

## ANNEX A

### Third Party Submissions and Oral Statements

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## ANNEX A - 1

### THIRD PARTY SUBMISSION BY CANADA

(30 March 2001)

#### I. INTRODUCTION

1. This dispute concerns a safeguard measure imposed by the United States on imports of circular welded carbon quality line pipe (line pipe) effective as of 1 March 2000 (the measure).
2. This dispute was initiated by a request for consultations submitted by Korea on 13 June 2000. Consultations were held on 28 July 2000, but no mutually satisfactory solution was reached.
3. On 26 September 2000, Korea requested the establishment of a panel. The Dispute Settlement Body (DSB) established this panel on 23 October 2000, with the standard terms of reference. Pursuant to Article 10.2 of the DSU, Canada notified the DSB of its substantial interest in this matter and reserved its rights to participate as a third party to the dispute.
4. Canada welcomes this opportunity to participate as a third party in this proceeding and provide its views on Korea's claims regarding the exclusion of Canada from the application of the safeguard measure imposed by the United States.
5. Canada has had the opportunity to review those portions of the First Written Submission of the United States as it pertains to this issue and is fully supportive of the points made by the United States.<sup>1</sup>

#### II. EXEMPTION OF CANADA FROM THE US SAFEGUARD MEASURE ON LINE PIPE

6. Pursuant to the obligations of the United States under the *North American Free Trade Agreement* (NAFTA), Canada was exempted from the safeguard measure imposed by the United States as the United States International Trade Commission (USITC) found that imports of line pipe from Canada did not "contribute importantly" to the serious injury, as this term is defined in Article 802 of the NAFTA<sup>2</sup>. Article 802 of the NAFTA was incorporated into US law through Sections 311 and 312 of the NAFTA Implementation Act.<sup>3</sup> The USITC subsequently recommended

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<sup>1</sup> First Submission of the United States, paras. 214-226.

<sup>2</sup> USITC Report, Investigation No. TA-201-70, Publication 3261, December, 1999 at I-33 (USITC Report), submitted as Exhibit KOR-6. Article 802 of the NAFTA provides that "any [NAFTA] Party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless:

- (a) imports from a [NAFTA] Party, considered individually, account for a substantial share of total imports; and
- (b) imports from a [NAFTA] Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports."

<sup>3</sup> 19 U.S.C. 3371, 3372 (Supp. 1993).

that the President exclude Canada from any relief action.<sup>4</sup> Imports of line pipe from Canada were excluded from the measure.<sup>5</sup>

### III. ARGUMENT

#### A. ARTICLE 2.2 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLES I, XIII AND XIX OF GATT 1994 DO NOT PROHIBIT A MEMBER FROM EXCLUDING A FREE TRADE AGREEMENT PARTNER FROM A SAFEGUARD MEASURE

7. Korea claims that the US decision to exclude imports from Canada from the application of the safeguard measure on line pipe is inconsistent with Article 2.2 of the *Agreement on Safeguards* and Articles I, XIII and XIX of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) because the United States failed to apply the safeguard measure to all imports irrespective of source, as required by Article 2.2. Korea also claims that this failure contravenes the “most favoured nation” obligation reflected in Articles I, XIII and XIX of GATT 1994<sup>6</sup>.

8. Canada submits that the last sentence of footnote 1 of Article 2.2 of the *Agreement on Safeguards*, which provides that “[n]othing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994” supports the view that regard must be had to the relevant GATT provisions in interpreting the *Agreement on Safeguards*. As indicated by the United States, under Article 31 of the Vienna Convention, the terms of footnote 1 must be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the *Agreement on Safeguards*.<sup>7</sup>

9. Canada agrees with the submissions of the United States that Articles XIX and paragraph 8 of Article XXIV of GATT 1994 read together justify an exclusion of a Member party to a free-trade area (FTA) from a safeguard measure imposed by another Member party to that same FTA. As noted by the United States, safeguard measures applied pursuant to Article XIX are not among the measures that Article XXIV:8 specifically authorizes participants in an FTA to maintain against each other.<sup>8</sup> Canada also agrees with the United States that to the extent that Article XIX, read in conjunction with other GATT 1994 articles, can be interpreted to contemplate the application of safeguard measures to products from all sources, Article XXIV creates a limited exception.<sup>9</sup>

10. Canada maintains that this interpretation of the relevant GATT provisions is consistent with the interpretation of Article 2.2 of the *Agreement on Safeguards* and footnote 1 to that Article. As the Appellate Body confirmed in *Argentina – Safeguard Measures on Imports of Footwear*, GATT 1994 and the *Agreement on Safeguards* contain an “inseparable package of rights and disciplines” and meaning must be given to all the relevant provisions of these two equally binding agreements.<sup>10</sup> As Article XIX and XXIV:8 of GATT 1994 provide for the possibility of an exclusion of a free trade partner from a safeguard measure imposed by another Member party to that free trade agreement, in keeping with general principles of treaty interpretation, the *Agreement on Safeguards* must also provide for the possibility of such an exclusion.

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<sup>4</sup> USITC Report. The USITC also found that imports of line pipe from Mexico were not contributing importantly to the serious injury and recommended that the President exclude imports of line pipe from Mexico from any relief action.

<sup>5</sup> Imports of line pipe from Mexico were also excluded from the measure.

<sup>6</sup> First Submission of the Republic of Korea, para. 168.

<sup>7</sup> First Submission of the United States, para. 221, see also para. 214.

<sup>8</sup> *Id.*, para. 216.

<sup>9</sup> *Id.*, para. 217.

<sup>10</sup> WT/DS121/AB/R, December 14, 1999, para. 81.

#### **IV. CONCLUSION**

11. Accordingly, Canada respectfully submits that the exclusion of a free trade partner from a safeguard measure is not inconsistent with Article 2.2 of the *Agreement on Safeguards* or Articles I, XIII or XIX of GATT 1994.

## ANNEX A-2

### THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

(30 March 2001)

#### I. INTRODUCTION

1. The European Communities (“the EC”) welcomes this opportunity to present its views in the proceeding brought by Korea over the consistency with GATT 1994 and the *Agreement on Safeguards* of the definitive safeguard measure imposed by the United States (“the US”) on imports of circular welded carbon-quality line pipe.

2. The EC has decided to intervene as third party in the present case because of its trade interests and its systemic interest in the correct interpretation of provisions of the GATT 1994 and the *Agreement on Safeguards*, as well as in the correct application of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“the DSU”).

3. As a general matter, it is the view of the EC that the safeguard mechanism should only be relied upon in exceptional circumstances and thus in *emergency* situations only, as the title of Article XIX GATT 1994 already sets out clearly. In the Appellate Body’s words, “Article XIX is clearly, and in every way, an extraordinary remedy”.<sup>1</sup> It should only be invoked when all of the strict requirements which are set out in WTO law have been fulfilled, in particular because the reliance on the safeguard mechanism interferes with the fair conduct of trade performed by competitive exporters. It is against this general background that the EC intends to make certain comments regarding the present case.

4. The EC will limit its submission to the **US request for preliminary ruling** and the issue of “**unforeseen developments**”, and reserves its right to comment at the Third Party Session on other issues of legal interpretation which it considers to be of particular interest.

#### II. THE US REQUEST FOR A PRELIMINARY RULING ON ADMISSIBILITY OF CERTAIN EVIDENCE SHOULD BE REJECTED

5.. In its First Written Submission the US has requested the Panel to issue a preliminary ruling with regard to the admissibility of certain evidence submitted or referred to in Korea’s First Written Submission, and which was allegedly not part of the record of the US investigating authorities (ITC).<sup>2</sup>

6.. The EC submits that the US request does not find support in, and is rather contrary to, the *Agreement on Safeguards* and unduly diminishes the rights conferred upon Members by the *WTO Agreement*. Accordingly, it respectfully requests the Panel to reject the US request.

7. In support of its request the US first relies on the fact that the information submitted by Korea was not in the ITC record.

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<sup>1</sup> Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8, WT/DS98/AB/R, 14 December 1999, para. 86 (“*Korea – Dairy Products*”); Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, para. 93 (“*Argentina – Footwear*”).

<sup>2</sup> US First Written Submission, paras. 278 ff.

8.. Nothing in the text of the *Agreement on Safeguards* or of the *DSU* limits a Member's right to make its own *prima facie* case.

9.. Specifically, this right is not qualified by any limit to the admissibility of evidence in any WTO provision or by any authorization to panels to reduce Members' right to make their case. In the absence of such an express limit, any ruling rejecting evidence as not admissible would diminish Members' rights under the *WTO Agreement*, contrary to Article 3.2 of the *DSU*.

10. The investigation record content cannot restrict a Panel's review of certain evidence in deciding a claim brought under the provisions of the *Agreement on Safeguards*.

