

**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.

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 Safeguards¹ (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").²

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.³

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/DS202/4.⁴

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.

¹ 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.

² WT/DS202/1.

³ WT/DS202/4.

⁴ 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, Koplan 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.

[Parties' arguments in Sections IV, V and Annexes deleted from this version.]

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.¹⁹ 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 *prima facie* case of violation.²⁰ 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.²¹

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'

¹⁹ 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.

²⁰ 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.

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

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."²²

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*²³ 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*²⁴ 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.

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

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

²³ *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.

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

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.²⁵ Korea claimed that this information was necessary in order for Korea to prepare its first written submission. Korea requested the Panel to seek the following information:

²⁵ 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 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.

- 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.

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.²⁶

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;
- 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

²⁶ 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.

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".²⁷ 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".²⁸ 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".²⁹ 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".³⁰ 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 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.

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

²⁸ 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*").

²⁹ See note 27 above.

³⁰ See note 28 above.

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.³¹

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 "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."³²

³¹ 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.

³² 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).

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*,³³ that Article XIII applied to the imposition of safeguard measures under Article XIX.³⁴ 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.”³⁵

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.³⁶ Korea submits that the 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.³⁷

(2) Arguments by the United States

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

³⁴ See US first written submission, para. 197, n.236.

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

³⁶ 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 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.*

³⁷ 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.

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*³⁸ 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."³⁹

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:

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.⁴⁰

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'.⁴¹ (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*.

³⁸ See footnote 33.

³⁹ US first written submission at para. 197.

⁴⁰ See *Argentina – Footwear Safeguard (AB)* at para. 79.

⁴¹ Id. at para. 81.

They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members.⁴² (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.'⁴³ (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'".⁴⁴ 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.⁴⁵

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):

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

⁴² Id.

⁴³ Id.

⁴⁴ US first written submission para. 204.

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

of the GATT 1994 and of the *Agreement on Safeguards* would apply *cumulatively*, except to the extent of a conflict between specific provisions.⁴⁶ (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.⁴⁷ 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*".⁴⁸ 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*.⁴⁹ (bold emphasis supplied)

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."⁵⁰ 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.

⁴⁶ See *Argentina – Footwear Safeguard (AB)* at para. 89.

⁴⁷ 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.

⁴⁸ See *Argentina – Footwear Safeguard (AB)* at para. 81.

⁴⁹ 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)*")

⁵⁰ *EC- Bananas III (AB)* at para. 157.

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."⁵¹

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".⁵²

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 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.⁵³ (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.⁵⁴ We therefore decline to draw any conclusions from the fact that certain Article XIII provisions are not

⁵¹ US oral statement at the first substantive meeting, para. 40.

⁵² *Argentina - Footwear Safeguard* at para. 8.58.

⁵³ *Argentina – Footwear Safeguard* (AB) at paras. 87-88.

⁵⁴ 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.

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".⁵⁵

7.45 The United States also argues that Article XIII:2(d) is "identical" to Article 5.2(a) of the Safeguards Agreement.⁵⁶ 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".⁵⁷ 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."⁵⁸ 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:

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

⁵⁵ *Argentina – Footwear Safeguard (AB)* at para. 88.

⁵⁶ US first written submission, para. 206.

⁵⁷ *Id.*

⁵⁸ *Turkey – Textiles* at footnote 327.

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.⁵⁹ (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".⁶⁰

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 Agreement⁶¹ 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 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.⁶² 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.

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

⁶⁰ *Argentina – Footwear Safeguard (AB)* at para. 88.

⁶¹ See section VII.B.3(a) below.

⁶² 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.

(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"⁶³ 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 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.

⁶³ Korea's first submission, para. 124.

(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:2.⁶⁴ 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.⁶⁵ 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)".⁶⁶ 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 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".⁶⁷ 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

⁶⁴ 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".

⁶⁵ Korea's first written submission para. 124.

⁶⁶ Korea's first written submission, para. 155.

⁶⁷ Korea's first written submission, para. 127.

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.⁶⁸

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".⁶⁹ 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".⁷⁰ 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".⁷¹ 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.⁷²

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 the United States, there was no way to determine the total volume eligible for exemption".⁷³ 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.⁷⁴

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)*

⁶⁸ 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.

⁶⁹ United States first written submission, para. 184.

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

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

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

⁷³ United States first written submission, para. 211.

