BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Definitive Safeguard Measures on Imports of Certain Steel Products

(AB-2003-3)

APPELLANT'S SUBMISSION OF THE UNITED STATES

August 21, 2003

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WORLD TRADE ORGANIZATION
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TABLE OF CONTENTS

TABLE OF REPORTS CITED IN THIS SUBMISSION

Short Title	Full Title and Citation
Argentina – Footwear	*Argentina – Safeguard Measures on Imports of Footwear*, Panel Report, WT/DS121/R, adopted 12 January 2000 *Argentina – Safeguard Measures on Imports of Footwear*, Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000
Argentina – Peaches	*Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches*, Panel Report, WT/DS238/R, adopted 15 April 2003
EC – Asbestos	*European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001
EC – Bed Linen	*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Appellate Body Report, WT/DS141/AB/R, adopted 12 March 2001
EC – Cast Iron Fittings	*European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, Panel Report, WT/DS219/R, adopted 18 August 2003 *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, Appellate Body Report, WT/DS219/AB/R, adopted 18 August 2003
Felt Hats	*Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of GATT*, GATT/CP/106, Working Party Report adopted 22 October 1951, GATT/CP.6/SR.19
India – Patent Protection	*India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998
Korea – Dairy	*Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Panel Report, WT/DS98/R, adopted 12 January 2000 *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000

Mexico – HFCS	*Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, Panel Report, WT/DS132/R, adopted 24 February 2000 *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States: Recourse to Article 21.5 by the United States*, WT/DS132/RW, adopted 21 November 2001 *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States: Recourse to Article 21.5 by the United States*, Appellate Body Report, WT/DS132/AB/RW, adopted 21 November 2001
Panel Reports	*United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R and WT/DS259/R (circulated 11 July 2003)
Thailand – Angles	*Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Appellate Body Report, WT/DS122/AB/R, adopted 5 April 2001
US – Corrosion Resistant Steel	*United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, Appellate Body Report, WT/DS213/AB/R, adopted 19 December 2002
US – Foreign Sales Corporations	*United States – Tax Treatment for "Foreign Sales Corporations"*, Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000
US – Hot-Rolled Steel	*United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Appellate Body Report, WT/DS184/AB/R, adopted 23 August 2001
US – Lamb Meat	*United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Panel Report, WT/DS177/R, adopted 16 May 2001 *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Appellate Body Report, WT/DS177/AB/R, adopted 16 May 2001

US – Line Pipe	*United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Panel Report, WT/DS202/R, adopted 8 March 2002 *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Appellate Body Report, WT/DS202/AB/R, adopted 8 March 2002
US – Wheat Gluten	*United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Panel Report, WT/DS166/AB/R, adopted 19 January 2001 *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Appellate Body Report, WT/DS166/AB/R, adopted 19 January 2001

I. INTRODUCTION

1. The United States presents this appellant submission pursuant to Rule 21 of the Working Procedures for Appellate Review and the Working Schedule of the division of the Appellate Body established to hear and decide this appeal. We are appealing the findings of the panel reports in *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* ("Panel Reports") that ten safeguard measures applied by the United States on certain steel products ("steel safeguard measures") are inconsistent with the WTO *Agreement on Safeguards* ("Safeguards Agreement") and Article XIX of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").[1]

2. The United States applied the safeguard measures in response to the crisis that faced U.S. steel producers in 2001. Beginning three years earlier, in 1998, imports of a variety of steel products had increased to previously unseen levels. The pattern and timing of the increases differed from product to product, but in all cases imports increased dramatically in or after 1998, and remained above their earlier levels in 2000. At the same time, import prices reached new lows. U.S. producers' own prices fell, and profit levels with them. Most producers experienced serious losses. By 2001, many steel producers, including some of the largest in the country, were either in bankruptcy or faced bankruptcy. Some, including the fourth largest producer, were expected to cease operations entirely. The Panel did not question these facts, or that they represented serious injury to the domestic industries at issue. The only question was whether the United States properly established that the increased imports caused serious injury to the domestic industries.