11. On the contrary, the fact that such evidence is not on record may indicate that a violation exists if the record is omissive.<sup>3</sup> In *Korea – Dairy Products* the Panel made clear that the investigating authorities are called to evaluate all relevant information before it or that it should have been before it so as to comply with the requirements of the *Agreement on Safeguards*, notably Article 4.<sup>4</sup> That provision in particular, by requiring investigating authorities to evaluate "all relevant factors of an objective and quantifiable nature" makes clear that domestic safeguard proceedings are not purely adversarial, but are characterized by an inquisitorial element and require some initiative on the part of the investigating authorities.

12. This character of safeguard proceeding is also borne out by the prescriptions in Article 3.1 of the *Agreement on Safeguards* concerning the activities that the investigating authorities must perform, in particular the obligation imposed on them to "[set] forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".

13. Furthermore, whether or not a WTO Member starting dispute settlement proceedings was represented and/or actively participated in the investigation can also not restrict the Panel's review of evidence submitted by the parties, and thus justify a Panel's ruling that certain evidence is inadmissible.

14. Participation of all interested parties, including WTO Members, in domestic proceedings is a right (sometimes referred to as "due process right"), normally also expressly provided for in domestic safeguard regulations, but certainly conferred by the *Agreement on Safeguards* (Article 3.1). The US itself acknowledges the existence of such a right.<sup>5</sup>

15. This right is completely distinct from and independent of the right of WTO Members to start dispute settlement proceedings where a violation of the *Agreement on Safeguards* is claimed.<sup>6</sup>

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<sup>3</sup> Cf. e.g. Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, adopted 21 June 1999 ("*Korea – Dairy Products*"), para. 7.81, where the Panel found the domestic investigation report to be omissive on one of the "injury factors" and therefore found that the investigating authorities had not complied with the requirements of Article 4 of the *Agreement on Safeguards*.

<sup>4</sup> *Korea – Dairy Products*, Panel Report, paras. 7.30, 7.31 and 7.55. Furthermore, in *US - Wheat Gluten* the Appellate Body clarified that if the competent authorities consider that a particular "other factor" not specifically listed in Article 4.2(a) of the *Agreement on Safeguards* may be relevant to the situation of the domestic industry, their duties of investigation and evaluation preclude them from remaining passive in the face of possible shortcomings in the evidence submitted, and views expressed, by the interested parties (Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, 22 December 2000, paras. 55-56 ("*US - Wheat Gluten*"). The situation described by the Appellate Body would therefore lead to an omissive record.

<sup>5</sup> US First Written Submission, para. 285.

<sup>6</sup> Similarly, in para. 114 of its Report on *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*", WT/DS122/AB/R, 12 March 2001), the Appellate Body noted that the obligations in Article 3.1 of the *Anti-Dumping Agreement*,

Specifically, the right to participate in domestic proceedings is not a prerequisite for to the right to resort to the dispute settlement system, nor does its non-exercise or partial exercise foreclose the right to resort to the dispute settlement system, including on issues which were discussed in domestic proceedings.<sup>7</sup>

16. In the absence of a specific limitation, a right under the *Agreement on Safeguards* - the right to participate in domestic proceedings - cannot be interpreted so as to restrict another one – the right to have violations of the *Agreement on Safeguards* reviewed in dispute settlement proceedings. This would however be the result if the US request were granted. Such a result, not the admission of evidence not on record, would be in open conflict with the principle of effective treaty interpretation, contrary to the US contention.<sup>8</sup>

17. It should further be noted that, as can also be inferred from the description in Article 3 of the *Agreement on Safeguards*, domestic proceedings focus on issues relating to domestic safeguard regulations (in this case, US regulations).

18. For example, if a WTO Member participating in a domestic proceeding were to object that a certain step is contrary to the investigating Member's obligations under WTO, this issue would not necessarily be taken into account by domestic authorities, whose normal task is to verify whether the conditions set out in domestic provisions for taking safeguard actions are met.

19. This in particular seems to be the case in the US. To the best of EC's knowledge there is no mention in US safeguard regulation of a duty to assess whether safeguard action would or would not be WTO-compatible (nor would the inclusion of a provision to this effect in a Member's safeguards rules be required under the *Agreement on Safeguards*).

20. The US authorities are obliged to apply section 201 of the Trade Act of 1974 and other statutory and regulatory standards, not to ensure conformity with WTO provisions. The EC would further recall that the *Uruguay Round Agreements Act (URAA)*, by which the US accepted the *WTO Agreement* into domestic legislation, contains an express provision of the following tenor:

“(a) RELATIONSHIP OF AGREEMENTS TO UNITED STATES LAW.—

(1) UNITED STATES LAW TO PREVAIL IN CONFLICT. – No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

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relating to domestic proceedings, are distinct from those in Article 17.5-17.6 of the same agreement, relating to dispute settlement proceedings.

<sup>7</sup> The *Agreement on Safeguards* does not contain a provision of the kind of Article 17.5(ii) of the *Anti-Dumping Agreement*, which defines the scope for the Panel's review by referring to “the facts available in conformity with appropriate domestic procedures to the authorities of the importing Member.”

<sup>8</sup> US First Written Submission, para. 286.

(2) CONSTRUCTION. -Nothing in this Act shall be construed-

(A) to amend or modify any law of the United States, (...)

unless specifically provided for in this Act.”<sup>9</sup>

21. This provision makes clear that there is no right under US legislation that US domestic authorities review compliance with WTO provisions and ensure their prevalence, quite the contrary. This further confirms that the rights accruing to WTO Members under the *Agreement on Safeguards* and other WTO provisions cannot be made dependent upon action before domestic authorities.

22. WTO Members’ right to dispute settlement adjudication is moreover not subject to, and cannot be encroached upon by, the varying requirements of domestic regulations. This right guarantees effective equality of all Members in respect of safeguard obligations.

23. Nor are the “due process” rights of other “interested parties”, including private parties, impaired by subsequent dispute settlement proceedings started by governments.<sup>10</sup> Dispute settlement proceedings are indeed an additional avenue to protect *inter alia* such rights.

24. The relevance of the evidence submitted by Korea to the present case, which is also questioned by the US<sup>11</sup>, is of course a different issue, consideration of which indeed assumes that certain evidence is admitted before the Panel. The EC considers that the evaluation of the relevance of evidence is a matter for the Panel in the discharge of its obligation, under Article 11 of the *DSU*, to make an objective assessment of the matter before it.<sup>12</sup>

25. With regard to the appropriate standard of review, the EC agrees that the role of the Panel is not to engage in a *de novo* exercise. Instead, the Panel’s review should determine whether the ITC had considered all relevant facts in its possession or which it should have obtained in accordance with the *Agreement on Safeguards* (including facts which might detract from an affirmative determination), whether these facts supported the ITC determination, whether the published report on the investigation contained adequate explanation of how the facts supported the determination made, and consequently whether the determination made was consistent with the US obligations under the *Agreement on Safeguards* and GATT 1994.

26. In other words, the Panel is not required to determine, *in lieu* of the investigating authorities, what would be the best possible decision to be taken under the circumstances of the case at hand, but rather whether the decision, as taken by the investigating authorities, trespassed the boundaries of WTO-consistency. As stated by the Appellate Body, under Article 11 of the *DSU*, panels are

“... charged with the mandate to determine the *facts* of the case and to arrive at *factual findings*. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof.”<sup>13</sup>

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<sup>9</sup> URAA, Section 102 (a).

<sup>10</sup> US First Written Submission, para. 286.

<sup>11</sup> US First Written Submission, para. 278.

<sup>12</sup> Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para. 117 (“*EC – Hormones*”).

<sup>13</sup> *Korea – Dairy Products*, Appellate Body Report, para. 137 (italics in original, underlined added); restated in *US – Wheat Gluten*, Appellate Body Report, para. 150.

27. Assessing the relevance of the evidence submitted by one of the parties to the dispute is therefore also not amounting to a *de novo* review on the part of the Panel, contrary to the US contention.<sup>14</sup>

28. Accordingly, the EC respectfully submits that the US request to dismiss such evidence as inadmissible should be rejected.

### III. THE US HAS NOT DEMONSTRATED “UNFORESEEN DEVELOPMENTS”

29. The EC concurs with Korea that no “unforeseen developments” leading to increased imports were identified and reviewed by the ITC in its report nor elsewhere in the record.

30. As stated by the Appellate Body in *Korea - Dairy Products* and *Argentina - Footwear*

“the developments which led to [a foreign product] being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected'.”<sup>15</sup>

As to the requirements imposed upon the authorities of a country seeking to take safeguard action, the Appellate Body further found that

“the first clause [in Article XIX:1(a) of GATT 1994] 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>16</sup>

31. It follows that 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...”.<sup>17</sup>

32. It is the view of the EC that such a *demonstration* requires a verifiable description, *i.e.* a determination in the record of the investigation, stating clearly that certain circumstances constitute unforeseen developments. This requires identifying

-circumstances which constitute developments leading to an import surge;

and

-circumstances which show that such developments were unforeseen.

