

7.230 Korea claims that the industry's profitability performance, which was considered as part of the ITC's analysis of significant overall impairment, was skewed by the peculiar problems of certain producers, such as Lone Star Steel and Geneva Steel. Korea submits that their problems were unrelated to their line pipe production or line pipe imports.

(1) Geneva Steel

(i) Arguments by Korea

7.231 Korea relies on Commissioner Crawford's finding that:

Geneva Steel temporarily shut down one of its two blast furnaces between December 1998 and September 1999, and filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in February 1999. While I do not discount the negative effects that these actions have had on the company's cost structure and on its employment levels, I find that they reflect the competitive conditions faced by Geneva Steel in its primary markets of hot-rolled sheet and cut-to-length plate.<sup>36</sup>

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<sup>36</sup> See, e.g., *Transcript* at 51-52 (Mr. Johnsen, Executive Vice President and General Counsel, Geneva Steel) and CR at I-32, PR at II-25.<sup>198</sup>

7.232 Korea asserts that costs incurred by Geneva Steel in (1) closing down one of its blast furnaces between December 1998 and September 1999 and (2) filing for bankruptcy affected its profitability. However, since these costs should have been attributed to the competitive conditions faced by Geneva Steel in its primary markets of hot-rolled sheet and cut-to-length plate, they should not have been attributed to its line pipe operations. Thus, the financial performance of Geneva Steel should not have been taken into account when the ITC analysed the financial health of the US line pipe industry.

(ii) Arguments by the United States

7.233 The United States submits that Commissioner Crawford's dissenting opinion does not form part of the ITC determination, and is therefore irrelevant to the Panel's deliberations. According to the United States, there was ample information on the record that the decline in Geneva Steel's line pipe business played a major role in the decision to shut down one of its blast furnaces, and in the company's bankruptcy. At the injury hearing, an executive from Geneva Steel stated that line pipe "is an essential part of our business from an overall margin perspective", and that Geneva Steel lost half of its volume of line pipe sales between 1997 and 1998.

(iii) Evaluation by the Panel

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<sup>198</sup> ITC Report p. I-63.

7.234 This claim raises the issue of whether the negative impact on Geneva Steel's (and therefore the US industry's) profitability of costs associated with the temporary closure and filing for bankruptcy were properly attributed to that company's line pipe activities. In asserting that the costs associated with the temporary closure of the second blast furnace and the filing for bankruptcy were not properly attributed to that company's line pipe activities, Korea relies on Commissioner Crawford's statement that "the negative effects that these actions have had on the company's cost structure and on its employment levels ... reflect the competitive conditions faced by Geneva Steel in its primary markets of hot-rolled sheet and cut-to-length plate".<sup>199</sup> In support of this statement, Commissioner Crawford referred to testimony given by a Geneva Steel<sup>200</sup> executive at the ITC injury hearing, and to parts of the ITC's confidential and public reports.

7.235 Regarding the testimony of the Geneva Steel executive, we see nothing to suggest that the costs associated with the temporary closure of the second blast furnace and the filing for bankruptcy were not properly attributed to Geneva Steel's line pipe activities. Although the Geneva Steel executive stated that "imports of hot-rolled sheet and cut plate surged in 1998, decimating those markets", he also stated that

"In line pipe, the import surge has been just as dramatic. At Geneva, we have lost half of our volume between 1997 and 1999. We estimate that approximately 75 to 80 per cent of that lost tonnage is directly due to imports with only 20 to 25 per cent being related to demand. The effect is similar with respect to prices and profitability. Profitability suffers because of declining prices, but also from the pernicious effect of declining through put on average unit cost. For an integrated producer, such as Geneva Steel, this is particularly important, in light of the fact that we make our own feed stock for line pipe. The import crisis has forced us to shut down one of our two blast furnaces. ... Increased orders of line pipe are vital to maintaining the base load of production we need to run that second blast furnace."<sup>201</sup>

Thus, the testimony of the Geneva Steel executive (in particular the statement that "[t]he import crisis<sup>202</sup> has forced us to shut down one of our two blast furnaces") supports the US argument that costs associated with the closure of Geneva Steel's second blast furnace, and its filing for bankruptcy, were related to a decline in its line pipe activities. There is nothing in this testimony to support Korea's argument that such costs should be attributed exclusively to a decline in Geneva Steel's hot-rolled sheet and cut-to-length plate activities.<sup>203</sup>

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<sup>199</sup> To the extent that some of Commissioner Crawford's findings and/or arguments have been relied upon as evidence by Korea (*see*, Korea Second Written Submission at para. 81), we will have regard to them in our findings. It is therefore not necessary for us to determine whether or not Commissioner Crawford's minority opinion forms part of the ITC determination.

<sup>200</sup> We note that Geneva Steel produces three main finished products: cut-to-length plate, hot-rolled sheet, and line pipe. Geneva Steel is an integrated producer of line pipe, in the sense that it uses internally produced hot-rolled steel to make line pipe.

<sup>201</sup> *Transcript of ITC Injury Hearing* (30 September 1999). p. 53.

<sup>202</sup> Given the specific context of these remarks, we are in no doubt that the relevant "import crisis" is that concerning imports of line pipe.

<sup>203</sup> Korea criticises the ITC for having accepted the Geneva Steel executive's testimony. Korea contrasts this with the ITC's alleged reluctance to accept testimony from a Respondent witness regarding the proportion of dual-stencilled pipe used for standard applications. First, we note that Korea's claim regarding Geneva Steel is based on a statement by Commissioner Crawford, and that Commissioner Crawford himself relied on the Geneva Steel executive's testimony (see ITC Report, p. I-63, note 36). Korea's criticism of the ITC therefore lacks some consistency. In addition, we note that the Respondent witness himself acknowledged that "there is no way of actually knowing [the proportion of dual-stencilled pipe used for standard applications] without tabulating every sale". In light of this admission by the Respondent witness himself, we believe that the ITC was entitled to question his testimony regarding the proportion of dual-stencilled pipe used for standard applications.

7.236 Regarding Commissioner Crawford's references to the confidential and public reports, we note that the United States has not made a copy of the confidential report available to us. However, the only data concerning Geneva Steel removed from the relevant part of the public report (i.e., II-25) appears to relate to "a question about the company's operations subsequent to bankruptcy" (emphasis supplied). In other words, the deleted information does not appear to relate to the closure of Geneva Steels second blast furnace, or to the time when Geneva Steel filed for bankruptcy. It is possible, therefore, to examine Commissioner Crawford's statement on the basis of the public report. However, we can see nothing in the part of the public report referred to by Commissioner Crawford to suggest that Geneva Steel's closure of its second blast furnace, or its filing for bankruptcy, was caused exclusively by its hot-rolled sheet and cut-to-length plate activities.

7.237 For these reasons, we see no reason to accept Korea's claim that the costs associated with the closure of Geneva Steel's second blast furnace, and with its filing for bankruptcy, should not have been attributed to its line pipe activities. We therefore see no reason why the ITC should have excluded Geneva Steel for the purpose of assessing the financial health of the US line pipe industry.

(2) Lone Star

(i) Arguments by Korea

7.238 Korea asserts that certain costs were allocated to Lone Star's line pipe operations for the purpose of calculating the industry-wide operating income for 1998, even though such costs were not related to the production or sale of line pipe. In this regard, Korea relies on the following statement by Commissioner Crawford:

I note that the 1998 operating income on the record may be somewhat misleading. In 1998, Lone Star allocated \*\*\* of charges for \*\*\* (primarily a reduction in operating its \*\*\* in favor of \*\*\*). The results of this decision appear to have been felt most keenly in the second half of 1998. This decision had a marked impact on SG&A for the company and for the industry as a whole, reducing the industry's level of operating income to \$10.8 million in 1998.<sup>204</sup>

(ii) Arguments by the United States

7.239 The United States submits that Commissioner Crawford's opinion does not form part of the ITC determination, and is therefore irrelevant for the Panel's deliberations. The United States also notes that the remaining Commissioners found that domestic producers had allocated increases in overhead and SGA on the basis of acceptable allocation methodologies. Furthermore, the United States asserts that the severe deterioration in the domestic industry's financial condition was not the result of any accounting decision by Lone Star Steel. In 1998, five of the 14 domestic producers operated at a loss in their line pipe operations, and five additional firms had reduced operating incomes. In interim 1999, 10 of the 14 firms operated at a loss, and all had reduced operating incomes, compared with interim 1998.