3. The Panel also did not question the thoroughness or openness of the investigation by the U.S. International Trade Commission ("USITC"). Nor could it. The USITC issued questionnaires to more than one thousand U.S. steel producers, foreign steel producers, U.S. steel importers, and U.S. steel consumers. It gathered information from public sources, and considered information submitted by more than one hundred interested parties. It conducted 11 days of public hearings, at which hundreds of witnesses testified.

4. As a result of these proceedings, the USITC issued 29 determinations – ten affirmative determinations and 19 negative determinations.[2] In support of these determinations, the USITC issued a detailed report.[3] The first three volumes were published in late December, 2001, consisting of 559 pages of narrative explanation of the Commissioners' determinations and 438 pages of data produced by the investigation. In response to a request from the U.S. President, the

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[1] Unless otherwise indicated, all citations in this submission to an article designated with an Arabic numeral are to the Safeguards Agreement, and all citations to an article with a Roman numeral are to the GATT 1994.

[2] The initial results included four determinations in which the six commissioners were evenly divided as to whether to issue an affirmative or negative determination. Pursuant to U.S. law, the U.S. President considered two of these evenly divided determinations to be affirmative, and two negative.

[3] *Steel*, Investigation No. TA-20-73, USITC Pub. 3479 ("ITC Report" or "USITC Report") (Exhibit CC-6).

USITC issued two supplements to the report. The first supplement to the report, containing hundreds of pages of additional tables, was issued on January 9, 2002. The second supplement to the report consisted of 20 pages of further explanation by the Commissioners with regard to unforeseen developments and parallelism.

5. Based on the USITC determinations, the U.S. President imposed safeguard measures on ten products – certain carbon flat-rolled steel ("CCFRS"); tin mill; hot-rolled bar; cold-finished bar; rebar; welded pipe; fittings, flanges, and tool joints ("FFTJ"); stainless steel bar; stainless steel rod; and stainless steel wire. These measures took the form of supplemental tariffs of 30 percent on CCFRS,[4] tin mill, hot-rolled bar, and cold-finished bar; 15 percent on rebar, welded pipe, stainless steel bar, and stainless steel rod; 13 percent on FFTJ; and 8 percent on stainless steel wire. The supplemental tariffs were scheduled to remain in place for three years, with the level of the tariff to decrease by one fifth in the second and third years.

6. Several Members challenged the consistency of these measures with the Safeguards Agreement and GATT 1994. The dispute proved to be the largest and most complicated to be heard by a panel under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), with a record more than 3000 pages long, and submissions by the parties totaling more than 3500 pages.

7. With some notable exceptions, which we discuss further below, the Panel correctly enunciated the general principles guiding the review of determinations by the competent authorities under the Safeguards Agreement. However, in applying these principles to the ten determinations under consideration, the Panel made a number of significant legal errors. Most importantly, it repeatedly found that the USITC failed to provide a reasoned and adequate explanation of its determination on the basis of legal principles inconsistent with the Safeguards Agreement and GATT 1994. Several errors recur in the Panel's analysis. This submission describes many instances where the Panel improperly rejected ITC conclusions on the basis that the ITC failed to provide a sufficient explanation of its finding. Some examples that show the far-ranging nature of the Panel's errors include:

- The Panel erroneously found that the ITC failed to provide a "reasoned and adequate explanation" of why exclusion of cold-finished bar imports from Israel and Jordan would not change the conclusion that imports from all other sources satisfied the conditions for application of a safeguards measure, even though there were no cold-finished bar imports from either Israel or Jordan.[5] The Panel similarly criticized the ITC for failing to provide reasoned and adequate explanations for other products in its parallelism analysis where there were no, or nearly no, imports from Israel and Jordan.

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[4] For slab, one segment of CCFRS, the tariff was applied as a tariff-rate quota ("TRQ").

[5] *See* Panel Reports, para. 10.642; *see also* Section E.3 below.