33. Still in *Argentina – Footwear*, the Appellate Body found that :

“Article XIX (...) establishes certain prerequisites for the imposition of safeguard measures.”<sup>18</sup>

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<sup>14</sup> US First Written Submission, para. 283.

<sup>15</sup> *Korea – Dairy Products*, Appellate Body Report, para. 84; *Argentina – Footwear*, Appellate Body Report, para. 91.

<sup>16</sup> *Korea – Dairy Products*, Appellate Body Report, para. 85; *Argentina – Footwear*, Appellate Body Report, para. 92 (emphasis added).

<sup>17</sup> *Argentina – Footwear*, Appellate Body Report, para. 98 (emphasis added).

<sup>18</sup> *Argentina – Footwear*, Appellate Body Report, para. 83 (emphasis added).

34. The last two Appellate Body's findings just recalled make clear that the demonstration as a matter of fact cannot be made *ex post facto*, for example in a written submission in the framework of a dispute settlement procedure. This entails that the demonstration of "unforeseen developments" must be brought forward in the investigation report or other document of the domestic authorities forming the basis for the application of the measure. Thus, in *Korea – Dairy products* the Panel considered that, since it had to make an objective assessment of the factual considerations and reasoning of the Korean authorities at the time of the determination, its analysis had to be based on the investigation report.<sup>19</sup> Likewise, in *US – Lamb* the Panel found that there was no discernible conclusion on "unforeseen developments" in the investigation report and found a violation of Article XIX of GATT 1994.<sup>20</sup>

35. In addition, Article 3.1 of the *Agreement on Safeguards* requires the competent authorities to set out in their report "their findings and reasoned conclusions reached on all pertinent issues of fact and law". While claims that the substantive requirement of "unforeseen developments" is missing are properly brought and reviewed under Article XIX of GATT 1994, Article 3.1 of the *Agreement on Safeguards* constitutes "context" for the interpretation of Article XIX.

36. The EC has found no specific reference in the ITC Report to a determination setting out which "unforeseen developments" caused the surge in imports of line pipe.

37. The EC notes that in its First Written Submission the US mentions certain circumstances emerging from the investigation record that in its view constituted "unforeseen developments" relevant under Article XIX of GATT 1994.<sup>21</sup> These are:

- expectations of both importers and domestic producers that demand would continue to be strong
- misjudgement of the domestic market by domestic producers
- collapse of oil prices
- the East Asian financial crisis.

38. In the EC's view, the first three circumstances are certainly not "unforeseen developments" and are not "leading to" a surge in imports.

39. In the first place, it goes without saying that poor business judgment on the part of the domestic industry is not a justification for safeguard relief against fair imports, nor does it lead to a surge in imports.

40. Furthermore, the first three circumstances can all be linked to the cyclical nature of the line pipe sector, closely following the cyclical fluctuations in oil prices – a circumstance equally accounted for in the ITC Report investigation record.<sup>22</sup> Moreover, at most these circumstances account for a (downward) change in the domestic overall demand. This does not mean that they have any bearing on the trends in imports, notably upward trends, as required by Article XIX of GATT 1994 and recalled the Appellate Body.

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<sup>19</sup> *Korea – Dairy Products*, Panel Report, para. 7.59.

<sup>20</sup> *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("US – Lamb"), WT/DS177/R, WT/DS178/R, circulated 21 December 2000, para.7.31, 7.39, 7.43, 7.44.

<sup>21</sup> US First Written Submission, paras. 230-231.

<sup>22</sup> See ITC Determination, p. II-44, also referred to by Korea in its First Written Submission, footnote 62.

41. As to the “East Asian financial crisis”, in the passage referred to by the US in its First Written Submission<sup>23</sup> it is accounted for as no more than a “feeling” of “a few producers” – immediately contrasted with another conflicting “feeling” of some other producer.

42. Thus, the series of factors, all included in the ITC Report, that the US managed to gather in just two paragraphs of its First Written Submission, at most proves the point that a conclusion on “unforeseen developments” is required. A list of disparate and possibly conflicting factors does not allow to discern clearly what development, if any, was really relevant to the domestic authorities’ decision, or what really “demonstrated” the presence of “unforeseen developments”. Investigating authorities cannot merely list and take stock of facts: they must also actively take a position. Otherwise, it would be sufficient to list a series of conflicting circumstances to meet Article XIX’s “unforeseen developments” requirement. This is not what the Appellate Body meant by referring to a “demonstration”.

43. Also, if no conclusion were required of the investigating authorities, the Panel would be authorized really to proceed to *de novo* review of the ITC determination and substitute its appreciation of the conflicting listed facts for the missing ITC appreciation.

44. In the light of the foregoing, the EC respectfully requests the Panel to uphold Korea’s claim that the US failed to demonstrate “unforeseen developments” which led to increased imports, as required in Article XIX of GATT 1994.

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<sup>23</sup> USITC Report, p. II-66, referred to in US First Written Submission, para. 231.

## ANNEX A-3

### THIRD PARTY SUBMISSION OF JAPAN

(30 March 2001)

As Japan has not yet exhausted its examination of the issues contained in the submissions of Korea and the United States, Japan would like to reserve the right to express its additional comments as the time of the Panel meeting.

#### I. INTRODUCTION

1. Japanese exporters of line pipe are subject to the safeguard measure at issue in this dispute. Like Korea, Japan believes that the measure and the safeguard investigation that preceded it were not in conformity with the obligations of the United States under the General Agreement on Tariffs and Trade 1994 herein after referred to as "GATT" and the Agreement on Safeguards ("the Safeguards Agreement").

2. Japan is concerned about the effect of the improper US actions in this case and also has systemic concerns about US safeguards practices in general.

3. Accordingly, Japan provides its views with regard to the following significant issues in this proceeding:

- the US remedy was not limited to the extent necessary to remedy the serious injury, as required by GATT Article XIX:1 and Article 5.1 of the Safeguards Agreement;
- the exclusion of Canada and Mexico from the remedy is discriminatory and violates Article 2.2 of the Safeguards Agreement;
- the US International Trade Commission (the ITC) investigation did not establish the requisite increase of imports, provide objective evidence of serious injury or demonstrate a causal link between increased imports and condition of the US industry, as required by GATT Article XIX:1 and Article 2 of the Safeguards Agreement;
- the US incorrectly interprets the term "unforeseen developments" of GATT Article XIX; and
- GATT Article XIX and Article 2.1 of the Safeguard Agreement require an authority to base its determination on data from the "recent past," and this aspect of the determination is subject to review by a panel.

## II. THE US REMEDY WAS NOT LIMITED TO THE EXTENT NECESSARY TO REMEDY ANY SERIOUS INJURY, AS REQUIRED BY GATT ARTICLE XIX:1 AND ARTICLE 5.1 OF THE SAFEGUARDS AGREEMENT

4. The Panel in *Korea—Dairy Safeguard* found that Article 5.1 of the Safeguards Agreement imposes a “very specific obligation”: the level of the restriction imposed by a safeguard measure must be commensurate with the goal of preventing or remedying the serious injury.<sup>1</sup> The Appellate Body affirmed this finding.<sup>2</sup>

5. The remedy level imposed by the President was far more restrictive than that recommended by the ITC, which was based on detailed market and economic analysis. In stark contrast to the ITC’s remedy recommendation, the President’s remedy was unsupported by any analysis. Moreover, it was more stringent not only than the ITC’s recommendation, but also than the restriction level requested by the US domestic industry.<sup>3</sup> Because the remedy level imposed by the President exceeds the level recommended by the ITC – the US authority that conducted the investigation – it cannot possibly be limited “to the extent necessary to prevent or remedy serious injury,” as required by Article 5.1 of the SG Agreement as well as the same requirement set out in GATT Article XIX:1(a).

## III. THE EXCLUSION OF CANADA AND MEXICO FROM THE REMEDY IS DISCRIMINATORY AND VIOLATES ARTICLE 2.2 OF THE SAFEGUARDS AGREEMENT

6. The MFN principle is one of the pillars of the GATT-WTO agreements. In the application of Safeguard measures, the MFN principle is also enshrined in Article 2.2 of the Safeguards Agreement, which states:

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

7. The United States did not impose the measure on all imports after a determination of serious injury based on examination of all imports. Rather, it applied the measure discriminatorily, excluding Canada and Mexico from its scope.

8. The United States claims, as it has in prior disputes, that footnote 1 of the SG Agreement authorizes it to exclude Canada and Mexico, the other members of the North American Free Trade Agreement (the NAFTA).<sup>4</sup> This argument should be rejected by the Panel. It is based on a tortured, incorrect textual analysis; also, it is inconsistent with the decisions of the Appellate Body in *Turkey—Textile*,<sup>5</sup> *Argentina—Footwear*<sup>6</sup> and *US—Wheat Gluten*.<sup>7</sup>

9. Footnote 1 provides that a customs union may apply a safeguard measure as a single unit where the determination of serious injury is based on conditions existing in the Customs Union, as a whole. But, footnote 1 permits no such special action by the members of a free-trade area. Moreover, even if it did, the US argument would fail because the US does not satisfy the two prerequisites set out by the Appellate Body in *Turkey—Textile*: (1) it cannot establish that the line pipe safeguard

<sup>1</sup> *Korea—Dairy Safeguard*, WT/DS98/R (21 June 1999) at para. 7.100.