(iii) Evaluation by the Panel

7.240 We are not convinced that Commissioner Crawford's statement<sup>205</sup> alone constitutes a prima facie case that the ITC allocated certain non-line pipe costs to Lone Star's line pipe activities. Her

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<sup>204</sup> ITC Report, p. I-63.

<sup>205</sup> We consider Commissioner Crawford's findings and/or arguments to the extent that they are relied on as evidence by Korea (see footnote 199). It is therefore not necessary for us to determine whether or not Commissioner Crawford's minority opinion forms part of the ITC determination.

statement must be weighed against the remaining Commissioners explicitly finding that "[i]ncreases in per-unit overhead and SG&A were allocated by the domestic producers in proportion to their sales of end products or based on other acceptable allocation methodologies".<sup>206</sup>

7.241 Furthermore, we note that in response to a question from the Panel, the United States "assure[d] the Panel that adding the Lone Star charge would not increase the industry's 1998 aggregate operating income of \$ 10.8 million by more than 20 per cent, or increase the ratio of operating income to net sales for 1998 of 2.9 per cent by more than one per centage point".<sup>207</sup> Thus, even adding the charge, the domestic industry's 1998 aggregate operating income would still not have exceeded \$12.96 million, compared to \$34.662 million in 1997. In addition, operating income for interim 1999 – **minus** \$12.786 million – was not affected by the 1998 Lone Star charge. According to the United States, adding the Lone Star charge would not increase the 1998 ratio of operating income to net sales to more than 3.9 per cent (from the 2.9 per cent presently reported). Korea argues that a ratio of 3.9 per cent is close to the 1995 ratio of 4.3 per cent, and that the ITC found the financial situation of the domestic to be "healthy" at that time.<sup>208</sup> However, the fact that a ratio of 4.3 per cent may be "healthy" does not necessarily mean that a ratio of 3.9 per cent (i.e., 9.3 per cent less) is equally "healthy", or inconsistent with a finding of serious injury. Indeed, a 1998 ratio of 3.9 per cent would still have to be measured against a 1997 ratio of 8.1 per cent. In addition, the Lone Star charge did not affect interim 1999, when the ratio was **minus** 11.4 per cent. Finally, we note that the ITC did not rely only on the operating income ratio in its assessment of the industry's financial performance; it also relied on absolute declines in revenue, and noted that in 1998 ten of the 14 US producers reported reduced operating income or increased losses.<sup>209</sup> Thus, even if the Lone Star charge had not been deducted from its operating income, we do not consider that this would have invalidated the ITC's finding of serious injury.

7.242 In light of the above, we see no basis for concluding that the injury data on which the ITC relied was flawed because it contained data from other industries.

(b) The downturn in the industry's condition was temporary and the condition of the industry was improving at the end of the period of investigation

(i) *Arguments by Korea*

7.243 Korea claims that the ITC erred in finding "serious injury", because the downturn in the state of the domestic industry was merely temporary, and the condition of the industry was improving at the end of the period of investigation.

7.244 According to Korea, the 1998 / interim 1999 downturn should have been viewed in the context of record industry performance in 1997. Korea asserts that a temporary downturn from a peak performance period does not constitute "significant overall impairment", especially in an industry that traditionally experiences wide swings in demand and profitability. Korea argues that even the US industry itself recognised that it was only in a temporary downturn, as evidenced by substantial investment in new / modernised production facilities. Thus, investments by the industry doubled in 1997, and doubled again in 1998. Capital expenditures increased another 30 per cent in the first half of 1999. Furthermore, one new producer began operations in 1998, and another in 1999. Nine US producers made capital expenditures in excess of \$1 million in at least one fiscal year.

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<sup>206</sup> ITC Report, p. I-31.

<sup>207</sup> Response to Question 8 to the United States at the first substantive meeting (see Annex B-2). We understand the United States to mean that, if the Lone Star charge had not been deducted from its 1998 operating income, the industry's 1998 aggregate operating income would not have increased by more than 20 per cent, and the ratio of operating income to net sales for 1998 would not have increased by more than one per centage point.

<sup>208</sup> Korea's second written submission at para. 98.

<sup>209</sup> ITC Report, p. I-18, I-20.

7.245 Korea asserts that the industry was not in a state of "significant overall impairment" at the time the ITC made its serious injury determination. Korea quotes from the *US - Wheat Gluten* panel, which "consider[ed] it essential that current serious injury be found to exist, up to and including the very end of the period of investigation".<sup>210</sup> Korea asserts that the "very end of the period" demonstrated a continuing decline in imports and an improving market for the US producers. Thus, the volume of US mill shipments stabilized in 1999 and began recovering strongly beginning in April 1999, and US producers had already announced significant price increases. Demand was also increasing. Increased domestic demand for line pipe and increased domestic shipments were due to an improvement in oil and gas prices that began in April 1999.

(ii) *Arguments by the United States*

7.246 The United States submits that Korea's argument that a one-year downturn from a historical high in an industry should not be viewed as a "significant overall impairment" of the industry<sup>211</sup> has no basis in the Safeguards Agreement. Article 4.1(a) defines "serious injury" as "a significant overall impairment in the position of the domestic industry." As Korea itself explains, the word "impair" is defined as "to weaken or make worse, to lessen in power," "overall" indicates that such impairment must be widespread and comprehensive, and "position of the domestic industry denotes its overall health."<sup>212</sup> The downturn experienced by the US industry was sufficient to satisfy the Safeguards Agreement's requirements of serious injury or threat of serious injury caused by increased imports. The record before the ITC contained extensive evidence to satisfy fully each of these components of the definition of serious injury. The condition of the domestic line pipe industry deteriorated greatly in 1998, and in interim 1999 as compared with interim 1998. This deterioration was observable in virtually every factor examined by the ITC and broadly affected industry participants. There is no basis for arguing that this did not amount to an "impairment" of the domestic industry, or that this impairment was not widespread and comprehensive.

7.247 The United States denies that domestic shipments of line pipe began recovering strongly in April 1999. Although shipments did increase in the months following the first quarter of 1999, average monthly shipments in the period April through August 1999 remained lower than in any prior year of the period investigated except 1994. With regard to capital expenditures by the domestic industry, the United States capital investment projects in the steel industry generally involve long lead times, and there was evidence in the record that 1998 capital spending reflected analysis and decisions that preceded the 1998 surge in imports.

7.248 Furthermore, the United States denies that the Safeguards Agreement requires a finding of current serious injury at the time of the competent authority's serious injury determination. There is no requirement that competent authorities collect information up to the day of their determination. Furthermore, the United States disagrees that the US line pipe industry was improving at the end of the period of investigation. The United States asserts that imports were actually increasing in May and June of 1999. With regard to the price increases referred to by Korea, the United States notes that in fact only the price increase announcements were made on 15 September 1999, and that the announced increases were to take effect in late 1999 and early 2000. The price increase announcements on which Korea relies do not prove that the industry was no longer in a state of significant overall impairment, for several reasons. First, there is no evidence in the record that these attempts at price increases were actually successful. As the two Commissioners finding threat of serious injury indicated in their views,<sup>213</sup> mere announcements of future price increases have little probative value, as it is always unclear whether these will actually "stick" in the market. Second, the evidence indicates price increase announcements by only three firms (Maverick Tube Corporation,

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<sup>210</sup> *US - Wheat Gluten*, at para. 8.81.

<sup>211</sup> Korea's first written submission, paras. 245-251.

<sup>212</sup> Korea's first written submission, para. 247.

<sup>213</sup> ITC Report, p. I-48 n.88.

Lone Star Steel Company, and Newport Steel) out of the 14 producers in the industry. Third, one of those companies (Lone Star) explained the price increase as being “necessary to offset increases in raw material costs,” and another (Newport Steel) stated that the price hike was “[d]ue to an increase in overall costs to manufacture tubular goods.”<sup>214</sup> Furthermore, the price increase announcements made in August 1999 coincided with the imposition of antidumping duties and the entry into effect of suspension agreements, affecting hot-rolled steel, the principal raw material used in the production of line pipe. Thus, the price increase announcements reflected rising raw material costs rather than an improvement in the condition of the industry as Korea contends.