- The Panel erroneously found that the ITC failed to provide a sufficient explanation in its causation discussion for its use of product-specific pricing data for cold-finished bar when it in fact provided such an explanation and the *identical* explanation was deemed sufficient by the Panel for another product, FFTJ.[6]

- The Panel incorrectly found that the ITC failed to provide a reasoned and adequate explanation, for purposes of non-attribution, of factors other than imports that the ITC deemed to contribute not at all or only minimally to injury. In such circumstances, the Safeguards Agreement cannot be read to require any further explanation beyond one that the factor's contribution to injury is not significant.[7]

- The Panel erred in finding that the ITC failed to provide a "reasoned and adequate explanation" for its determinations for tin mill and stainless steel wire because there was not a single agency opinion concerning these products. According to the Panel, the findings made by individual Commissioners on different product groupings "cannot be reconciled as a matter of their substance."[8] The Panel's finding imputes to the Safeguards Agreement a requirement that it does not contain that all findings made by individual members of a multiple-member authority reconcile with one another

- The Panel found that the ITC failed to provide a "reasoned and adequate explanation" of why it did not attribute to imports injury caused to the stainless steel bar industry by declines in demand. According to the Panel, "the USITC could have, for example, demonstrated that there was no linkage between demand declines during the period of investigation and injury suffered in this particular case."[9] The Panel improperly disregarded the fact that the ITC provided precisely such an analysis.[10]

8. These errors are surprising because in other instances the Panel's evaluation does fully address the analysis of the USITC, considers the complexities of the situation, and applies the obligations of the Safeguards Agreement correctly to other USITC conclusions. In these instances, the Panel found that the USITC provided a reasoned and adequate explanation, and otherwise acted consistently with the Safeguards Agreement.

9. However, too often, the Panel's evaluation addresses only one element of the USITC's analysis, dismisses a complex evaluation with simplistic reasoning, rejects a conclusion with no reasoning at all, or substitutes its own reasoning, including a view that more analysis could have been performed, without evaluating the analysis actually conducted by the ITC. It is important that the Appellate Body reverse these findings so that future panels will know that a finding of

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[6] *Compare* Panel Reports, paras. 10.452 and 10.519. *See also* section D below.
[7] *See* section D below.
[8] Panel Reports, paras. 10.200, 10.262. *See also* section F. below.
[9] Panel Reports, para. 10.558.
[10] *See* section D below.

inconsistency with the Safeguards Agreement must address the entirety of the competent authorities' reasoning, and competent authorities in future safeguard proceedings can be secure that their conclusions will stand unless a panel can demonstrate, based upon the entirety of the competent authorities' reasoning, that those conclusions are inconsistent with the Safeguards Agreement.

II. EXECUTIVE SUMMARY

A. General Errors in the Panel's Findings Under Article 3.1 of the Agreement on Safeguards

10. The Panel recognized that an explanation need not be voluminous to be consistent with WTO rules. However, immediately after noting that an explanation may be succinct and straightforward, the Panel added that "[t]he timing of the explanation, its extent and its quality are all factors that can affect whether an explanation is reasoned and adequate."[11] There is no basis in the Safeguards Agreement for finding that "timing" or "extent" is relevant to whether the competent authorities' explanations are reasoned and adequate.

11. The Appellate Body found in *US - Line Pipe* that "to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish expressly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports."[12] However, the text of the Safeguards Agreement makes clear that the competent authorities' findings are sufficiently "explicit" if they provide the findings and reasoned conclusions required under Article 3.1.

12. Articles 3.1 and 4.2(c) do not obligate the competent authorities to present their report in any particular form. However, the Panel neglected these principles in some of its findings. At various points, it found the USITC failed to provide a reasoned and adequate explanation because the USITC Report did not cite specifically to data or reasoning in another section of the report that supported a particular conclusion. This reasoning finds no support in the Safeguards Agreement.

13. There are also several instances in which the Panel failed to meet the requirements of Article 12.7 of the DSU, which requires that the panel include in its report its "findings of fact, the applicability of relevant provisions, *and the basic rationale behind any findings and recommendations it makes*." In some cases, it failed to provide any rationale whatsoever for its findings. In other cases, the Panel provided reasoning so cursory or conclusory that it is impossible to discern how and why the Panel reached its conclusion.