⁷⁴ 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.

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).⁷⁵

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.

(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.

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

(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."⁷⁶

⁷⁶ *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).

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 argued⁷⁷ 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).⁷⁸

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)).⁷⁹ 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 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*"⁸⁰ (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

⁷⁷ 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).

⁷⁸ 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.

⁷⁹ 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).

⁸⁰ *Korea – Dairy Safeguards (AB)* at para. 98.

three representative years".⁸¹ 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".⁸² 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".⁸³

(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 5.1.⁸⁴ (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 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

⁸¹ US first written submission, para. 44.

⁸² US first written submission, para. 45.

⁸³ US first written submission, para. 172.

⁸⁴ *Korea – Dairy Safeguard (AB)* at para. 96.

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.⁸⁵ 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".^{86 87}

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

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"⁸⁸. 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.

⁸⁵ 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.

⁸⁶ 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.

⁸⁷ 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.

⁸⁸ Korea's first written submission para. 144.

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"⁸⁹ 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 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.⁹⁰ According to Korea, the

⁸⁹ Korea's second written submission para. 39.

⁹⁰ 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.

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.⁹¹ 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."⁹² 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.⁹³ 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 analysis⁹⁴ 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."⁹⁵

(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 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."⁹⁶ 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

⁹¹ 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).

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

⁹³ See ITC Report, Majority Views on Remedy at I-76-77.

⁹⁴ 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.

⁹⁵ 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)).

⁹⁶ ITC report p. I-5.

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.⁹⁷ 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.⁹⁸ 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.⁹⁹ 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 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

⁹⁷ 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.

⁹⁸ ITC report, p. II-28, Table 10.

⁹⁹ ITC report, p. II-27, Table 9.

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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰² 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.¹⁰³

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 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

¹⁰⁰ Oral Statement of the Republic of Korea, para. 80.

¹⁰¹ US first written submission, paras. 173-174.

¹⁰² Petitioners’ Posthearing Brief on Remedy, p. 44 (17 November 1999).

¹⁰³ *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.

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 recommendation¹⁰⁴

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".¹⁰⁵ 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 5.1.¹⁰⁶

(ii) Petitioners' proposal¹⁰⁷

7.95 The ITC found that the quota proposed by Petitioners "would exceed the amount necessary to prevent or remedy serious injury".¹⁰⁸ 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".¹⁰⁹ 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

¹⁰⁴ 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.

¹⁰⁵ ITC Report at p. I-75.

¹⁰⁶ 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.

¹⁰⁷ 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).

¹⁰⁸ ITC Report at p. I-80.

¹⁰⁹ Korea's first written submission, para. 145, footnotes omitted.

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-quota¹¹⁰ 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.

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,¹¹¹ it is economically impossible for domestic producers to increase

¹¹⁰ 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.

¹¹¹ 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

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".¹¹²

(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).¹¹³ 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.¹¹⁴ 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 imports of line pipe.¹¹⁵ 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

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.

¹¹² 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.

¹¹³ 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.

¹¹⁴ Korea's second written submission, para. 41.

¹¹⁵ 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.

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.

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,¹¹⁶ 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.¹¹⁷ 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".¹¹⁸

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 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

¹¹⁶ 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.

¹¹⁷ 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.

¹¹⁸ Korea's first written submission at para. 167.

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.¹¹⁹

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",¹²⁰ and that "[t]he obligation to 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'"¹²¹ 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."¹²² Korea also asserts that the United States had not made any claims of

¹¹⁹ See Korea's response to Question 10 of the Panel at the first substantive meeting (see Annex B-1).

¹²⁰ Korea's response to Question 4 from the Panel at the second substantive meeting (see Annex B-7).

¹²¹ *Id.*

¹²² *EC – Bananas III (AB)* at para. 142.

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.¹²³ (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".¹²⁴ 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 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

¹²³ Korea's second written submission, para. 53.

¹²⁴ 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.

[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.¹²⁵

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.

(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:

¹²⁵ *EC – Bananas III (AB)* at para. 143.

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.¹²⁶ 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,¹²⁷ 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) and (c),¹²⁸ and (2) eliminate duties and other restrictive regulations of commerce on "substantially all" intra-NAFTA trade.

¹²⁶ The United States does not dispute that Article XIX dictates MFN treatment.

¹²⁷ 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.