(iii) *Evaluation by the Panel*

7.249 Korea claims that a finding of serious injury is precluded if there is only a temporary, one-year downturn in the condition of the industry, following an historical high, and if the condition of the industry is improving at the end of the period of investigation. In examining this claim, we shall first consider Korea's argument that there was only a temporary downturn in the condition of the industry. We shall then consider Korea's argument that the condition of the industry was improving at the end of the period of investigation.

7.250 According to Korea, the temporary nature of the downturn in the US line pipe industry was evidenced by the capital investments made by that industry during the downturn. However, there is evidence in the ITC report to the effect that “1998 investment expenditures reflect pre-import surge analysis and decisions”.<sup>215</sup> The ITC noted that “capital investment projects in the steel industry generally require long lead times in order to afford sufficient time for project approval, securing of financing, installation, and start-up operations”.<sup>216</sup> In addition, the ITC found that “there is evidence that the decline in profitability since the middle of 1998 has caused the postponement or elimination of discretionary capital spending”.<sup>217</sup> In light of these considerations, we find no basis for concluding that capital investments made in 1998 and 1999 indicate the temporary nature of the downturn experienced by the US line pipe industry.<sup>218</sup>

7.251 In support of its argument that the condition of the domestic industry was improving at the end of the period of investigation, Korea refers to increasing demand, increasing domestic shipments, and domestic producer price increases.

7.252 There would appear to be little doubt that demand was increasing at the end of the period of investigation. However, increasing demand at the end of the period of investigation is not necessarily indicative of an absence of serious injury at the end of the period of investigation. Article 4.2(a) enumerates a number of factors (“changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment”) which must<sup>219</sup> be evaluated by Members in making a determination of serious injury. Although there may be circumstances in which demand is relevant to the question of serious injury, the fact that demand is not included as an Article 4.2(a) factor clearly indicates that this will not always be the case. Thus, changes in demand at the end of the period of investigation need not necessarily be taken into account by competent authorities for the purpose of making a finding on serious injury. A competent authority would only need to evaluate demand for the purpose of determining the existence of serious injury if it were shown in a given case that demand was a “relevant factor[] ... having a bearing on the situation of that industry”. Korea has not

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<sup>214</sup> Post-hearing Injury Brief of Japanese and Korean Respondents, Exhibit 1.

<sup>215</sup> ITC Report, note 122.

<sup>216</sup> ITC Report, p. I-42.

<sup>217</sup> ITC Report, p. I-20.

<sup>218</sup> We note that the parties disagree as to the amount of increased capacity during the POI. However, this issue was raised by Korea in the context of its claim regarding causation (see, for example, para. 75 of Korea's oral statement at the second substantive meeting). There is therefore no need for us to resolve this issue at this juncture.

<sup>219</sup> See *Argentina – Footwear Safeguard (AB)* at para. 136.

established that this was the case in the line pipe investigation. Indeed, increased demand at the end of the period of investigation may be of extremely limited relevance to the state of the domestic industry, since there is no guarantee that the increased demand will be met by domestic shipments rather than by imports. For these reasons, we do not consider that increased demand at the end of the period of investigation necessarily means that the condition of the domestic industry was improving at the end of the period of investigation, or that a finding of serious injury is precluded.

7.253 With regard to Korea's argument that shipments began recovering strongly in April 1999, we note the US argument that average monthly shipments for April – August 1999 were lower than average monthly shipments for any prior year other than 1994. Korea has not disputed this argument. We further note that shipments declined from June to July 1999, and from July to August 1999. Shipments in August 1999 were only five per cent higher than shipments in April 1999. For these reasons, we see no basis to accept Korea's argument that shipments began recovering strongly in April 1999. In any event, we consider that an upturn in respect of one Article 4.2(a) serious injury factor, such as shipments / sales, towards the end of the period of investigation does not necessarily indicate that the domestic industry is recovering, especially if all, or the majority, of the remaining serious injury factors demonstrate negative trends over the entirety of the period of investigation.<sup>220</sup>

7.254 With regard to price increases, announcements were made by three domestic producers in September 1999. The announced price increases were to take effect in late 1999 and early 2000. We are not convinced that the announced price increases indicate that the condition of the domestic industry was improving at the end of the period of investigation. This is because, according to one witness at the ITC's injury hearing, the price increases "are sticking, but ... the mills ... will verify that their raw material costs pretty much are offsetting that".<sup>221</sup> Another witness stated that "[t]he prices are up. We did announce a price increase, but it was not market-driven so much as it was cost-driven ... Those costs have gone up for us more than the price increase we announced, so we are still under water significantly".<sup>222</sup> Since it therefore appears that the announced price increases were driven by cost increases, it is far from certain that the announced price increases would have improved the state of the domestic industry (rather, they may simply have prevented the state of the domestic industry from deteriorating further). Furthermore, since the price increases were made by only three (out of 14) domestic producers, it is far from certain (1) that they would have had any significant impact on the overall state of the industry (especially as the prices of one of the largest producers, California Steel, were unaffected by these increases), and (2) that they would have been followed by the remaining domestic producers.

7.255 We recall that the onus is on Korea, as the complaining party, to assert and prove its case.<sup>223</sup> For the above reasons, we find that Korea has failed to assert and prove that the ITC erred in finding serious injury because the downturn in the state of the domestic industry was merely temporary, and the condition of the industry was improving at the end of the period of investigation. We reject Korea's claims accordingly.

(c) Adequate explanation and justification: the requirements of Articles 3.1 and 4.2(c) of the Safeguards Agreement

(i) *Arguments by Korea*

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<sup>220</sup> Korea has not claimed that other Article 4.2(a) factors show an upturn in domestic industry performance at the end of the POI.

<sup>221</sup> ITC injury hearing transcript, page 126 (Congressman Berry).

<sup>222</sup> ITC injury hearing transcript, page 127 (Mr. Dunn).

<sup>223</sup> *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, report of the Appellate Body, WT/DS33/AB/R, p. 16, adopted 23 May 1997.

7.256 Korea claims that the ITC's serious injury finding is inconsistent with Article XIX and Articles 3.1 and 4 because the ITC's conclusions are not adequately explained and justified. According to Korea, Articles 3 and 4.2(c), as interpreted by the panel and Appellate Body in *Argentina - Footwear Safeguard*, and by the Appellate Body in *Wheat Gluten* and *Lamb*, require that the reasoning and explanation of the ITC's determination be contained in its published report. Korea argues that the United States violated this requirement because the published ITC determination does not contain certain confidential record data which forms the basis for the Commissioners' conclusions, and because the ITC Commissioners reached contrary conclusions on the record data, without providing sufficient explanation for, or reconciling, their different views. In particular, Korea notes that three Commissioners found serious injury, two found a threat of serious injury, and one found neither serious injury nor threat of serious injury. According to Korea, "[t]he first question is, did the ITC Majority and/or the Separate Views on Injury, consider the[] facts or issues sufficiently, or at all? The second question is, if they did, why weren't the[] facts and issues reconciled with the decision reached?"

(ii) *Arguments by the United States*

7.257 The United States rejects Korea's argument that the fact that the Commissioners of the USITC were not unanimous in their injury findings renders the ITC's determination inconsistent with Articles 3.1 or 4.2(c). Articles 3 and 4 of the Safeguards Agreement impose requirements concerning the publication of the decisions of the "competent authorities of a Member". The Safeguards Agreement does not address the question of how the "competent authorities of a Member" make their decisions. This is a matter left to the Member. Under US law the competent authority for making serious injury determinations is the USITC. US law does not require that decisions of the USITC be unanimous. The decisions of the five Commissioners who made affirmative findings in this case constitute the only determination of the USITC. The views of the one Commissioner who made a negative decision do not constitute, and are not a part of, the USITC determination.

7.258 The United States notes that Article 3.1 provides that the "competent authorities shall publish a report setting forth *their* findings and reasoned conclusions . . . ." Since the views of the Commissioner who found in the negative do not constitute a determination of the USITC, and thus of the competent authorities, the United States is not required by Article 3.1 to publish the views of the dissenting Commissioner. The fact that the United States has disclosed more than is required of it by the Safeguards Agreement does not increase the burdens imposed on it by the Safeguards Agreement. Thus, the fact that a Commissioner whose views do not form part of the determination did not agree with that determination does not undermine the decision of the five Commissioners who made affirmative findings, which collectively constitutes the determination of the USITC, and thus of the United States.