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[11] Panel Reports, para. 10.115.

[12] *US – Line Pipe*, AB Report, para. 217.

14. As previously noted, the Panel based almost all of its findings against the United States on its conclusions that the ITC Report failed to provide a "reasoned and adequate explanation" of certain findings. If correct, such a finding would obviously indicate a breach of the competent authorities' Article 3.1 obligation to provide findings and reasoned conclusions. But the Panel went further. In each case that the Panel found that the ITC failed to explain its analysis, the Panel made a follow-on finding, without any further analysis, that the Commissioners did not actually *perform* the analysis correctly, thereby breaching Article 2.1, 4.2, or 4.2(b). This presumption is inconsistent with the terms of the Safeguards Agreement, and is also incorrect.

B. The Panel Erred in Finding That the ITC's Conclusions on Unforeseen Developments Were Inconsistent With Article XIX and Article 3.1.

15. The Panel erred in finding that the USITC's conclusions on unforeseen developments were inconsistent with Article XIX and Article 3.1. The Panel failed to take into account the differences between the unforeseen developments requirement and the Article 2 and 4 conditions for applying a safeguard measure and, therefore, applied the standard of review incorrectly. The standard adopted by the Panel errs in two ways – it mistakenly reflects concerns relevant to Article 4.2, and it disregards concerns relevant to the "unforeseen developments" requirement under Article XIX:1(a).

16. The Panel erred in finding that the USITC was required to differentiate the degree of impact of the unforeseen developments on each product and on each country from which the imports originated. Article XIX does not specify a particular type of analysis to demonstrate unforeseen developments, and certainly does not require the competent authorities to differentiate their various impacts on particular imports. The Panel cited no authority for its finding that the USITC was obliged to "differentiate" the impact of various unforeseen developments on each product. To read such a requirement into Article XIX would obligate the competent authorities to evaluate unforeseen developments in the same way as imports themselves. This is manifestly incorrect.

17. The Panel also erred in failing to make the findings necessary for the application of its erroneous standard. The Panel cited no facts suggesting that the USITC's general explanation as to unforeseen developments was in any way unrepresentative of the specific steel industries and imports covered by the various measures. It simply assumed that the USITC's demonstration, which focused on macroeconomic events and relied on broad economic indicators, could not suffice as a demonstration for any specific measure. The Panel's finding that more specific information might have been useful simply does not establish that the USITC failed to provide a reasoned and adequate explanation demonstrating unforeseen developments that led to an injurious increase in imports.

18. The Panel erred in finding that data and analysis in the USITC Report, but outside the Unforeseen Developments section, were irrelevant to an evaluation of the USITC unforeseen development findings. The Panel asserted that the USITC provided no data in support of the

conclusion that imports increased in the wake of the unforeseen developments. The Panel recognized, however, the USITC made increased import findings for each product, and the USITC Report cited to data tables showing imports into the United States for each country and for each product over the entire period of investigation.

19. The Panel found that, because these data tables were cited only in regard to statements about NAFTA imports, "they cannot be used before the Panel to fill gaps in the USITC's reasoning."[13] The tables were not cited to fill in a gap in the USITC's reasoning, but to identify the evidence on the record that the USITC used in reaching its conclusions and to demonstrate how the evidence supported those conclusions. The Safeguards Agreement did not require the exclusion of this information from the Panel's analysis.

20. In addition to the substantive inconsistencies with Article XIX:1(a) and Article 3.1 in the Panel's unforeseen developments analysis, the Panel also violated its own obligations under Article 12.7. The Panel did not undertake the analyses of the evidence required of it and failed to articulate, except in conclusory fashion, why the USITC's findings failed to provide a reasonable and adequate explanation. By failing to make any findings of fact, or even to point to any facts that made the USITC's demonstration seem not adequate, the Panel failed to set forth explanations and reasons sufficient to disclose its justifications for its findings and recommendations.