¹²⁸ 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,

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.¹²⁹ 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.¹³⁰

7.143 Korea, on the other hand, has argued that NAFTA is "not in compliance Article XXIV:8 of the GATT 1994".¹³¹ 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.¹³²

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.

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

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.

¹²⁹ 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).

¹³⁰ Response to Panel Question 2 to the United States at the second substantive meeting (see Annex B-8).

¹³¹ Korea's oral statement at the first substantive meeting, note 21.

¹³² Response to Panel Question 1 to Korea at the second substantive meeting (see Annex B-7).

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).¹³³ 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 evidence¹³⁴ 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).¹³⁵

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.¹³⁶ (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 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

¹³³ 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.

¹³⁴ See para. 7.144 *supra*.

¹³⁵ 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.

¹³⁶ *Turkey – Textiles (AB)* at para. 58.

no question of whether it is necessary for the elimination of "duties and other restrictive regulations of commerce".¹³⁷

(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 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)

¹³⁷ 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.

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".¹³⁸

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 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.¹³⁹

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.

¹³⁸ Response to Question 20 from the Panel at the first substantive meeting (see Annex B-2).

¹³⁹ *Argentina – Footwear Safeguard* at para. 8.84.

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.¹⁴⁰ 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.¹⁴¹

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 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.

¹⁴⁰ 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)

¹⁴¹ 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.

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".¹⁴² 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.¹⁴³ 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.

7.166 The Panel then asked Korea to specify where in its submission Korea had pursued Claim 7. Korea referred the Panel¹⁴⁴ 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

¹⁴² Korea's first written submission, paras 172 and 173.

¹⁴³ See *US - Wheat Gluten (AB)* at para. 98.

¹⁴⁴ See Note to the Panel, attached to Korea's replies to questions from the Panel at the second substantive meeting.

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.”¹⁴⁵ 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”.¹⁴⁶ 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:

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

¹⁴⁵ 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.

¹⁴⁶ Hence our treatment of this argument in the preceding section (at para. 7.162).

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".¹⁴⁷ 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 percentage 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".¹⁴⁸ 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 7.¹⁴⁹

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.

¹⁴⁷ Korea's first written submission at para. 172.

¹⁴⁸ *US – Wheat Gluten (AB)* at para. 98, emphasis in original.

¹⁴⁹ 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.

7.174 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.²

² 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.¹⁵⁰

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 2000.¹⁵¹ 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 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..."¹⁵²

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 2000¹⁵³ 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".¹⁵⁴ 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

¹⁵⁰ 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.

¹⁵¹ 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").

¹⁵² *Id.* at 9194.

¹⁵³ 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").

¹⁵⁴ 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.

it clear that in implementing the measure all supplying countries¹⁵⁵ 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 Directors¹⁵⁶ 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.¹⁵⁷ 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 2,¹⁵⁸ 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 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.¹⁵⁹ 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

¹⁵⁵ Except Mexico and Canada.

¹⁵⁶ 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").

¹⁵⁷ The developing WTO Members included in the list are: Bangladesh, Brazil, Colombia, Egypt, India, Indonesia, Korea, South Africa, Turkey and Venezuela.

¹⁵⁸ G/SG/N/10/USA/5.

¹⁵⁹ 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.

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.¹⁶⁰ 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:

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.¹⁶¹

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"¹⁶² (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* –

¹⁶⁰ 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.

¹⁶¹ *Argentina – Footwear Safeguard (AB)* at para. 130.

¹⁶² *Argentina – Footwear Safeguard (AB)* at footnote 130.

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.¹⁶³ 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.

(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-

¹⁶³ See Korea's first written submission at para. 205.

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.¹⁶⁴

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".¹⁶⁵ (emphasis in the original)

¹⁶⁴ 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 the contrary, imports declined." Thus, Korea's emphasis is on whether imports decreased or increased, not on whether the increase was sudden and sharp.

¹⁶⁵ *Argentina – Footwear Safeguard (AB)* at para. 131.

(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.¹⁶⁶

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.^{167 168}

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 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

¹⁶⁶ *US – Wheat Gluten* at para. 8.5.

¹⁶⁷ ITC Report, p. I-14.

¹⁶⁸ 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).