7.259 Nor does the fact that two Commissioners found increased imports to be a substantial cause of threat of serious injury undermine the finding of the three Commissioners who found such imports to be a substantial cause of present serious injury. The difference between a finding of serious injury and one of threat is a matter of degree and timing; it does not involve Commissioners coming to opposite conclusions. The Commissioners did not reach contrary findings of fact. After evaluating and weighing the many factors involved in the injury analysis, the Commissioners making affirmative injury findings merely came to somewhat different conclusions as to the timing of when serious injury had occurred or would occur.

7.260 The United States contends that Korea's argument also fails because the Safeguards Agreement does not require the competent authorities of a Member to choose between serious injury or the threat thereof. Article 2 permits a Member to impose a safeguard measure if that Member has determined that a product is being imported in such quantities and under such conditions "as to cause *or* threaten to cause serious injury to the domestic industry." The Safeguards Agreement does not require to choose between serious injury or threat thereof. According to the US, the five

Commissioners making affirmative findings in the Line Pipe investigation might each have found "serious injury or the threat thereof" (without specifying which), and their collective determination would still have been consistent with the requirements of Article 2 of the Safeguards Agreement.

7.261 The United States denies that findings of serious injury and threat of serious injury are mutually exclusive. Since a Member may apply a safeguard measure only to the extent necessary to prevent or remedy serious injury and facilitate adjustment, the nature of a safeguard measure depends primarily on the condition of the industry and its need for adjustment. The competent authorities' finding of serious injury or threat of serious injury is a legal characterization of the condition of the industry. Thus, there is likely to be a relationship between the finding of the competent authorities and the safeguard measure applied by a Member. However, it is the underlying facts describing the condition of the industry, and not the choice to label that condition as serious injury or threat of serious injury, that provide the benchmark for the application of the measure. In contrast to the diversity of potential industry situations and safeguard measures, the competent authorities have only three options in rendering their determination – no serious injury, current serious injury, or threat of serious injury. Fitting an industry into one of these broad categories addresses primarily the timing of the onset of serious injury – not at all, now, or imminent – and does not indicate much about the precise state of the industry. Thus, the mere fact that the competent authorities found serious injury instead of threat of serious injury, or vice versa, in their investigation does not provide the information needed to determine the extent to which a Member may or should apply a safeguard measure. That is defined by the factors measuring the industry's performance and need for adjustment.

*(iii) Evaluation by the Panel*

7.262 We shall begin by examining Korea's claim under Article 3.1, which requires Members to set forth findings and reasoned conclusions on "all pertinent issues of fact and law" in their published report. In order to address Korea's claim under this provision, we must determine whether the ITC Report, which contained a finding of "serious injury or the threat of serious injury", satisfied this requirement.

7.263 The basic conditions for the application of safeguard measures are contained in Article 2.1. In our view, the fulfilment of these basic conditions is a "pertinent issue[] of ... law" in respect of which "findings" or "reasoned conclusions" must be included in the published report. By virtue of Article 2.1, a safeguard measure may only be applied if a product "is being imported ... in such increased quantities, ... and under such conditions as to cause or threaten to cause serious injury to the domestic industry". As confirmed by Article 4.2(a), one of the conditions for the application of a safeguard measure is a determination that "increased imports have caused or are threatening to cause serious injury". Thus, Article 3.1 requires Members to include in their published reports findings or reasoned conclusions on whether "increased imports have caused or are threatening to cause serious injury".

7.264 Korea claims that this requirement cannot be met by a finding of "serious injury or the threat of serious injury". According to Korea, Article 3.1 requires either a discrete finding of serious injury, or a discrete finding of threat of serious injury. We agree, as a result of the definitions of "serious injury" and "threat of serious injury" contained in Article 4.1(a) and (b) respectively:

- (a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;
- (b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent ..."

Since "threat of serious injury" is defined as "serious injury that is clearly imminent", necessarily "threat of serious injury" can only arise if serious injury is not present. If serious injury is present, it

cannot at the same time be "clearly imminent". In other words, "serious injury" and "threat of serious injury" are mutually exclusive. Accordingly, the Article 3.1 requirement that Members include in their published reports findings or reasoned conclusions on whether "increased imports have caused or are threatening to cause serious injury" cannot be fulfilled by a finding of "serious injury or the threat of serious injury". Rather, Article 3.1 requires a finding either that increased imports have caused serious injury, or that increased imports are threatening to cause serious injury.

7.265 The United States asserts that although the competent authorities' finding of serious injury or threat of serious injury is a "legal characterization of the condition of the industry", "it is the underlying facts describing the condition of the industry, and not the choice to label that condition as serious injury or threat of serious injury, that provide the benchmark for the application of the measure." According to the United States, "the competent authorities have only three options in rendering their determination – no serious injury, current serious injury, or threat of serious injury. Fitting an industry into one of these broad categories addresses primarily the timing of the onset of serious injury – not at all, now, or imminent – and does not indicate much about the precise state of the industry. Thus, the mere fact that the competent authorities found serious injury instead of threat of serious injury, or vice versa, in their investigation does not provide the information needed to determine the extent to which a Member may or should apply a safeguard measure. That is defined by the factors measuring the industry's performance and need for adjustment."<sup>224</sup>

7.266 We agree with the United States that the condition of the domestic industry is the benchmark for application of a safeguard measure.<sup>225</sup> However, we disagree that the terms "serious injury" and "threat of serious injury" are merely labels that do not themselves indicate the condition of the industry. On the contrary, the term "serious injury" signifies that the condition of the industry is one of "significant overall impairment", whereas the term "threat of serious injury" signifies that the condition of the industry is one where "significant overall impairment" is "clearly imminent". In other words, the terms "serious injury" and "threat of serious injury" do indicate the condition of the industry, as a result of the definitions of those terms contained in Article 4.1(a) and (b).

7.267 The US argument that the terms "serious injury" and "threat of serious injury" are merely labels is also contradicted by the first sentence of Article 5.1, whereby "[a] Member shall apply safeguard measures only to the extent necessary to prevent or remedy *serious injury* and to facilitate adjustment" (emphasis supplied). In our view, this provision establishes a clear link between the benchmark for the application of a safeguard measure (i.e., the condition of the industry), and the term "serious injury". If the term "serious injury" were not itself indicative of the condition of the industry, we fail to see why that term would have been included in the first sentence of Article 5.1. Article 5.1 allows a Member to apply a safeguard measure to "prevent ... serious injury", which presupposes a finding of threat of serious injury, or to "remedy serious injury", which presupposes a finding of serious injury. Since Article 5.1 does not allow Members to apply safeguard measures to "prevent and/or remedy serious injury", we consider that Members must clearly determine in advance whether there is either a threat of serious injury to be prevented, or present serious injury to be remedied.

7.268 Furthermore, Article 5.2(b) precludes quota modulation "in the case of threat of serious injury". In other words, there are important substantive consequences resulting from whether a Member finds "serious injury" or "threat of serious injury". In our view, this further confirms that the terms "serious injury" and "threat of serious injury" are not mere labels.

7.269 Turning to Korea's claim under Article 4.2(c), this provision requires Members' competent authorities to

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<sup>224</sup> US response to Question 1 from the Panel at the first substantive meeting (see Annex B-2).

<sup>225</sup> The United States also made this argument in para. 4 of its additional statement at the second substantive meeting.

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.

7.270 Given the inclusion of the phrase "in accordance with the provisions of Article 3", we consider that Article 4.2(c) should be read in light of Article 3. In particular, given the similarities between the last sentence of Article 3.1 and Article 4.2(c), we consider that Article 4.2(c) should be read in light of the last sentence of Article 3.1. Accordingly, we are of the view that the "detailed analysis" to be published under Article 4.2(c) should include "findings and conclusions reached on all pertinent issues of fact and law", including a finding and conclusion on whether there is either serious injury, or threat of serious injury.

7.271 For the above reasons, we find that the United States violated Articles 3.1 and 4.2(c) by failing to include in its published report a finding or reasoned conclusion either (1) that increased imports have caused serious injury, or (2) that increased imports are threatening to cause serious injury.

7.272 In respect of Korea's claim that a failure to include relevant confidential information in a published determination constitutes a violation of Articles 3.1 and 4.2(c), we note that the panel in *US - Wheat Gluten* found that

the requirement in Article 4.2(c) to publish a "detailed analysis of the case under investigation" and "demonstration of the relevance of the factors examined" cannot entail the publication of "information which is by nature confidential or which is provided on a confidential basis" within the meaning of Article 3.2.