C. The Panel Erred in Finding That the "Increased Imports" Requirement Was Not Satisfied for CCFRS, Hot-Rolled Bar and Stainless Steel Rod.

21. The Panel erred in finding that the "increased imports" requirement was not satisfied for CCFRS, hot-rolled bar and stainless steel rod. The standard applied by the Panel is not supported by the text of the Safeguards Agreement or Article XIX of GATT 1994. Moreover, the Panel erred in its analysis of the import data for CCFRS, hot-rolled bar and stainless steel rod.

22. The Panel concluded that "the determination that imports have increased pursuant to Article 2.1 can be made only when an increase evidences a certain degree of recentness, suddenness, sharpness and significance." However, neither the Safeguards Agreement nor Article XIX of GATT 1994 contain language that would justify the imposition of such a requirement for satisfying the increased imports obligation.

23. The text of Article 2.1 does not support an interpretation that an increase in imports must be "recent" in any sense other than the ability of the imports to cause or threaten serious injury. The notion of "recentness" derives its specific meaning from the ability of increased imports to cause or threaten serious injury. The Panel based its conclusion that increased imports must be

[13] Panel Reports, para. 10.117.

"sudden" on the reference to "unforeseen developments" in Article XIX. The Panel was reading into Article XIX a requirement that it does not contain.

24. In its *Argentina – Footwear* report the Appellate Body was clear that the attributes of recentness, suddenness, sharpness, and significance are inexorably linked to the ability of imports to cause or threaten serious injury. Whether an increase in imports has been recent, sudden, sharp, and significant enough to cause or threaten serious injury are questions that are answered as competent authorities go beyond the question of increased imports and proceed with their consideration of serious injury/threat and causation.

25. In sum, the standard applied by the Panel for assessing whether the increased imports requirement had been met – whether the increase shows "a certain degree of recentness, suddenness, sharpness and significance" – is at odds with the relevant provisions of the Safeguards Agreement.

26. The Panel's increased imports analysis with respect to certain CCFRS was erroneous. There is no dispute that imports of CCFRS increased from 1996 to 2000, the five full years covered by the USITC's investigation. The Panel did not disagree with any of the evidence of increased imports, but still concluded that the USITC Report had failed to provide "an adequate and reasoned explanation of how the facts support the determination" because the USITC "did not seem to focus on, or at least account for" the fact that there was a decrease in imports, on both an absolute and a relative basis, from interim 2000 to interim 2001. But the Panel did not – and could not – point to any provision of the WTO Agreements that required the USITC to address interim 2001 import levels as part of its increased imports determination or, in particular, to give the change between interim periods dispositive weight. Indeed, the Panel's own analysis of the relevant WTO provisions makes it clear that no such requirement exists.

27. The Panel committed further error in its discussion of the surge in CCFRS imports that occurred in 1998. As the Panel explained, "the inquiry is not whether imports have increased 'recently and suddenly' *in the abstract*. A *concrete* evaluation is what is called for." In this case, the USITC conducted just such an evaluation. It explained in detail how the 1998 import surge had long-term effects that were still occurring at the time of its determination. These findings provide exactly the sort of "concrete" analysis that the Panel found to be necessary.

28. The Panel's increased imports analysis with respect to hot-rolled bar was erroneous. On an absolute basis, imports of hot-rolled bar increased by 52.5 percent in the period 1996-2000, and rose in three out of the four year-to-year comparisons, including a sizable increase from 1999 to 2000. Absolute imports declined by 28.9 percent from the first half of 2000 to the first half of 2001.

29. The Panel discounted the sharp increase in absolute imports in the five full years of the period of investigation, and focused almost exclusively on the smaller decline in imports in the first half of 2001. The Panel's analysis is at odds with its own discussion elsewhere in its report

of the significance of a decrease in imports at the very end of a period of investigation. The Panel acknowledged 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." The Panel explained that in deciding whether a decrease in imports at the end of a period of investigation prevents a finding of increased imports, "factors that must be taken into account are the duration and the degree of the decrease at the end of the relevant period of investigation, as well as the nature, for instance the sharpness and the extent, of the increase that intervened beforehand."