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.¹³⁰

¹³⁰The 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 1998.¹⁶⁹ 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 appropriate conclusions to be drawn regarding the state of the domestic industry.¹⁷⁰ (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

¹⁶⁹ We will deal with the appropriateness of this "matched" semester analysis *infra*.

¹⁷⁰ *US-Lamb Meat (AB)* at footnote 88.

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.¹⁷¹ 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.¹⁷² According to the United States this standard practice helps eliminate the possible effect of any seasonal or cyclical distortions which may affect the comparison. Although the ITC concedes that line pipe is not a seasonal product, we are of the view that the methodology applied in the comparison was not chosen in order to manipulate the data and show a particular result. Nor is there any evidence of manipulation or bias resulting from an alleged inconsistency with the ITC's serious injury analysis. Although the ITC did make some observations that include or make reference to the second half of 1998 in its determination on serious injury or threat of serious injury, we do not consider that the ITC was comparing the situation in the first half of 1999 to that in the second half of 1998. The ITC was simply describing factual circumstances that existed in the second half of 1998 and the first half of 1999. The ITC was not drawing conclusions based on a comparison of those periods.

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 preceeding the authority's decision".¹⁷³ The word "recent" – which was used by the Appellate Body in interpreting the phrase "is being imported" – is defined as "not long

¹⁷¹ 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.

¹⁷² 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.

¹⁷³ Korea's reply to Question 1 from the Panel at the first substantive meeting (see Annex B-1).

past; that happened, appeared, began to exist, or existed lately".¹⁷⁴ 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".¹⁷⁵ 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 "increased", as opposed to "increasing". The use of the word "increased" indicates to us that there is no need for a determination that imports are presently still increasing. Rather, imports could have "increased" in the recent past, but not necessarily be increasing up to the end of the period of investigation or immediately preceding the determination. 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.¹⁷⁶

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".¹⁷⁷ 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

¹⁷⁴ *The Compact Edition of the Oxford English Dictionary*, Volume 1 (Oxford University Press, 1971).

¹⁷⁵ ITC Report at p. I-14.

¹⁷⁶ 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.

¹⁷⁷ Korea's reply to Question 1 from the Panel at the first substantive meeting.

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.¹⁷⁸

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."¹⁷⁹ 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".¹⁸⁰ 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.

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".¹⁸¹ 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 2.1.¹⁸² In other words, although

¹⁷⁸ *US-Lamb Meat (AB)*, at paras. 137-138.

¹⁷⁹ *Argentina - Footwear Safeguard (AB)* at para. 131.

¹⁸⁰ *Id.* at 129.

¹⁸¹ ITC Report, p. I-14.

¹⁸² 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.

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.^{183 184}

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.

(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

¹⁸³ 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.

¹⁸⁴ 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.

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.¹⁸⁵

(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 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.¹⁸⁶

(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

¹⁸⁵ 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.

¹⁸⁶ *US – Lamb Meat (AB)*, at para. 106.

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.¹⁸⁷ 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."¹⁸⁸

(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.¹⁸⁹ As a legal matter, the provision requires the consideration of "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.¹⁹⁰ 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

¹⁸⁷ 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.").

¹⁸⁸ ITC Report, p. II-26

¹⁸⁹ Korea's first written submission paras. 226-236.

¹⁹⁰ ITC Report, p. II-25.

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.¹⁹¹

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.¹⁹² 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.¹⁹³

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."¹⁹⁴ 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 1999.¹⁹⁵ 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 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.¹⁹⁶ 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

¹⁹¹ ITC Report, p. I-31.

¹⁹² Korea's first written submission para. 229 (quoting from USITC Report, Crawford Dissenting Views on Injury, p. I-69 n.67) (footnote omitted).

¹⁹³ Korea's first written submission, para. 234.

¹⁹⁴ ITC Report, p. I-69 n.67.

¹⁹⁵ 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.

¹⁹⁶ ITC Report, p. II-28, Table 10.

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,¹⁹⁷ 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).

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.

¹⁹⁷ Assuming that the company at issue produces more than one product.

(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.³⁶

³⁶ 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-25.¹⁹⁸

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

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".¹⁹⁹ In support of this statement,

¹⁹⁸ ITC Report p. I-63.

¹⁹⁹ 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.

Commissioner Crawford referred to testimony given by a Geneva Steel²⁰⁰ 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."²⁰¹

Thus, the testimony of the Geneva Steel executive (in particular the statement that "[t]he import crisis²⁰² 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.²⁰³

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 Steel's 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.