7.273 We see no reason not to be guided by the *US - Wheat Gluten* panel's finding in respect of Korea's Article 4.2(c) claim. Similarly, and given the express reference in Article 4.2(c) to Article 3, we fail to see how the Article 3.1 (last sentence) requirement to "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law" could entail the publication of "information which is by nature confidential or which is provided on a confidential basis" within the meaning of Article 3.2. Accordingly, we reject Korea's claim that failure to include relevant confidential information in a published determination is *per se* a violation of Articles 3.1 and 4.2(c).

### **3. Threat of serious injury**

#### **(a) Arguments by Korea**

7.274 Korea claims that the ITC finding of threat of serious injury did not comply with the Article 4.1(b) requirement that "[a] determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility". Korea claims that the two Commissioners who found threat of serious injury did so merely on the allegation, conjecture or remote possibility that imports would increase in the future, despite a decline in imports at the end of the period of investigation. Korea also claims that the ITC findings of threat of serious injury did not comply with the requirements of Article 2 regarding the conditions for a safeguard measure.

#### **(b) Arguments by the United States**

7.275 The United States asserts that, in making their threat of serious injury determination, Commissioners Askey and Bragg did not rely on a threat of increased imports, but on an actual surge in import levels between 1997 and 1998 that continued through interim 1999. These two Commissioners therefore made the finding of increased imports that Korea implies is a sufficient basis for a threat of serious injury. This is not changed by the fact that the two Commissioners also

made a supplemental finding that subject imports were likely to increase in the foreseeable future, a finding which further supported their conclusions of a threat of serious injury. The United States also denies that the two Commissioners failed to identify a causal link between increased imports and threat of serious injury.

(c) Evaluation by the Panel

7.276 In our view, the facts do not support Korea's claim that Commissioners Askey and Bragg found a threat of serious injury merely on the allegation, conjecture or remote possibility that imports would increase in the future. In respect of increased imports, the two Commissioners found:

Although we find that the existing increase in imports is a cause no less than any other cause of the threat of serious injury to the domestic line pipe industry, we *further* find that, notwithstanding the decline in subject import volume evidenced between interim periods, subject imports are likely to increase in the foreseeable future.<sup>226</sup> (emphasis supplied)

Accordingly, we consider that Commissioners Askey and Bragg based their determination primarily on actual increased imports, and merely made a supplemental finding ("we further find") regarding the threat of future increased imports.<sup>227</sup> There is, therefore, no factual basis to Korea's Article 4.1(b) or 2 claims.

#### 4. Causal link between increased imports and serious injury or threat of serious injury

(a) Arguments by Korea

7.277 Korea claims that the ITC violated Article 4.2(b) by failing to properly demonstrate that injury caused by other factors had not been attributed to increased imports. Korea relies on the Appellate Body's finding in *US - Wheat Gluten* that, in order to comply with the non-attribution requirement, investigating authorities must distinguish the injurious effects caused by increased imports from the injurious effects caused by other factors. Korea asserts that the ITC failed to make this distinction.

7.278 Korea asserts that the ITC did not properly distinguish the injurious effects caused by these other factors from the injurious effects of increased imports, with the result that the ITC was not able to assure that it did not attribute injury caused by other factors to increased imports. In particular, the US causation standard - substantial cause - requires the ITC to look at the injurious effects of other factors in isolation, relative to the injurious effects of increased imports (i.e., are the other factors individually a greater cause of injury than increased imports?). The substantial cause standard does not require the ITC to consider the possibility that the combined injurious effects of these other factors taken together could have caused any serious injury suffered by the US line pipe industry.

7.279 Korea argues that the entire focus and the sequence of the US evaluation of "other factors" in this case is inconsistent with Article 4.2(b) and contains the same methodological flaws already identified by the Appellate Body in *US - Lamb Meat*. The ITC began with an analysis of the combined effects of other factors plus imports and determined whether, all together, they caused "injury." Based on that finding, the ITC then examined whether "the impact of increased imports was as great or greater than the effect of the downturn in demand," or any other individual factor. That examination of the "relative" impact of imports, in and of itself, was the only basis, for deciding that imports were a substantial cause of the serious injury. The ITC did not independently evaluate

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<sup>226</sup> ITC Report, p. I-48.

<sup>227</sup> The issue of whether or not the two Commissioners were correct to find actual increased imports has not been raised by Korea in this context.

whether increased imports bore a “substantial and genuine” relationship to serious injury. The fact that imports may be a greater cause of injury than a single other factor cannot establish that increased imports caused serious injury.

(b) Arguments by the United States

7.280 The United States asserts that the ITC properly distinguished the effects of other factors from the effects of increased imports. In particular, the ITC examined six factors other than increased imports as possible other causes of serious injury. While the ITC found that one other causal factor, declining demand in the oil and gas sector, contributed to the serious injury experienced by the domestic industry, it also found that the impact of increased imports was as great or greater than the effect of the downturn in oil and gas sector demand.

7.281 According to the United States the ITC distinguished any injurious effects caused by increased imports from the effects of declining demand due to decreased oil and gas drilling and production by finding that the decline in demand for line pipe could not explain the level of financial losses experienced by the domestic industry, the domestic producers’ loss of market share, or the across-the-board price declines affecting line pipe products not used in oil and gas gathering applications. Therefore, the ITC did not improperly attribute to imports injury caused by the decline in oil and gas demand, and its findings demonstrated that the causal link between the increased imports and the serious injury was undisturbed by any contribution to injury resulting from reduced oil and gas drilling and production activities. The ITC also considered competition among domestic producers, changes in the OCTG market, declines in the domestic industry’s exports, increases in per-unit overhead and SG&A resulting from declines in overall production and declining raw material costs which had been the cause of declining line pipe prices, as other possible causes of injury to the domestic production. For each of the factors above the ITC found that they were not a more important cause to the serious injury than increased imports.

(c) Evaluation by the Panel

7.282 Korea's claim is based on the second sentence of Article 4.2(b), which provides:

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.

7.283 The ITC identified a number of factors (in addition to increased imports) which caused injury to the line pipe industry. These factors were a decline in line pipe demand resulting from reduced oil and natural gas drilling and production activities; competition among domestic producers; a decline in export markets in 1998 and interim 1999; a shift from OCTG production to line pipe production; and a decline in raw material costs.

7.284 The ITC analysed the relative causal importance of these factors by determining whether any factor is a more important cause of injury than increased imports.<sup>228</sup> This type of analysis is very similar to that reviewed by the Appellate Body in *US- Wheat Gluten* and *US –Lamb Meat*. Therefore, the Appellate Body's analysis and findings in these cases will provide useful guidance for the Panel in this case.

7.285 In *US – Lamb Meat* the Appellate Body referred to the need to establish

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<sup>228</sup> In a safeguards investigation the standard applied by the ITC consists of determining whether the subject product is being imported in such increased quantities as to be a "substantial cause" of serious injury. The term "substantial cause" is defined in the statute as "a cause which is important and not less than any other cause" (Section 202 of the Trade Act of 1974, as amended; notified to the WTO and circulated as G/SG/N/1/USA/1)

"a genuine and substantial relationship of cause and effect" between increased imports and serious injury or threat thereof. As part of that determination, Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports "shall not be attributed to increased imports." In a situation where *several factors* are causing injury "at the same time", a final determination about the injurious effects caused by *increased imports* can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it *assumes* that the other causal factors are *not* causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.<sup>229</sup>

7.286 The Appellate Body emphasised that,

[t]o be certain that the injury caused by these other factors, whatever its magnitude, was not attributed to increased imports, the USITC should also have assessed, to some extent, the injurious effects of these other factors.<sup>230</sup>

7.287 Among the other factors causing injury that were analysed by the ITC, the ITC paid particular attention to the decline in line pipe demand resulting from reduced oil and natural gas drilling and production activities. In its evaluation of this other factor, the ITC:

"recognize[d] that apparent consumption of line pipe in 1999 was significantly lower than in 1998. We presume that this decline in demand largely resulted from reduced oil and natural gas drilling and production activity, as respondents argued. There is no question that such a substantial decline in demand contributed to the serious injury experienced by the domestic industry in 1998-99."