30. The Panel failed to apply these principles to the absolute import data for hot-rolled bar. Had it done so, it would have found that the decrease in imports in interim 2001 was limited to only one six-month period; and that this short period was preceded by five years of almost uninterrupted increases in imports, which in the aggregate far exceeded the decrease in interim 2001.

31. On a relative basis, imports of hot-rolled bar increased by 43.23 percent from 1996 to 2000, and rose in three out of the four year-to-year comparisons, including a sizable increase from 1999 to 2000. Relative imports declined over the interim periods, falling from 27.0 percent in interim 2000 to 24.6 percent in interim 2001.

32. Again, the Panel discounted the development of relative imports in the five full years of the period of investigation, and focused almost exclusively on a decline in imports in the first six months of 2001. The Panel failed to consider that the decrease in relative imports in the first six months of 2001 was of limited duration when compared with the preceding three years of rising import levels, and that even in interim 2001 relative import levels remained at higher levels than in the first three years of the period of investigation.

33. In evaluating the increase in absolute imports for stainless steel rod the Panel erred in two respects. On an absolute basis, imports of stainless steel rod increased by 36.1 percent in the period 1996-2000, and rose in three out of the four year-to-year comparisons, including a sizable increase from 1999 to 2000. Absolute imports declined by 31.3 percent from the first half of 2000 to the first half of 2001.

34. The Panel arbitrarily decided that the decline in the first six months of 2001 was more significant than the increases of prior years, without considering the different durations and magnitudes of the increases and decrease.

35. The Panel's second error was its rejection of the USITC's explanation of why the decline in absolute imports in interim 2001 did not outweigh the increases of the previous two years. The USITC acknowledged the decline in imports in interim 2001, but it also explained that, despite this decline, the market share of imports remained essentially stable in interim 2001. In other words, there was good reason to discount the significance of the decline in absolute imports

in interim 2001, because the effect on the U.S. industry in terms of market share was essentially unchanged at the increased level of 1999-2000.

D. The Panel Erred In Finding that the ITC's Causation Analysis for Seven Products Covered by the Steel Safeguard Measures Was Inconsistent with Articles 2.1, 3.1, and 4.2(b) of the Safeguards Agreement.

36. The Panel erred in concluding that the ITC's causation analyses for seven products covered by the steel safeguard measures were inconsistent with Articles 2.1, 3.1, and 4.2(b) of the Safeguards Agreement. As an initial matter, the Panel erred in finding that Article 4.2(b) of the Agreement generally requires the competent authorities to perform an "overall" or "cumulative" analysis of the injurious effects of non-import factors on an industry as part of its causation analysis. The Panel's approach is inconsistent with prior Appellate Body reports discussing the requirements of Article 4.2(b). Indeed, the Panel's approach has been clearly rejected by the Appellate Body in the context of the causation provisions of the Antidumping Agreement.[14]

37. Moreover, to the extent that the Panel's interpretation is premised on the notion that the competent authorities should "weigh" the effects of non-import factors, either collectively or individually, against the effects of imports in their analysis, there is simply no language in the text of Article 4.2(b) that suggests such an approach is required of a competent authority. The Article requires only that the competent authorities ensure that they do not attribute to imports the effects of "other" factors on the industry; it does not require them to weigh the effects of imports and other factors against each other.

38. Second, the Panel erred in finding that the ITC failed to establish, in a reasoned and adequate manner, the existence of a causal link between imports of CCFRS and declines in the CCFRS industry's condition during the period of investigation. The Panel erred by performing a *de novo* analysis of the record evidence relating to the existence of such a causal link and by substituting its own conclusion on this issue for that of the ITC. The Panel also erred in finding that the ITC's pricing and underselling analysis for CCFRS were not consistent with the record or the methodology used for other products. As the United States describes in detail below, the ITC's finding of a causal link between the pricing and volume trends of CCFRS imports and the industry's declines are reasoned, complete, and fully consistent with the record data. These findings should have been affirmed by the Panel.