<sup>2</sup> *Korea—Dairy Safeguard*, WT/DS98/AB/R (14 December 1999) at para. 96.

<sup>3</sup> See Korea’s First Submission at para. 145.

<sup>4</sup> US First Submission at paras. 214-226.

<sup>5</sup> *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) (*Turkey—Textile*) at paras. 42-58.

<sup>6</sup> *Argentina—Safeguard Measure on Imports of Footwear*, WT/DS121/AB/R (14 December 1999) (*Argentina—Footwear*) at paras. 99-114.

<sup>7</sup> *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (22 December 2000) (*U.S.—Wheat Gluten*) at paras. 93-100.

measure was introduced upon the formation of the NAFTA; and (2) even if it could, it cannot establish that the formation of the NAFTA would have been prevented if it had not been allowed to introduce the measure.<sup>8</sup>

10. Moreover, even if the US had met these requirements, its reliance on footnote 1 still would be misplaced. In *Argentina—Footwear*, the Appellate Body held that Argentina could not justify its departure from the non-discrimination obligation of Article 2.2 by relying on footnote 1 and Argentina's MERCOSUR membership.<sup>9</sup> The Appellate Body stated as follows:

106. We question the Panel's implicit assumption that footnote 1 to Article 2.1 of the *Agreement on Safeguards* applies to the facts of this case. The ordinary meaning of the first sentence of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure "as a single unit or on behalf of a member State." On the facts of this case, Argentina applied the safeguard measures at issue after an investigation by Argentina authorities of the effects of imports from all sources on the Argentine domestic industry.

107. MERCOSUR did not apply these safeguard measures, either as a single unit or on behalf of Argentina. . . .

108. Therefore, at the time the safeguard measures at issue in this case were imposed by the Government of Argentina, these measures were not applied by MERCOSUR "on behalf of" Argentina, but rather, they were applied by Argentina. It is Argentina that is a Member of the WTO for the purposes of Article 2 of the *Agreement on Safeguards*, and it is Argentina that applied the safeguard measures after conducting an investigation of products being imported into *its* territory and the effects of those imports on *its* domestic industry. For these reasons, we do not believe that footnote 1 to Article 2.1 applies to the safeguard measures imposed by Argentina in this case. As a result, we find that the Panel erred in assuming that footnote 1 applied, and we, therefore, reverse the legal reasoning and findings of the Panel relating to footnote 1 to Article 2.1 of the *Agreement on Safeguards*.<sup>10</sup>

11. Here, the US conducted an investigation and imposed a safeguard measure to protect the US market. As in *Argentina—Footwear*, even if NAFTA were a customs union (it is not), the safeguard measure was not "applied by a customs union on behalf of a member state."<sup>11</sup>

12. *Argentina—Footwear* clarifies that footnote 1 does not apply where a Member of a customs union applies a safeguard on its own behalf. The decision also clarifies that, when a customs union applies a safeguard, it can do so as a single unit where the determination of serious injury was based on conditions existing in the customs union as a whole. For these reasons as well, the US arguments based on footnote 1 must be rejected.

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<sup>8</sup> *Turkey—Textile*, para. 58.

<sup>9</sup> *Argentina—Footwear* at para. 108.

<sup>10</sup> *Id.* at paras. 106-107 (footnotes omitted; emphasis added).

<sup>11</sup> *Id.* at para. 114 (emphasis in original).

13. Finally, the US resort to the last sentence of footnote 1 is unavailing. First, as demonstrated above, footnote 1 applies to customs unions, not to free-trade areas. Thus, the US does not qualify for application of the last sentence: NAFTA is a free trade agreement and doesn't establish a customs union.

14. Moreover, even if the last sentence of footnote 1 were applicable, it says merely that nothing in the SG Agreement "prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994." It does not say, as the U.S. vainly asserts, that the US is allowed to exempt its NAFTA partners from safeguard measures. As demonstrated by the discussion in the Analytical Index of the GATT, the issue of the relationship between GATT Articles XIX and XXIV had been discussed repeatedly during the history of the GATT, and the interpretation advanced by the US was never accepted.<sup>12</sup> Thus the last sentence of footnote 1 certainly was not an affirmation of the propriety of exemption of free trade agreement partners.

#### **IV. THE US ITC INVESTIGATION DID NOT ESTABLISH THE REQUISITE INCREASE OF IMPORTS, PROVIDE OBJECTIVE EVIDENCE OF SERIOUS INJURY OR DEMONSTRATE A CAUSAL LINK BETWEEN INCREASED IMPORTS AND THE CONDITION OF THE US INDUSTRY, AS REQUIRED BY GATT ARTICLE XIX:1 AND ARTICLE 2 OF THE SAFEGUARDS AGREEMENT**

15. In its decision in *Argentina—Footwear*, the Appellate Body clarified that strict compliance with each requirement relating to safeguard investigations is a prerequisite for imposing safeguard measures.<sup>13</sup>

16. Korea has demonstrated at paragraphs 184 through 311 of its First Submission that the ITC decision failed to meet three of the fundamental requirements set forth in Article 2 of the Safeguards Agreement. Japan will not reiterate at length the sound argumentation provided by Korea. Rather, it will summarize the essence of the ITC's failings.

17. First, the ITC failed to demonstrate that there was a sudden, sharp and recent increase in imports, as required by the Appellate Body in *Argentina—Footwear* in order to satisfy GATT Article XIX:1 and Article 2.1 of the Safeguards Agreement.<sup>14</sup> Indeed, the record establishes that imports declined during the twelve months prior to the ITC determination (the "recent past").<sup>15</sup> Moreover, the record shows that imports declined relative to domestic production from the last half of 1998 to the first half of 1999.<sup>16</sup>

18. Second, the ITC failed to demonstrate that the U.S. line pipe industry was seriously injured, as required by Article 4 of the Safeguards Agreement. The Appellate Body decision in *US—Wheat Gluten* requires that, to satisfy Articles 3.1 and 4.2(c) of the Safeguards Agreement, the administering authority must include in its report adequate reasoning in support of the serious injury determination.<sup>17</sup> The ITC failed to do so. As Korea demonstrates at paragraphs 214 to 262 of its First Submission, the findings and conclusions of the ITC Commissioners contain many inconsistencies and contradictions, and the ITC Report does not explain how the Commissioners reached their contrary conclusions.

19. Moreover, the ITC ignored evidence from the "very end of the period" that demonstrated that, by the time of its decision, the US line pipe industry already was recovering from its temporary

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<sup>12</sup> *Guide to GATT Law and Practice*, Volume II, pages 822-823 and 838-840 (WTO, Geneva, 1995).

<sup>13</sup> *Argentina—Footwear* at para. 93.

<sup>14</sup> *Id.* at para. 130.

<sup>15</sup> See Korea's First Submission at paras. 194-206.

<sup>16</sup> *Id.* at paras. 207-211.

<sup>17</sup> *US—Wheat Gluten* at para. 160.

downturn. A temporary downturn in performance from a period of peak performance does not establish extensive and substantial weakness of the US industry such as to justify an affirmative determination of serious injury.

20. Third, the ITC failed to demonstrate a causal nexus between increased imports and serious injury to the US line pipe industry, as required by GATT Article XIX:1 and Article 4.2(b) of the Safeguards Agreement. As Korea demonstrates at paragraphs 263 to 311 of its First Submission, there was no coincidence of trends between imports and the performance of the US industry. Price trends resulted from a decline in demand for line pipe in the United States, and there was no evidence that imports led prices down. In addition, the record evidence establishes that other factors, principally a decline in demand for line pipe by the US oil and gas industry, caused whatever injury the U.S. line pipe industry may have experienced. Thus, the causal nexus required by Articles 4.2(b) of the Safeguards Agreement does not exist.

#### **V. THE US INCORRECTLY INTERPRETS THE TERM “UNFORESEEN DEVELOPMENTS” IN GATT ARTICLE XIX**

21. The US asserts at paragraph 230 of its First Submission that Korea has conceded that the ITC investigation demonstrated the existence of unforeseen developments. As set forth below, the US assertion is flawed and is based on a misinterpretation of the term “unforeseen developments” in GATT Article XIX.

22. As the Appellate Body has clarified, the term “unforeseen developments” does not refer to whether a domestic industry expected the market conditions prevailing prior to imposition of a safeguard measure. Rather, the Appellate Body concluded as following in *Argentina—Footwear*:

We note once again, that Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, “emergency actions.” And, such “emergency actions” are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not “foreseen” or “expected” when it incurred that obligation.<sup>18</sup>

23. Thus, Article XIX refers to a Member’s expectations with regard to the result of the effect of the obligations incurred by the Member.