"For several reasons, however, we are not persuaded that the decline in oil and natural gas activities was a greater contributing factor to the industry's serious injury than the imports."<sup>231</sup>

7.288 From the above findings of the ITC, it can be established that the methodology used in its analysis of the injury caused by the oil and gas industry decline has the objective (consistent with applicable US law) of determining whether this factor is a more important cause of injury than the increased imports. We are not convinced that such a determination is enough to satisfy the requirements of Article 4.2(b), which mandates that injury caused by other factors not be attributed to the increased imports. Indeed, the ITC recognizes that the decline in the oil and gas industry was having injurious effects on the domestic line pipe industry. However, it is not apparent from this analysis how, if at all, the ITC separated the injurious effects of the decline in the oil and gas industry from the injurious effects of the increased imports. The ITC's analysis provides no insight into the nature and extent of the injury caused by the decline in the oil and gas industry. Instead, as in the *US – Lamb Meat* case, the United States effectively assumed that the decline in the oil and gas industry did not cause the injury attributed to increased imports. As found by the Appellate Body in *US –*

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<sup>229</sup> *US – Lamb Meat (AB)* at para. 179.

<sup>230</sup> *US – Lamb Meat (AB)* at para. 185.

<sup>231</sup> ITC Report, p. I-28.

*Lamb Meat*, such an assumption is inconsistent with Article 4.2(b). The same assumption was effectively made by the ITC in respect of the other causes of injury identified above, since its analysis of those factors was also confined to a determination of whether the injury caused by the relevant factor was not a more important cause of serious injury than increased imports.

7.289 We further note that the ITC immediately determines whether there is a link between the increased imports and the serious injury, without first attempting to separate out injury that is being caused by other factors. Then the ITC takes each of the other factors, one at a time, and examines its relative causal importance with respect to the serious injury that it has previously determined to exist (*i.e.*, injury that has been caused by increased imports and all other factors). We note that the serious injury under examination remains "polluted" by the injurious effects, however, of the remaining other factors. Therefore, the United States is not assessing the relative causal importance of the injurious effects of the other factor at issue against the injurious effects of the increased imports. Rather, it assesses the injurious effects of the other factor at issue against the injurious effects of increased imports and the remaining other factors. We do not consider that such an analysis allows an investigating authority to determine whether there is "a genuine and substantial relationship of cause and effect" between the serious injury and the increased imports.

7.290 In light of the above, we find that the ITC in its report did not adequately explain how it ensured that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports. For this reason, we find that the United States acted inconsistently with Article 4.2(b) of the Safeguards Agreement.

7.291 Korea also claims that the United States failed to demonstrate a causal relationship between the increased imports and the serious injury for two other reasons. First, Korea argues that there was no coincidence of trends between the imports and the performance of the domestic industry. Second, Korea argues that conditions of competition, including the relationship between volumes and price declines and an overstatement of the imports, did not demonstrate that there was a causal relationship between the increased imports and the performance of the industry. Since we have already concluded that the US causation methodology as performed in this case is not in compliance with Articles 4.2(b) because it failed to ensure that injury caused by other factors was not attributed to the increased imports, we consider that it is not necessary to rule on these additional arguments.

7.292 We also note that Korea claims that, with respect to the threat of serious injury finding by two of the ITC Commissioners, there was a failure to demonstrate a causal relationship between the imports and the imminent serious injury. In essence the methodology applied by the ITC for a finding of a causal link between the serious injury and the increased imports and between the threat of serious injury and the increased imports is one and the same. To the extent that we have already found that the methodology used for a finding of causation in the case of serious injury does not comply with Article 4.2(b) and that such methodology is the same as the one used for a finding of causation in the case of threat of serious injury, it follows that the methodology used for a determination of existence of a causal link between the increased imports and a threat of serious injury is also in violation of Article 4.2(b).

## **5. Unforeseen developments**

7.293 Korea asserts that the US violated Article XIX by failing to demonstrate any unforeseen developments justifying the need for safeguard action. Korea asserts that there is no indication in the ITC determination that the ITC addressed the issue of unforeseen developments. Therefore, Korea claims that the ITC determination does not demonstrate unforeseen developments.

7.294 The United States asserts that Korea itself has identified the relevant unforeseen developments, by referring to the unexpected collapse in oil prices in late 1998 and early 1999. In its

first written submission the United States also points to the East Asian financial crisis as another unforeseen development of importance.

7.295 We note that the requirement to demonstrate the existence of unforeseen developments in order to apply a safeguard measure under Article XIX is an issue that is well established in WTO law. The Appellate Body in their *Korea – Dairy Safeguard* report, when referring to the issue of unforeseen developments, found:

[W]e do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994.<sup>232</sup>

This finding has been subsequently confirmed by the Appellate Body in its reports on *Argentina – Footwear Safeguard*, *US – Wheat Gluten* and *US – Lamb Meat*. Moreover, we do not understand the United States to dispute the existence of the requirement to demonstrate the existence of unforeseen developments.

7.296 In evaluating the US compliance with the requirements of Article XIX we observe the Appellate Body's finding in *US – Lamb Meat* that:

as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, "in order for a safeguard measure to be applied" consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed.<sup>233</sup> (footnote omitted)

We also note that the Appellate Body has established that the demonstration of unforeseen developments is required not only before the measure is applied but also that such a demonstration must appear in the report of the investigating authorities:

In our view, the logical connection between the "conditions" identified in the second clause of Article XIX:1(a) and the "circumstances" outlined in the first clause of [Article 3.1 SA] dictates that the demonstration of the existence of these circumstances must also feature in the same report of the competent authorities. Any other approach would sever the "logical connection" between these two clauses, and would also leave vague and uncertain how compliance with the first clause of Article XIX:1(a) would be fulfilled.<sup>234</sup>

7.297 In view of the Appellate Body's findings, we turned to the ITC report in order to verify whether the United States had carried out the demonstration required by Article XIX. In this case, the ITC report does not contain any demonstration of the existence of unforeseen developments. While the US arguments in these proceedings point to the collapse in oil and gas prices and the East Asian financial crisis as being the unforeseen developments referred to in Article XIX, they were not considered or identified as such in the ITC report. Rather, the collapse in oil and gas prices was examined in the ITC report only as another factor causing injury to the domestic industry.<sup>235</sup> Regarding the East Asian financial crisis, the US points to page II-66 of the ITC report where it is mentioned that:

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<sup>232</sup> *Korea - Dairy Safeguard (AB)* at para. 85.

<sup>233</sup> *US – Lamb Meat (AB)* at para. 72.

<sup>234</sup> *Id.*

<sup>235</sup> ITC Report, p. I-27 to I-30.

A few producers felt that one reason for the increase in imports was a decrease in demand in Asia due to the financial crisis there.

This reference can hardly be considered a demonstration of the existence of unforeseen developments as required by Article XIX.

7.298 To obtain further clarification on this issue, we requested the United States to indicate to the Panel where it considered that it had fulfilled its obligation to demonstrate the existence of unforeseen developments.<sup>236</sup> The United States did not directly answer our question and limited its reply to reiterate its argument that Korea had conceded the existence of unforeseen developments and that therefore it had failed to make a *prima facie* case of violation of Article XIX. Therefore, in the absence of anything in the ITC report or any other document leading up to the imposition of the measure that contains a demonstration of the existence of unforeseen developments, we find that the United States has failed to comply with its obligations under Article XIX in its application of a safeguard measure to imports of line pipe.

7.299 Now we turn to the US argument that Korea has failed to make a *prima facie* case of violation of Article XIX by conceding that certain conditions leading up to the increase in imports were unexpected. We note that the Appellate Body has made it very clear that the existence of unforeseen developments is a prerequisite that must be demonstrated before the safeguard measure is applied. Therefore it is for the competent authorities of a Member to ensure the demonstration of the existence of unforeseen developments at the time of the investigation. As we have found above the United States has failed to do so. The fact that, in its submission, Korea may have pointed to some circumstances which led to an increase in the imports, and that those circumstances may have not been foreseen, does not change the fact that before the measure was applied the ITC did not demonstrate the existence of unforeseen developments. Korea correctly argued before the Panel that there was no indication that the ITC addressed the issue of unforeseen developments in its determination. We do not see how else Korea could have complied with the burden to make a *prima facie* case of failure by the ITC to demonstrate the existence of unforeseen developments. Nor do we see how Korea could be understood to have conceded the existence of unforeseen developments. Therefore, we reject the US argument that Korea has failed to make a *prima facie* case that the United States is not in conformity with Article XIX by failing to demonstrate the existence of unforeseen developments leading to the injurious increased imports.