²⁰⁰ 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.

²⁰¹ *Transcript of ITC Injury Hearing* (30 September 1999), p. 53.

²⁰² Given the specific context of these remarks, we are in no doubt that the relevant "import crisis" is that concerning imports of line pipe.

²⁰³ 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.

7.237 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 1998.²⁰⁴

(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 statement²⁰⁵ alone constitutes a prima facie case that the ITC allocated certain non-line pipe costs to Lone Star's line pipe activities. Her 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".²⁰⁶

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".²⁰⁷ Thus,

²⁰⁴ ITC Report, p. I-63.

²⁰⁵ 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.

²⁰⁶ ITC Report, p. I-31.

²⁰⁷ 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

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.²⁰⁸ 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.²⁰⁹ 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.

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".²¹⁰ 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

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 percentage point.

²⁰⁸ Korea's second written submission at para. 98.

²⁰⁹ ITC Report, p. I-18, I-20.

²¹⁰ *US – Wheat Gluten*, at para. 8.81.

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 industry²¹¹ 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."²¹² 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,²¹³ 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, 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."²¹⁴ 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

²¹¹ Korea's first written submission, paras. 245-251.

²¹² Korea's first written submission, para. 247.

²¹³ ITC Report, p. I-48 n.88.

²¹⁴ Post-hearing Injury Brief of Japanese and Korean Respondents, Exhibit 1.

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".²¹⁵ 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".²¹⁶ 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".²¹⁷ 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.²¹⁸

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 must²¹⁹ 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 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.

²¹⁵ ITC Report, note 122.

²¹⁶ ITC Report, p. I-42.

²¹⁷ ITC Report, p. I-20.

²¹⁸ 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.

²¹⁹ See *Argentina – Footwear Safeguard (AB)* at para. 136.

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.²²⁰

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".²²¹ 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".²²² 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.²²³ 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*

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

²²⁰ Korea has not claimed that other Article 4.2(a) factors show an upturn in domestic industry performance at the end of the POI.

²²¹ ITC injury hearing transcript, page 126 (Congressman Berry).

²²² ITC injury hearing transcript, page 127 (Mr. Dunn).

²²³ *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.

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."²²⁴

7.266 We agree with the United States that the condition of the domestic industry is the benchmark for application of a safeguard measure.²²⁵ 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

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

²²⁴ US response to Question 1 from the Panel at the first substantive meeting (see Annex B-2).

²²⁵ The United States also made this argument in para. 4 of its additional statement at the second substantive meeting.

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.²²⁶ (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.²²⁷ 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 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.

²²⁶ ITC Report, p. I-48.

²²⁷ 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.

(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.²²⁸ 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

"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

²²⁸ 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)

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.²²⁹

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.²³⁰

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."²³¹

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 – 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

²²⁹ *US – Lamb Meat (AB)* at para. 179.

²³⁰ *US – Lamb Meat (AB)* at para. 185.

²³¹ ITC Report, p. I-28.

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 1994.²³²

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.²³³ (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.²³⁴

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.²³⁵ Regarding the East Asian financial crisis, the US points to page II-66 of the ITC report where it is mentioned that:

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.

²³² *Korea – Dairy Safeguard* (AB) at para. 85.

²³³ *US – Lamb Meat* (AB) at para. 72.

²³⁴ *Id.*

²³⁵ ITC Report, p. I-27 to I-30.

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.²³⁶ 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.²³⁷ 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.

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,

²³⁶ 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.

²³⁷ 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.

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).²³⁸

(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.

²³⁸ *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.²³⁹

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

²³⁹ *US - Wheat Gluten* (AB), para. 136.

caused by increased imports.²⁴⁰ On 24 January 2000 the United States made a supplemental notification under Article 12.1(b).²⁴¹ 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.²⁴²

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 12.3.²⁴³ 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:

²⁴⁰ Document G/SG/N/8/USA/7.

²⁴¹ Document G/SG/N/8/USA/7/Suppl.1.

²⁴² G/SG/N/10/USA/5/Rev.1.

²⁴³ 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.²⁴⁴

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.²⁴⁵

(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.²⁴⁶

²⁴⁴ *US - Wheat Gluten (AB)* at para. 137.

²⁴⁵ 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.

²⁴⁶ *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.