#### **VI. THE PANEL SHOULD REJECT THE US ATTEMPT TO INSULATE THE ITC INJURY DETERMINATION FROM REVIEW**

24. One strategy used by the US in its First Submission is, whenever possible, to insulate aspects of the ITC investigation from review. Nowhere is this more apparent than at paragraph 70, where the US attempts to counter Korea’s rational suggestion that the ITC should have examined the most recent data available to comply with GATT Article XIX and Article 2 of the Safeguards Agreement.<sup>19</sup>

25. The US suggests that Korea’s arguments would require “the Panel to substitute its judgement for that of the USITC as to the appropriate period for assessing whether there were increased imports,” and that this would constitute impermissible *de novo* review.<sup>20</sup> The US is incorrect. Korea argues, quite correctly, that given the plain meaning of GATT Article XIX and Article 2.1 of the

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<sup>18</sup> *Id.* at para. 93.

<sup>19</sup> *See* Korea’s First Submission at paras. 192-213.

<sup>20</sup> US First Submission at para. 70.

Safeguards Agreement, as interpreted by the Appellate Body,<sup>21</sup> the ITC finding, which ignored recent data, was improper.

26. Japan agrees with Korea and notes, in this regard, that the proper standard of review for safeguard actions is set out at Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) and not, as the US implies, at Article 17.6 of the Agreement on Implementation of Article VI of GATT 1994. DSU Article 11 requires the Panel to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . .”

27. Clearly, this is precisely what Korea has requested the Panel to do. Korea has demonstrated that an objective assessment inescapably leads to the conclusion that the ITC’s treatment of the data violated GATT Article XIX and Article 2.1 of the Safeguards Agreement.

## VII. CONCLUSION

28. Japan appreciates the opportunity to present its views to the Panel. Japan hopes that the Panel will share Japan’s views that: (1) the remedy was not limited to the extent necessary to remedy serious injury; (2) the exclusion of Canada and Mexico from the remedy is discriminatory and violates Article 2.2 of the Safeguards Agreement; (3) the determination by the ITC did not establish the requisite increase in imports, provide objective evidence of serious injury, or demonstrate a causal link between increased imports and the condition of the US industry; (4) the U.S. interpretation of the term “unforeseen developments” of GATT Article XIX is flawed; and (5) GATT Article XIX and Article 2.1 of the Safeguard Agreement require an authority to base its determination on data from the “recent past,” and this aspect of the determination is subject to review by a panel.

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<sup>21</sup> See Korea’s First Submission at paras. 197-200.

## ANNEX A-4

### ORAL STATEMENT BY CANADA

(12 April 2001)

#### I. INTRODUCTION

The Government of Canada appreciates this opportunity to provide its views to the Panel on certain issues arising in this dispute. Canada reserved its right to participate as a third party in these proceedings because of its substantial interest in the matter, particularly with respect to the claim of Korea regarding the exclusion of Canada from the application of the safeguard measure on imports of circular welded carbon quality line pipe imposed by the United States.

We are fully supportive of the points raised by the United States in the portions of its First Submission pertaining to this particular issue. We maintain that Article 2.2 of the Agreement on Safeguards, read together with Articles I, XIII and XIX of GATT 1994, permit the exclusion of free trade agreement partners from the application of safeguard measures. We further maintain that Korea's claims to the contrary are unfounded and as such should be rejected by the Panel.

#### II. ARGUMENT

Korea raises legal claims under both GATT 1994 and the Agreement on Safeguards regarding the United States' decision to exclude imports of line pipe from Canada from the application of the safeguard measure. Korea asserts that, by so doing, the United States breached its obligations under Article 2.2 of the Agreement on Safeguards. Korea also claims that the United States contravened the "most favoured nation" obligation reflected in Articles I, XIII and XIX of GATT 1994.

Canada was exempted from the safeguard measure imposed by the United States as the United States International Trade Commission (USITC) found that imports of line pipe from Canada did not "contribute importantly" to the serious injury. This was done in accordance with US obligations under the North American Free Trade Agreement (NAFTA), more specifically Article 802.

For the reasons explained fully in our written submission, Canada asserts that neither the Agreement on Safeguards nor the GATT 1994 precludes members of a free trade area from excluding each other's imports from the application of their safeguard measures. Rather, Canada agrees with the United States' submission that Articles XIX and paragraph 8 of Article XXIV of GATT 1994 read together justify such an exclusion.

As noted by the United States, safeguard measures applied pursuant to Article XIX are not among the measures that Article XXIV:8 specifically authorizes participants in an FTA to maintain against each other. Canada also agrees with the United States that to the extent that Article XIX, read in conjunction with other GATT 1994 articles, can be interpreted to contemplate the application of safeguard measures to products from all sources, Article XXIV creates a limited exception.

Canada further maintains that this interpretation of the relevant GATT provisions is consistent with the interpretation of Article 2 of the Agreement on Safeguards and footnote 1 to that Article. As the Appellate Body confirmed in *Argentina – Safeguard Measures on Imports of Footwear*, GATT

1994 and the Agreement on Safeguards contain an “inseparable package of rights and disciplines” and meaning must be given to all the relevant provisions of these two equally binding agreements. As Article XIX and XXIV:8 of GATT 1994 provide for the possibility of an exclusion of a free trade partner from a safeguard measure imposed by another Member party to that free trade agreement, in keeping with general principles of treaty interpretation, the Agreement on Safeguards must also provide for the possibility of such an exclusion.

### **III. CONCLUSION**

Accordingly, Canada respectfully submits to the Panel that the exclusion of a free trade partner from a safeguard measure is not inconsistent with Article 2.2 of the Agreement on Safeguards or Articles I, XIII or XIX of GATT 1994.

## ANNEX A-5

### ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(12 April 2001)

Mr. Chairman, distinguished Members of the Panel,

Thank you for providing the European Communities [EC] with this opportunity to present its views before you today.

1. This case raises several systemic issues relating to the interpretation of the Agreement on Safeguards as well as of the WTO Agreement's annexes at large. The EC will not repeat the arguments already brought to your attention in its written submission. Instead, it will take this opportunity to make some additional comments on other issues, notably

- (a) acquisition of confidential information;
- (b) exclusion of imports from FTA partners from the scope of the measure;
- (c) causation.

#### I. CONFIDENTIAL INFORMATION

2. The review of the ITC determination is closely intertwined with the full availability of all relevant data on the ITC investigation record and which were thus "before the US authorities"<sup>1</sup> when they arrived at their conclusions.

3. The EC itself has had no access to the confidential data which Korea has requested the Panel to acquire. However, Korea's remarks i.e. in paras. 64-64 and 72-83 of its First Written Submission strongly suggest that certain data not accounted for in the publicly available version of the ITC determination may have been relevant to the actual decision of the domestic authorities.

4. The EC would recall that in *Thailand – Angles* the Appellate Body recognized that all facts – whether confidential or not – should be reviewable in dispute settlement if they have been available to the domestic authorities.<sup>2</sup>

5. The US objects by referring to the fact that it has not obtained permission for disclosure from the parties concerned and relies on Article 3.2 of the Agreement on Safeguards. However, failure to obtain authorization from the parties concerned is not dispositive.

6. Quite simply, the US cannot have it both ways. It cannot, on the one hand, put forward its failure to request authorization as a reason for its refusal to supply these data to the Panel and, at the

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<sup>1</sup> Cf. Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("Korea Dairy Products"), WT/DS98/R, 12 January 2000, paras. 7.30-31; EC Third Party Submission, para. 11.

<sup>2</sup> Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("Thailand – Angles"), WT/DS122/AB/R, 12 March 2001, para. 117.

same time, justify its measure without allowing appropriate review. The US is effectively asking the Panel a blank check as to the accuracy of the ITC investigation and conclusions. The Appellate Body has recalled that the standard of review under Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes [DSU] requires a panel:

“to *determine the facts* of the case and to arrive at *factual findings*. In carrying out this mandate, a panel has the duty to *examine and consider all the evidence* before it, not just the evidence submitted by one or the other party, and to *evaluate the relevance and probative force* of each piece thereof.”<sup>3</sup>

The possible tensions between Article 3.2 of the Agreement on Safeguards and Article 13.1 of the DSU cannot read this duty out of the WTO texts.

7. A WTO Member – like Korea in this case – which is not in possession of the confidential information on the ITC record cannot by definition precisely indicate which confidential information should be disclosed. The same rationale underlying the authorization to draw adverse inferences – that is, the duty of cooperation under Article 13.1 of the DSU and the availability of evidence on one party only – justifies that the burden be on the US to convince the Panel that the information was not at all relevant to the determination.