7.300 The United States also argues that in absence of a *prima facie* case by Korea (that the United States failed to comply with the unforeseen developments requirement in Article XIX) the Panel is not permitted to construct a claim Korea has failed to make.<sup>237</sup> The US argument is based on the premise that Korea fails to make a *prima facie* case of violation under Article XIX. Having found that Korea has made a *prima facie* case of violation of Article XIX, there is no basis for an argument that the Panel is constructing a claim not made by Korea.

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<sup>236</sup> During the second meeting of the Panel with the parties the following question was put to the United States:

10. In *US - Lamb Meat (AB)*, the Appellate Body found that "as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, 'in order for a safeguard measure to be applied' consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made before the safeguard measure is applied." Please indicate where the United States made the required demonstration of unforeseen developments. Please provide any supporting documentation, and give specific references.

<sup>237</sup> In support of their arguments the United States cites to the Appellate Body report on *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, para. 129, adopted 19 March 1999.

## 6. Emergency action

### (a) Arguments by Korea

7.301 Korea claims that the line pipe measure does not satisfy the requirements of emergency action of Article 11 (and the preamble) of the Safeguards Agreement or Article XIX. According to Korea, safeguard measures cannot be imposed unless an emergency situation exists which has been brought on by a sudden, significant increase in imports due to an unforeseen event. Such an emergency situation does not exist in this case, as safeguard measures were not meant to address temporary downturns, which are expected in a business cycle. Nor were safeguard measures intended to remedy temporary downturns caused by factors other than imports. As the Appellate Body recognized in *Argentina – Footwear Safeguard (AB)*, safeguard measures were not intended to address “ordinary events in routine commerce.” To the contrary, the Appellate Body explained, “safeguard measures were intended ... to be matters out of the ordinary, to be matters of urgency, to be, in short, ‘*emergency actions*’” (emphasis added).<sup>238</sup>

### (b) Arguments by the United States

7.302 The United States asserts that nothing in the Safeguards Agreement or Article XIX requires a showing that imports present an emergency situation. Rather, the Safeguards Agreement and Article XIX set forth the conditions under which a Member may take the “emergency action” provided under Article XIX.

### (c) Evaluation by the Panel

7.303 Although Article XIX is entitled ‘*Emergency Action on Imports of Particular Products*’, there is no further reference to the phrase “emergency action” in that Article. The plain language of that provision does not require Members to demonstrate the existence of an “emergency” before being able to take Article XIX safeguard action. Rather, the phrase “emergency action” describes the nature of the (safeguard) action to be taken, once the conditions set forth in Article XIX (and the Safeguards Agreement) have been fulfilled. While the reference to “emergency action” in the title of Article XIX may serve to infer meaning into the substantive obligations of Article XIX (and the Safeguards Agreement), it does not constitute a substantive obligation itself.

7.304 Article 11.1(a) of the Safeguards Agreement provides that:

A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

7.305 Again, we consider that the reference to “emergency action” in this provision simply describes the type of (safeguard) action that may be taken by a Member once the conditions of Article XIX and the Safeguards Agreement are fulfilled. Article 11.1(a) does not impose any additional requirement on Members to demonstrate an “emergency” situation before being able to impose safeguard measures.

7.306 For these reasons, we reject Korea's claim that the line pipe measure does not satisfy the requirements of emergency action of Article 11 (and the preamble) of the Safeguards Agreement or Article XIX.

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<sup>238</sup> *Argentina - Footwear Safeguard (AB)* at para. 93.

## 7. Procedural Issues

(a) Alleged violation of Article 12.3: failure to provide adequate opportunity for prior consultations

(i) *Arguments by Korea*

7.307 Korea claims that the US violated Article 12.3 by failing to provide adequate opportunity for prior consultations on the line pipe measure. Korea asserts that the United States did not disclose the proposed measure to Korea prior to or during the consultations held in Washington on 24 January 2000. Korea notes that it learned of the details of the President's proposed measure through a White House press release issued on 11 February 2000 (the "press release"). Korea argues that this press release did not provide it with an "adequate opportunity" for prior consultations. According to Korea, it therefore had no meaningful ability to discuss the actual remedy proposed before it was imposed.

(ii) *Arguments by the United States*

7.308 The United States argues that Korea received notice of the measure that the President proposed to apply on 11 February 2000, 17 days before the date the measure was scheduled to take effect. The US notes that Article 12.3 obliges a Member proposing to apply a safeguard measure to provide "adequate opportunity for prior consultations". The US refers to the Appellate Body finding in *US - Wheat Gluten* that this obligation:

[R]equires a Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange on the issues identified. To us, it follows from the text of Article 12.3 itself that information on the *proposed* measure must be provided in *advance* of the consultations, so that the consultations can adequately address that measure.<sup>239</sup>

7.309 The United States argues that the Article 12.3 obligation must be interpreted in light of the object and purpose of the Safeguards Agreement and Article XIX, which allow "emergency actions". According to the United States, Article 12.3 requires the provision of an *opportunity* for prior consultations, rather than requiring consultations themselves. Thus, a Member satisfies the Article 12.3 obligation by providing a time or chance for consultations, by providing necessary information and by making itself available for consultations. Since the consultations cover "emergency" action, tight time-frames will obviously be necessary. The US argues that it announced in its supplemental Article 12.1(b) notification of 24 January 2000 that it was prepared to consult with any Member having a substantial interest as an exporter of line pipe, and did not foreclose the possibility of further consultations following the President's 11 February 2000 announcement of the proposed safeguard measure. Moreover, the press release provided the information a Member would need to conduct consultations under Article 12.3. In light of the emergency nature of the action, this schedule presented Korea with an adequate opportunity to request consultations (the US notes that its authorities met with EC officials during this period). That it failed to seize this opportunity is Korea's fault, and does not establish a failure by the United States to comply with its obligations under the WTO Agreement.

(iii) *Evaluation by the Panel*

7.310 On 8 November 1999, pursuant to Article 12.1(b), the United States notified to the Committee on Safeguards that the ITC had reached an affirmative finding of serious injury or threat thereof

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<sup>239</sup> *US - Wheat Gluten* (AB), para. 136.

caused by increased imports.<sup>240</sup> On 24 January 2000 the United States made a supplemental notification under Article 12.1(b).<sup>241</sup> This supplemental notification in essence summarized the 22 December 1999 ITC report, and contained detailed information on the measure that had been proposed by the ITC majority to the US President (as well as an alternative recommendation by two ITC Commissioners). Also on 24 January 2000, the United States and Korea held consultations in Washington, D.C. On 11 February 2000, the US President issued a press release announcing his decision to apply a safeguard measure on imports of line pipe. The press release contained details of the measure decided upon by the President, and stated that the measure would take effect on 1 March 2000. On 22 February 2000, pursuant to Article 12.1(c), the United States notified the Committee on Safeguards of its decision to apply a safeguard measure on imports of line pipe.<sup>242</sup>

7.311 Before we proceed with our analysis, we note that Korea is not challenging the timeliness of the US notifications under Article 12.1, nor the content of those notifications under Article 12.2. Korea's challenge rests exclusively on an asserted violation of the consultation obligations under Article 12.3, which provides that:

A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

7.312 According to Korea, the consultations held on 24 January 2000 did not fulfil the requirement of Article 12.3, because they did not provide a meaningful opportunity to discuss the actual remedy proposed before it was imposed. The United States responds that Korea was informed of the measure by the 11 February 2000 press release and therefore had the opportunity to request consultations before the actual imposition of the measure, but failed to do so.

7.313 The US position relies on the assumption that the press release was sufficient, both in form and content, to ensure Korea an "adequate opportunity for prior consultations" under Article 12.3.<sup>243</sup> On this issue we note that Article 12.3 provides that the purpose of the consultations provided for therein is to "*inter alia*, review the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8." The Appellate Body concluded that with regard to the adequacy of the opportunity for prior consultations under Article 12.3:

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<sup>240</sup> Document G/SG/N/8/USA/7.

<sup>241</sup> Document G/SG/N/8/USA/7/Suppl.1.