39. Finally, with respect to the rest of its conclusions to the effect that the ITC failed to perform its causation analysis in a manner consistent with the requirements of Article 4.2(b), the Panel consistently made three types of error that rendered its conclusions inconsistent with its obligations under the Safeguards Agreement and the DSU. In its analysis, the Panel frequently

[14] *EC - Cast Iron Fittings*, AB Report, paras. 190-192.

asserts the ITC made specific findings that the ITC simply did not make, misunderstands or misstates the ITC's actual findings, and fails to evaluate the entirety of the ITC's findings. By making these types of errors, the Panel failed to properly evaluate whether the ITC considered all the pertinent factors and whether the ITC provided a reasoned explanation of how the facts supported its determinations, as it is obliged to do under the Safeguards Agreement and the DSU.

40. In sum, the ITC thoroughly, objectively and reasonably evaluated the record evidence in its investigation and established that there was a "genuine and substantial" causal link between increased imports and serious injury for all seven products. Moreover, the ITC correctly ensured that it did not attribute to imports any injury caused by other factors, and provided a reasoned and adequate analysis in support of all its findings for the products. The Panel's conclusions to the contrary should be reversed by the Appellate Body.

E. The Panel's Conclusions on Parallelism Are Without Basis in Either Article 2.1 or Article 4.2 of the Safeguards Agreement.

41. The Panel concluded that the application of safeguards measures with respect to each product at issue was inconsistent with Articles 2.1 and 4.2 because the United States failed to comply with the obligation of "parallelism." It rejected the ITC's parallelism analysis based on two general legal conclusions. Neither of these conclusions has any basis in the Safeguards Agreement.

42. First, the Panel found that, for nine of the ten safeguards measures, the ITC had failed to satisfy an obligation to account for the effects of imports from those sources (Canada, Mexico, Israel, and Jordan) excluded from the safeguards measure. The Panel cited nothing in support of its conclusion that parallelism requires authorities to account for the effects of imports from excluded sources. In fact, this requirement was newly created by the Panel, and has no textual basis whatsoever in the Safeguards Agreement. The Panel violated Article 3.2 of the DSU by creating a new obligation. It could not find the U.S. safeguards measures defective because they did not satisfy a non-existent obligation.

43. Second, the Panel found that, for each safeguards measure, the United States had not established explicitly that, when imports from Israel and Jordan were excluded, the imports from sources covered by the measure satisfy the conditions for application of a safeguards measure. The Panel disregarded the explicit findings that were provided by the ITC indicating that imports from Israel and Jordan were either non-existent or infinitesimal. It incorrectly construed the Safeguards Agreement to require that findings be in a specific format of its choosing. In this instance as well, the Panel rejected the ITC parallelism analysis on grounds inconsistent with the text of the Safeguards Agreement.

F. The Panel Erred in Concluding That the Increased Imports, Causation and Parallelism Findings Relevant to the Tin Mill and Stainless Steel Wire Determinations Were "Impossible to Reconcile" and, Therefore, Did Not Provide a "Reasoned and Adequate Explanation."

44. For two of the steel products involved in this appeal, tin mill and stainless steel wire, the USITC Commissioners making affirmative determinations did not all define the like or directly competitive product in the same way. Nonetheless, there is no dispute that there were three affirmative votes with regard to a like product that included tin mill steel and a like product that included stainless steel wire.

45. The Panel characterized the increased imports findings of the Commissioners who relied on different like product definitions as "divergent," "impossible to reconcile," "inconsistent," "alternative explanations departing from each other," and "alternative explanations partly departing from each other." Because of this supposed "divergence" or "inconsistency," the Panel found that the United States breached Articles 2.1 and 3.1 by failing to provide a reasoned and adequate explanation of how the increased imports requirement was satisfied for tin mill or for stainless steel wire.