8. Therefore, in the EC’s view, to the extent that there may be some doubt that confidential information was relevant to the taking of the measure under review, the Panel should acquire the information which was available to the ITC – if necessary under specific arrangements and in forms agreed by the parties – and allow appropriate debate on it.

## **II. THE EXCLUSION OF IMPORTS FROM FTA PARTNERS FROM THE US SAFEGUARD MEASURE IS CONTRARY TO ARTICLE 2 OF THE AGREEMENT ON SAFEGUARDS**

9. Korea argues that the US exemption from the safeguard measure violated MFN requirements established in Articles I, XIII:1 and XIX of GATT 1994 and in Article 2 of the Agreement on Safeguards. The US argues that it could legitimately exclude imports from its free trade agreements [FTAs] partners from the scope of its safeguard measure. It considers that Articles XIX and XXIV:8 of GATT 1994 read together allow this conclusion. In its view, this is borne out by footnote 1 to Article 2 of the Agreement on Safeguards.

10. The EC submits that the ITC determination and the exclusion of imports from US FTA partners from the measure is in clear violation of the principle of “parallelism” between the scope of a safeguard *investigation* and the application of safeguard *measures* established by the Appellate Body in *Argentina – Footwear*.<sup>4</sup> The Panel therefore can uphold Korea’s claim on the basis of that principle, which applies in this case too, irrespective of the question as to the relationship between the Agreement on Safeguards and GATT Articles XIX and XXIV. To recall, when upholding such principle the Appellate Body found that:

“we also are not persuaded that an analysis of Article XXIV of the GATT 1994 was relevant to the specific issue that was before the Panel. This issue, as the Panel itself

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<sup>3</sup> *Korea – Dairy Products*, Appellate Body Report, para. 137 (italics in original, underlined added); restated in Appellate Body Report, United States – Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities (“*US – Wheat Gluten*”), WT/DS166/AB/R, 19 January 2001, para. 150.

<sup>4</sup> Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* (“*Argentina – Footwear*”), WT/DS121/AB/R, 12 January 2000, para. 111; see also Panel Report, United States – Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities (“*US – Wheat Gluten*”), WT/DS166/R, 31 July 2000, para. 8.170.

observed, is whether Argentina, *after including imports from all sources in its investigation* of “increased imports” of footwear products into its territory and the consequent effects of such imports on its domestic footwear industry, *was justified in excluding other MERCOSUR member States from the application of the safeguard measures.*”<sup>5</sup>

The same principle was more recently applied by the Appellate Body in *US – Wheat Gluten*.<sup>6</sup>

11. Still in *Argentina – Footwear*, the Appellate Body noted that, given the product basis of the investigation in that case,

“Argentina was also required under Article 2.2 to apply those measures to imports from all sources, including from other MERCOSUR member States.”<sup>7</sup>

12. The facts of this case are strikingly similar to the ones at issue in *Argentina – Footwear*, on the basis of which the Appellate Body ruled. The ITC investigation was also based on imports from *all sources, including* imports from countries with which the US had concluded FTAs, like Canada and Mexico.

13. When describing the scope of the investigation, the ITC Report only identifies the product by its tariff and commercial characteristics.<sup>8</sup> On the other hand, there is no reference to the products’ origin.

14. When looking at imports and finding that they had increased, the ITC referred to data concerning imports from all sources<sup>9</sup> – those which are contained in Table C-1 annexed to the ITC Report.

15. The assessment of trends in increased imports was of course one of the preliminary steps to take a safeguard measure, and notably preliminary to the assessment of “serious injury”.

16. When further looking at the share of the domestic market held by US producers compared to the imports’ market share, the ITC referred to the same comprehensive table.<sup>10</sup>

17. Again, when engaging in its causation analysis, the ITC looked at increased imports<sup>11</sup> and 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 poor performance”. This conclusion and its preceding analysis of increased imports were also based on Table C-1.<sup>12</sup>

18. The foregoing steps in the ITC investigation broadly correspond to those described in Article 2 and Article 4.2(a) and (b) of the Agreement on Safeguards. Both provisions must be fulfilled before a determination of “serious injury” can be made under the Agreement on Safeguards. Therefore, it is clear that the overall determination of increased imports and “serious injury” was made taking into account of *inter alia* the imports from Canada and Mexico.

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<sup>5</sup> *Argentina – Footwear*, Appellate Body Report, para. 109 (emphasis added).

<sup>6</sup> *US – Wheat Gluten*, Appellate Body Report, para. 100.

<sup>7</sup> *Argentina – Footwear*, Appellate Body Report, para. 112.

<sup>8</sup> USITC Report, p. I-7 – I-8; footnote 1 at p. I-3.

<sup>9</sup> USITC Report, p. I-14, referring to the total import value in Table C-1. This total includes imports from Canada and Mexico.

<sup>10</sup> USITC Report, p. I-18, footnote 98.

<sup>11</sup> USITC Report, p. I-23 ff.

<sup>12</sup> USITC Report, p. I-24, text at footnotes 145-147.

19. The fact that the ITC made a separate causation finding with respect to its FTA partners does not affect the foregoing conclusion. The analysis leading to the ITC determination is still based on imports from Canada and Mexico, and the measure does not “parallel” this fact.

20. Furthermore, the specific justifications given by the ITC to exclude NAFTA imports could have applied to other imports which were eventually subject to the measures. Exclusion of NAFTA imports had thus no other reason than origin.

21. Imports from Canada were excluded as not causing injury allegedly because of their limited amount.<sup>13</sup> However, imports from e.g. the United Kingdom were even less in quantity, but this did not shield those imports from being found to have caused injury, and thus from the reach of the measure.

22. As to imports from Mexico, they may have been in countertrend for one year (1998) – i.e. they may have decreased when the other imports increased. This however does not take away that their size was most significant – the first or the second foreign source<sup>14</sup> – over the overall period (1994–first semester of 1999) at which the ITC looked to make its determination.

23. At any rate, the unqualified terms in which the principle of parallelism was set out simply do not allow for distinctions of the type attempted by the ITC. The only relevant factor considered by the Appellate Body is whether the investigating authorities concluded that the requirements for the imposition of a measure were met by investigating certain imports, and by taking into account the trends and effects of those imports.

24. Like the Argentinean authorities, the ITC investigated imports from all sources and then excluded FTA partners imports from its measure. If imports from FTA countries were considered not to cause serious injury, it was only ex post, that is after they had served to come to an “increased imports” and a “serious injury” finding. Accordingly, a different solution from that arrived at in *Argentina – Footwear* is not warranted.

25. The EC would also recall that most recently in *US – Wheat Gluten* the Appellate Body applied again the principle of parallelism and found that the ITC could not have excluded imports from Canada from its safeguard measure because

“it did not establish explicitly that imports from [all] sources, excluding Canada, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.”<sup>15</sup>

This finding was made notwithstanding the fact that the Appellate Body recognized that the ITC had “examined the importance of imports from Canada separately”. There is thus no difference with the present case.

26. Furthermore, contrary to what the ITC appears to suggest<sup>16</sup>, the ITC overall finding of causation could certainly not have been the same if imports from Mexico and Canada had been excluded. On the basis of the facts on the record, and in particular the overall important size of imports from Canada and Mexico, it cannot be assumed that the injury findings would not have changed if those imports had been disregarded. Therefore, it cannot be concluded that the ITC methodology is *de facto* equivalent to observance of the principle of parallelism.

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<sup>13</sup> USITC Report, p. I-35.

<sup>14</sup> USITC Report, p. I-33.

<sup>15</sup> *US – Wheat Gluten*, Appellate Body Report, para. 98.

<sup>16</sup> USITC Report, p. I-26, footnote 168.

27. In view of the foregoing, the ITC's exclusion of imports from its NAFTA partners from the scope of its measure is unsupported.

### III. THE ITC CAUSATION ANALYSIS DOES NOT CORRESPOND TO THE REQUIREMENTS IN ARTICLE 4 OF THE AGREEMENT ON SAFEGUARDS

28. The EC shares Korea's conclusion that the temporary downturn of the line pipe industry did not amount to a "significant overall impairment" and thus to "serious injury" as required by Article 4 of the Agreement on Safeguards.

29. However, even setting the issue of serious injury aside, there are three additional fundamental flaws in the ITC causation determination:

- (a) lack of "coincidence in trends" between imports and the domestic industry performance;
- (b) lack of appropriate "non-attribution" to imports of the effects of "other factors";
- (c) "mis-attribution" of injurious effects to imports of specialty products.

#### III.1. NO COINCIDENCE IN TRENDS

30. First, in the period on which the ITC bases its findings on the "coincidence of trends", i.e. 1998 and the first semester of 1999, imports were actually *declining*, rather than increasing. This point is clearly made in Korea's First Written Submission<sup>17</sup> and the EC will not reiterate those arguments.

#### III.2. NO "NON-ATTRIBUTION"

31. Second, the test applied by the ITC to "other factors" neither corresponds to, nor satisfies, Article 4.2 of the Agreement on Safeguards and the analytical test developed by the Appellate Body in *US – Wheat Gluten*.