<sup>242</sup> G/SG/N/10/USA/5/Rev.1.

<sup>243</sup> The United States does not argue that either its revised Article 12.1(b) notification of 24 January 2001, or its Article 12.1(c) notification of 23 February 2000, provided Korea with an adequate opportunity for Article 12.3 consultations.

We recall that the measure decided upon by the President in this case differed substantially from that recommended by the ITC. Korea's argument rests on the premise that information about the measure actually to be imposed, in this case the measure decided upon by the US President, must be provided in order to afford an adequate basis for consultations under Article 12.3. The Appellate Body, in *US - Wheat Gluten*, did not specifically address the question whether the measure recommended by the ITC and notified under Article 12.1(b) was the "proposed measure" for which an adequate opportunity for prior consultations was required under Article 12.3 (*US - Wheat Gluten (AB)* at note 130). The United States does not contend, in this case, that its revised notification under Article 12.1(b), setting out the recommendations of the ITC, provided the necessary precise description of the proposed measure. We note, in passing, that the two measures recommended by the USITC, as described in the revised Article 12.1(b) notification, do not contain information on the allocation of the recommended quota measures, information which was considered important in assessing the adequacy of the description of the proposed measure by the Appellate Body in *US- Wheat Gluten*.

[A]n exporting Member will not have an "adequate opportunity" under Article 12.3 to negotiate overall equivalent concessions through consultations unless, prior to those consultations, it has obtained, *inter alia*, sufficiently detailed information on the form of the proposed measure, including the nature of the remedy.<sup>244</sup>

7.314 In order to have adequate opportunity for consultations, an exporting Member must have obtained sufficiently detailed information on the proposed measure. We consider that a press release does not ensure that exporting Members obtained the necessary detailed information on the proposed measure. A simple press release does not guarantee that exporting Members obtained the information contained therein, because, *inter alia*, a press release may not be accessible to all Members having a substantial interest. Indeed, Members may not even know of the existence of such a press release, or may be unable to obtain a copy of it. Therefore, we find that the 11 February 2000 press release, regardless of its content, cannot itself be considered to have provided Korea with an adequate opportunity for prior consultations. Accordingly, we are of the view that the United States has acted inconsistently with its obligations under Article 12.3 by failing to provide an adequate opportunity for prior consultations with Members having a substantial interest as exporters of line pipe.<sup>245</sup>

(b) Article 8.1 compensation

7.315 Korea claims that the United States violated Article 8.1 in the same way that it violated Article 12.3. According to Korea, Articles 8.1 and 12.3 are explicitly linked, and require that there be an opportunity for prior consultation with full knowledge of the proposed measure.

7.316 The United States notes that Korea's Article 8.1 claim is explicitly linked to its Article 12.3 claim. Since the United States argues that it complied with Article 12.3, it considers that it also acted in conformity with Article 8.1.

7.317 Article 8.1 provides:

A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

7.318 In our view, Korea's Article 8.1 claim is entirely dependent on its Article 12.3 claim. This view is supported by the Appellate Body's finding in *US – Wheat Gluten*:

In view of [the] explicit link between Articles 8.1 and 12.3 of the *Agreement on Safeguards*, a Member cannot, in our view, "endeavour to maintain" an adequate balance of concessions unless it has, as a first step, provided an adequate opportunity for prior consultations on a proposed measure.<sup>246</sup>

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<sup>244</sup> *US - Wheat Gluten (AB)* at para. 137.

<sup>245</sup> We note the US argument that its 12.1(b) notification did not foreclose the possibility of further consultations following the announcement of the safeguard measure. Although this assertion may be correct, still this does not change our finding that the press release was not an adequate basis for consultations under Article 12.3. Thus, even though further consultations may not have been precluded, there was still no adequate basis on which meaningful consultations could take place.

<sup>246</sup> *US - Wheat Gluten (AB)* at para. 146.

7.319 We concur fully with the Appellate Body's finding that if a Member has not provided adequate opportunity for consultations under Article 12.3, it cannot have complied with its obligation to endeavour to maintain a substantially equivalent level of concessions and other obligations. Therefore, we find that the United States, by failing to comply with its obligations under Article 12.3, has also acted inconsistently with its obligations under Article 8.1 to endeavour to maintain a substantially equivalent level of concessions and other obligations.

## VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In the light of our findings, we conclude that the US line pipe measure was imposed inconsistently with certain provisions of GATT 1994 and/or the Safeguards Agreement, in particular:

- (1) the line pipe measure is not consistent with the general rule contained in the chapeau of Article XIII:2 because it has been applied without respecting traditional trade patterns;
- (2) the line pipe measure is not consistent with Article XIII:2(a) because it has been applied without fixing the total amount of imports permitted at the lower tariff rate;
- (3) the United States acted inconsistently with Articles 3.1 and 4.2(c) by failing to include in its published report a finding or reasoned conclusion either (1) that increased imports have caused serious injury, or (2) that increased imports are threatening to cause serious injury;
- (4) the United States acted inconsistently with Article 4.2(b) by failing to establish a causal link between the increased imports and the serious injury, or threat thereof;
- (5) the United States has not complied with its obligations under Article 9.1 by applying the measure to developing countries whose imports do not exceed the individual and collective thresholds in that provision;
- (6) the United States acted inconsistently with its obligations under Article XIX by failing to demonstrate the existence of unforeseen developments prior to the application of the line pipe measure;
- (7) the United States has acted inconsistently with its obligations under Article 12.3 by failing to provide an adequate opportunity for prior consultations with Members having a substantial interest as exporters of line pipe;
- (8) the United States has acted inconsistently with its obligations under Article 8.1 to endeavour to maintain a substantially equivalent level of concessions and other obligations;

8.2 In light of our findings, we reject Korea's claims that:

- (1) the line pipe measure is inconsistent with the provisions of Article 5;
- (2) the line pipe measure violates Article XIX:I and Articles 5.1 and 7.1 because the measure was not limited to the extent and the time necessary to remedy the injury and allow adjustment;
- (3) the United States' finding of increased imports was inconsistent with Article 2.1 and Article XIX;

- (4) the United States violated Articles 4.1(c), and 4.2 (a), (b) and (c) because the data relied on by the ITC was flawed since it contained data from other industries;
- (5) the ITC erred in finding serious injury because the downturn in the state of the domestic industry was merely temporary, and the condition of the industry was improving at the end of the period of investigation;
- (6) the United States acted inconsistently with its obligations under Articles 2 and 4.1(b) by basing a finding of threat of serious injury on an allegation, conjecture or remote possibility;
- (7) the United States' failure to include relevant confidential information in a published determination constitutes a violation of Articles 3.1 and 4.2(c);
- (8) the line pipe measure does not satisfy the requirements of emergency action of Article 11 (and the preamble) of the Safeguards Agreement or Article XIX of GATT 1994;
- (9) the United States violated Article 2 and 4 by exempting Mexico and Canada from the measure;
- (10) the United States violated Articles I, XIII:1 and XIX by exempting Mexico and Canada from the measure.

8.3 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, we conclude that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described in paragraph 8.1 *supra*, it has nullified or impaired the benefits accruing to Korea under the Agreement on Safeguards and GATT 1994.

8.4 We therefore recommend that the Dispute Settlement Body request the United States to bring its line pipe measure into conformity with its obligations under the WTO Agreement on Safeguards and the GATT of 1994.

8.5 We also note that in its first written submission Korea requests the Panel to "find that the US safeguard measure should be lifted immediately and the ITC safeguard investigation on line pipe terminated". We consider this to be a request by Korea for a specific suggestion on the implementation of the above recommendation under Article 19.1 of the DSU, which provides:

In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

8.6 By virtue of Article 19.1 of the DSU the Panel has the authority to suggest ways in which a Member could implement the Panel's recommendation. That we have the *authority* under Article 19.1 of the *DSU* to make a specific suggestion does not mean that we must or should do so in a given case. As stated *supra*, we recommend that the United States bring its safeguard measure into conformity with its WTO obligations. Although the suggestion that is being requested by Korea could be *one* way that the United States could implement our recommendation, we consider that there may be various other ways in which the United States could implement the Panel recommendation. We do not consider that the suggestion requested by Korea is the only, or necessarily the most appropriate, way in which the United States could implement our recommendation. Accordingly, we decline Korea's request for a specific suggestion by the Panel on ways in which the United States may implement the recommendation made in this report.