32. The Appellate Body developed a test in three steps: (1) the distinction of injurious effects by imports from those by other factors; (2) the attribution of such effects to increased imports and other relevant factors; (3) as final step, the determination of whether "the causal link" exists between increased imports and serious injury, involving a "genuine and substantial relationship".<sup>18</sup>

33. The first two steps reflect the requirements laid down in Article 4.2(b) of the Agreement on Safeguards. In particular, the Appellate Body required that the competent authorities attribute to imports and to all other factors the injury caused by them *before* finally assessing the relationship between increased imports and serious injury ("the causal link"). This "sequencing" is made clear by the Appellate Body's referring to the establishment of "the causal link" as the "*final step*".<sup>19</sup>

34. The Appellate Body itself clarified that the goal of examining "other factors" is to ensure the "non-attribution" to imports of injury actually caused by such factors:

"Under Article 4.2(b) of the Agreement on Safeguards, it is essential for the competent authorities to examine whether factors other than increased imports are

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<sup>17</sup> Korea's First Written Submission, paras. 266-272.

<sup>18</sup> *US – Wheat Gluten*, Appellate Body Report, para. 69.

<sup>19</sup> *US – Wheat Gluten*, Appellate Body Report, para. 69.

simultaneously causing injury. If the competent authorities do not conduct this examination, *they cannot ensure that injury caused by other factors is not “attributed” to increased imports.*<sup>20</sup>

and, therefore, that such injury is

“not treated as if it were injury caused by increased imports, when it is not”.<sup>21</sup>

35. The same concern expressed by the Appellate Body also underlies the prescription, in Article 5.1 of the Agreement on Safeguards, to apply a measure only to the extent that it is necessary to remedy the “serious injury”.

36. The obligation laid down in Article 5.1 is the logical extension of the requirement not to attribute the effects of other factors to imports under Article 4.2(b) of the Agreement on Safeguards. By the same token, Article 5.1 can only have its full meaning if the non-attribution of “other factors” has been made in the context of the investigation.

37. The way in which the Appellate Body applied its test to the ITC *Wheat Gluten* determination also confirms that “genuine and substantial relationship” has to be examined in the light of the “non-attribution” analysis.

38. The Appellate Body noted that the US authorities had not “adequately evaluated the complexity of this issue” before them (in that case, the “the relationship between the increases in average capacity, the increases in imports and the overall situation of the domestic industry”).<sup>22</sup> It therefore concluded that the ITC had not demonstrated adequately that non-import factors had not been attributed, and therefore could not have established the existence of “‘the causal link’ Article 4.2(b) requires between increased imports and serious injury”.

39. In the present case too, even when the US authorities assessed that certain factors other than imports were “less important than” increased imports, they did not draw the necessary and appropriate consequences, that is they did not proceed to the non-attribution, so that the focus of the analysis could then be shifted on the relationship between the imports and serious injury. Before that, a “genuine” relationship cannot be observed, because the relationship is still “intertwined” with the impact of other factors.

40. The EC would also recall that in *US – Lamb* the Panel proceeded to the same type of analysis indicated by the Appellate Body in *US – Wheat Gluten*, and found a violation of Article 4.2(b) because certain “other factors”, though not considered to be “negligible”, had not led to “non-attribution” by the ITC.<sup>23</sup>

41. In the EC’s view the following “other factors” in particular were not properly analyzed by the ITC.

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<sup>20</sup> *US – Wheat Gluten*, Appellate Body Report, para. 91.

<sup>21</sup> *US – Wheat Gluten*, Appellate Body Report, para. 69.

<sup>22</sup> *US – Wheat Gluten*, Appellate Body Report, paras. 91 and 90.

<sup>23</sup> Panel Report, United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (“*US – Lamb*”), WT/DS177/R, WT/DS178/R, 21 December 2000, paras. 7.277-7.279.

## 1. Trends in oil and gas industry

42. If any coincidence in trends of economic indicators resulted from the ITC investigation, rather than between imports and the industry situation this was between the oil and gas market and the line pipe industry. This has correctly been pointed out by Korea in its First Written Submission.<sup>24</sup>

43. The ITC recognized that the situation in the oil and gas industry clearly contributed to the serious injury.<sup>25</sup> Even the US producers recognized that demand in the oil, gas and energy market was a principal factor affecting demand in line pipe.<sup>26</sup>

44. However, the ITC did not draw the necessary conclusions, as required by the Agreement on Safeguards and by the Appellate Body. All that can be found in the ITC Report is that the impact of this factor was not greater than that of imports – but no explanation as to how this important factor was “non-attributed” to imports.

45. In addition, the importance of this factor on the domestic industry situation should have induced the ITC to carry out an analysis of the type conducted by the Appellate Body in *US – Wheat Gluten* in respect of an “other” factor particularly important in that case, i.e. increased capacity. This would have been the way to take full account of the complexity of the relation between the trends in the oil and gas industry, the increases in imports and the overall situation of the domestic industry.<sup>27</sup>

## 2. Competition from other domestic producers (i.e. new market entrants)

46. The US industry was already in a situation of relatively low capacity utilization at the beginning of the investigation period. In spite of this, it steadily increased capacity.<sup>28</sup> Not only did it add 8 per cent between 1994 and 1998, as noted by the ITC in its determination.<sup>29</sup> In interim 1999, a similar increase occurred, presumably in view of the entry of two new producers on the domestic market.<sup>30</sup> This further increase was clearly not a negligible one and the ITC failed to properly analyze it to ensure its “non-attribution” to imports. The ITC only looked at the 8 per cent increase between 1994 and 1998 and merely concluded “competition among domestic producers was not a more important cause of serious injury”.<sup>31</sup>

## 3. Production shift from OCTG products to line pipe

47. The ITC noted some shift from OCTG production to line pipe production, but considered that it was “*not clear* that they switched to line pipe ... in substantial quantities”.<sup>32</sup> The ITC nevertheless came to a finding,<sup>33</sup> which is confined to the statutory requirement that this factor did not constitute “a more important cause of the serious injury” than increased imports.

48. First of all, if the magnitude of this factor was not entirely clear, it was incumbent upon the ITC to shed light. In *US – Wheat Gluten*, the Appellate Body disagreed with the Panel that the domestic authorities

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<sup>24</sup> Korea’s First Written Submission, paras. 291–294.

<sup>25</sup> USITC Report, pp. I-28 and II-11.

<sup>26</sup> USITC Report, p. II-45.

<sup>27</sup> *US – Wheat Gluten*, Appellate Body Report, para. 90.

<sup>28</sup> USITC Report, p. II-22, Table 5.

<sup>29</sup> USITC Report, p. I-30.

<sup>30</sup> USITC Report, pp. II-21, I-30.

<sup>31</sup> USITC Report, p. I-30.

<sup>32</sup> USITC Report, pp. I-30 – I-31.

<sup>33</sup> USITC Report, p. I-30.

“need only examine “other factors” which are *clearly* raised before them as relevant by interested parties”<sup>34</sup>

and found that

“the competent authorities must undertake additional investigative steps, when circumstances so require, in order to fulfil their obligations to evaluate all relevant factors.”<sup>35</sup>

49. The ITC could certainly not have been spared from “non-attribution” to imports of the effects of another possible cause of serious injury without assessing its exact impact.

50. Moreover, since the ITC nonetheless proceeded to make a finding, and did not qualify such factors as “negligible”, it should have made sure that the impact of these factors was not attributed to imports.

#### **4. Decline in export markets**

51. The ITC determined that US exports had dropped from 13.5 per cent of production in 1997 to practically negligible amounts.<sup>36</sup> This does not mean a negligible impact on the domestic market, and the ITC itself recognized that the downward trend in exports worsened the situation.<sup>37</sup> However, the ITC again concluded the decline of exports was not a more important cause than increased imports without taking any further step to ensure “non-attribution”.

### **III.3. “MIS-ATTRIBUTION” OF INJURIOUS EFFECTS TO IMPORTS OF SPECIALTY PRODUCTS**

52. The EC notes that in the course of the investigation it was pointed out that certain products included in the scope of the investigation – the high frequency induction [“HFI”] line pipe over 6 inches in diameter – were imported for a special application (deep water pipelines) in which they could not actually be replaced by the products made by the “domestic industry” identified by the ITC. It was further pointed out that there was no domestic production of such specialty products.<sup>38</sup>

53. Regardless of the fact that HFI products were found to be “like” the products made by the producers identified as the “domestic industry”, in view of the aforesaid circumstances they could not at all have had a bearing on the situation of the “domestic industry” within the meaning of Article 4.2(a) of the Agreement on Safeguards. Since the ITC was aware of this different application, and of the absence of competition with the “domestic industry”, it should have examined the impact of those specialty products on the domestic industry as another “relevant factor” under Article 4.2 of the Agreement on Safeguards.

54. As recalled, in *US – Wheat Gluten* the Appellate Body has called the Members’ domestic authorities to examine other factors even when not “clearly raised”. *A fortiori* they are called to evaluate them in cases, like the one in point, where the matter was clearly raised and before the competent authorities.

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<sup>34</sup> *US – Wheat Gluten*, Appellate Body Report, para. 56 (emphasis in original).

<sup>35</sup> *US – Wheat Gluten*, Appellate Body Report, para. 55.

<sup>36</sup> USITC Report, pp. II-22 – II-23, Tables 5 and 6. This percentage is obtained by relating production data in Table 5 and Export shipments in Table 6.

<sup>37</sup> USITC Report, p. I-31.

<sup>38</sup> USITC Report, p. I-9 and footnotes 20-21; p. II-10, 48-49.

55. Since the ITC did not perform the “non-attribution”, or did not properly look into all relevant factors, it could not examine whether a “genuine and substantial relationship” existed between increased imports and serious injury.

56. In view of the foregoing, the ITC’s s review of the “other factors” in the *line pipe* investigation was not consistent with Article 4.2 of the Agreement on Safeguards. Accordingly, the EC respectfully submits that the Panel should uphold Korea’s claim.

## ANNEX A-6

### ORAL STATEMENT OF JAPAN

(12 April 2001)

1. Mr. Chairman, Members of the Panel, Japan welcomes the opportunity to present its views orally in this proceeding.
2. Japan's exporters of line pipe, like those of Korea, are subject to the US safeguard measure at issue in this dispute. Moreover, Japan has systemic concerns about US safeguards practices in general. I will now summarize Japan's views, some of which are expressed in greater detail in Japan's Third Party Submission.
3. First, the measure was not limited to the extent necessary to remedy any serious injury. The measure imposed by the US President, which was unsupported by any analysis, was far more restrictive than that recommended by the USITC, which was based on detailed market and economic analysis. Thus, the measure cannot possibly be limited "to the extent necessary to prevent or remedy serious injury," as required by Article 5.1 of the Safeguards Agreement and Article XIX:1(a) of GATT 1994.
4. Second, the exclusion of Canada and Mexico from the remedy is discriminatory and violates Article 2.2 of the Safeguards Agreement, which requires application of a measure "to a product being imported irrespective of its source."
5. Footnote 1 of the Agreement, upon which the US relies, does not apply in this dispute. The footnote applies only to customs unions applying a safeguard measure as a single unit. NAFTA is not a customs union. Moreover, even if footnote 1 applied to free-trade areas (which it does not), the safeguard measure at issue was not applied by NAFTA on behalf of the United States; the US applied the measure on its own behalf.
6. Third, the USITC investigation failed to satisfy the requirements of Article 2 of the Safeguards Agreement and Article XIX:1 of GATT 1994. The USITC investigation failed to: (a) establish a sudden, sharp and recent increase in imports; (b) provide objective evidence that the US line pipe industry was seriously injured; and (c) demonstrate a causal link between increased imports and any injury to the US industry.
7. Fourth, the United States incorrectly interprets the term "unforeseen developments" in Article XIX:1 of GATT 1994. The term does not, as the US claims, refer to whether a domestic industry expected the market conditions prevailing prior to imposition of a safeguard measure. Rather, it refers to a Member's expectations with regard to the consequences of trade liberalization (or, more precisely, the trade effects flowing from incurring new GATT obligations and lowering tariffs).
8. Finally, the Panel should reject the US attempt to insulate the USITC injury determination from review. The proper standard for review of safeguard actions is set out in Article 11 of the DSU, which requires the Panel "to make an objective assessment of the matter before it." Thus, the Panel should indeed determine whether the USITC erred in failing to examine the most recent data available.

## ANNEX A-7

### ORAL STATEMENT BY MEXICO

(12 April 2001)

#### I. INTRODUCTION

Distinguished members of the Panel:

I would like to thank you on behalf of Mexico for enabling us to explain our point of view with respect to the case at issue, and I take this opportunity to express our gratitude for the important work you are doing. The proper interpretation of the provisions governing the application and exclusion of safeguard measures in a free-trade area is of vital importance in providing security and predictability to the multilateral trading system. Mexico has a substantial interest in this case, both from the trade and the systemic point of view. We are concerned, *inter alia*, at Korea's peculiar interpretation (shared by Japan) of the way in which safeguard measures should be applied.

Before turning to the substance, I would like to express Mexico's deep concern at the fact that the working procedures of this Panel did not provide for translation into Spanish of the written submissions of the parties to the dispute or the third parties. Not only has this affected our rights as Members of this Organization, but it has presented us with a number of practical problems. We hope that in future dispute settlement procedures the rights of third parties to receive documents in what is an official WTO language will be safeguarded.

#### II. LEGAL ARGUMENTS

Concerning the arguments relating to the exclusion of Mexico and Canada from the application of the safeguard, although the United States has already provided a satisfactory reply, certain elements should be highlighted in order to help resolve the issue.

Firstly, as the United States mentioned, nobody is questioning the fact that the decision to exclude Mexico from the application of the safeguard was taken pursuant to the United States' obligations under the North American Free Trade Agreement (hereinafter referred to as NAFTA), more specifically Article 802 thereof.

Secondly, there are two basic principles governing the multilateral trading system: (i) Members of this Organization have the right to establish free-trade areas with a view to facilitating trade between the constituent customs territories; (ii) the other provisions of the GATT 1994, in particular the most-favoured-nation principle (see Articles I, XIII:1; and XIX), cannot prejudice the exercise of that right.

As we all know, Article XXIV:8(b) of the GATT 1994 defines a free-trade area as an area in which the constituent territories eliminate the duties and other restrictive regulations of commerce between them. Where an agreement establishing a free-trade area (as in this case with NAFTA) provides that safeguards shall not be applied to the products from the constituent territories, this is not only consistent with Article XXIV:8(b), but it is also in keeping with the purpose of that Article, which is to "facilitate trade". This approach was confirmed by the Appellate Body in *Turkey – Textiles* when it pointed out that Article XXIV of the GATT 1994 must be interpreted in the light of the fact that the purpose of a customs union (or free-trade area) was precisely to "facilitate trade".

Similarly, we observe that Article XIX is not among the restrictions which, according to Article XXIV:8(b) of the GATT 1994, may be maintained within a free-trade area where necessary. This means that the elimination of "other restrictive regulations of commerce" includes the elimination of the application of safeguard measures.

We note that Korea argues that the exclusion of Mexico from the application of the safeguard measure has prejudiced the other historical suppliers. Any prejudice to Korean exporters is in fact due to the surcharge applied to a percentage of their exports. The fact that the United States market should substitute Mexican and Canadian imports or domestic production for Korean imports or find substitutes for the product in question neither benefits nor prejudices Korean exporters.

At the same time, Japan argues that the requirements for invoking protection under Article XXIV of the GATT were not met. Here, we would simply like to make the point that what is being discussed is the authority to exclude the parties to NAFTA from the application of a safeguard, and not the imposition of the safeguard *per se*. Accordingly, we can affirm that (i) the establishment of the free-trade area did, indeed, provide for such exclusion and (ii) the failure to provide for the elimination of restrictive regulations of commerce such as safeguards would have adversely affected the establishment of a free-trade area.

I shall now turn to the issue of the last sentence of footnote 1 of the Agreement on Safeguards, and in this regard, I would like to make only two general remarks.

The first of these remarks is very simple: the last sentence of footnote 1 reads "Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of the GATT 1994." It does not say that the provision in question applies only to paragraph 8(a) (customs unions) and that it excludes free-trade areas (paragraph 8(b)). To maintain, as Japan has, that this footnote is applicable to customs unions only is tantamount to diminishing Mexico's rights under the Agreement on Safeguards, in violation of Articles 3 and 19 of the DSU.

Our second remark concerns the relationship between the Agreement on Safeguards and the GATT 1994. The interpretation whereby the rights conferred by Article XXIV of the GATT are applicable only to the provisions of that Agreement and do not extend to the Agreement on Safeguards is incorrect. As we know, the Appellate Body has made it clear that the GATT and the Agreement on Safeguards contain provisions of the same Agreement, the "WTO Agreement", and therefore represent "an inseparable package of rights and disciplines that must be considered in conjunction"; and "any safeguard action must conform with the provisions of Article XIX of the GATT 1994". This same interpretation has been upheld in respect of other WTO Agreements, confirming that rights under the GATT (in this case under Article XXIV) do not lose their effect when another agreement in the area of trade in goods is examined.

### III. CONCLUSION

In view of the above considerations, we respectfully request the Panel to carefully examine the nature of the exclusion in the light of the purpose of Article XXIV of the GATT, and to confirm the interpretation that Members have the right, under Article XXIV, to exclude their partners in a free-trade area from the application of safeguard measures and that this right is valid under the Agreement on Safeguards.

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