46. The Panel cross-referenced its conclusions with respect to the increased imports requirement for tin mill in its analysis of causation for both tin mill and stainless steel wire. The Panel also concluded that lack of uniformity in like product definition precluded satisfying the parallelism requirement for tin mill and stainless steel wire.

47. The "inconsistency" identified by the Panel is of no legal consequence. Contrary to the Panel's assumption, it is not necessary to "reconcile" the increased imports findings of each Commissioner or group of Commissioners. There is nothing intrinsically irreconcilable about findings based on different product groupings.

48. By requiring uniformity of like product definition among the Commissioners making affirmative determinations, the Panel read into Articles 2.1 and 3.1 a substantive requirement that does not exist in the Safeguards Agreement. Neither the text of Articles 2.1 and 3.1 nor the object and purpose of the Safeguards Agreement support the Panel's interpretation that uniformity of like product definition is required.

49. The Appellate Body's *US – Line Pipe* report supports the USITC's practice of aggregating mixed votes of individual Commissioners. Under the Appellate Body's reasoning in that dispute, an affirmative finding on tin mill alone, carbon and alloy flat products alone, or both may support the conclusion that imports of tin mill are causing serious injury.

50. The Safeguards Agreement leaves entirely to Members' discretion how they structure their competent authorities and the decision-making process in safeguards investigations. By construing the Safeguards Agreement to require uniformity in the like product definition by a

multi-member competent authority, the Panel is infringing unnecessarily on the manner in which a Member may internally structure the decision-making process of its competent authority.

51. The competent authorities (*i.e.*, the USITC) made an affirmative determination with regard to tin mill and stainless steel wire under U.S. law and fully complied with Article 3.1 by publishing "a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." The report addressed all of the factors necessary for an affirmative determination consistent with Articles 2.1 and 4. Since the views of the Commissioners and data in the USITC Report provided findings and reasoned conclusions in support of the affirmative determinations, Article 3.1 did not require further explanation.

III. ARGUMENT

A. General Errors in the Panel's Findings Under Article 3.1 of the Agreement on Safeguards

1. The Panel Applied the "Reasoned and Adequate Explanation" Standard Incorrectly Or Incorrectly Imposed Additional Requirements In Finding the U.S. Measures to be Inconsistent with Article 3.1.

52. The Panel based many of its findings against the United States on a conclusion that the USITC Report failed to provide a "reasoned and adequate explanation" of some aspect of each of the injury determinations. In many instances, the Panel's findings are undermined by its failure even to recognize that the ITC considered and discussed various issues and factors. These multitudinous errors have been set forth in summary fashion in the Executive Summary and will be addressed in detail in the sections that follow.

53. While the United States recognizes that the Panel's review function was significantly complicated by the number of issues that the complaining parties presented during the Panel proceeding, such burdens and difficulties cannot excuse the errors in the Panel's analysis and conclusions. The following sections will discuss each of the Panel's adverse findings, and identify the legal flaws with each separate conclusion. However, several errors appear repeatedly in the Panel's analysis with respect to the requirements of Article 3.1, indicating overarching conceptual flaws in the Panel's approach.

54. Under Article 3.1, "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law."[15] The Panel

[15] Article 4.2(c) requires the authorities to publish the Article 3.1 report "promptly" and to include in it a "detailed analysis of the case" and "a demonstration of the relevance of the factors examined." The Panel noted that "Article 4.2(c) was not extensively addressed by the parties as a discrete basis for violation" and, accordingly, "d[id] not consider that an additional reference to Article

correctly noted in its standard of review section that the Appellate Body has found "that a panel must assess whether a reasoned and adequate explanation has been provided as to how the facts support the determination."[16] It added that a panel must "critically examine" the competent authorities' explanation to review whether it "fully addresses the nature, and especially, the complexities, of the data, and responds to other plausible interpretations of that data."[17]

55. The Panel also emphasized correctly that with regard to Articles 2, 3, and 4 and Article XIX, "the role of the Panel is to 'review' determinations and demonstrations made and reported by an investigating authority," and not to be the initial fact finder.[18] This statement reflects that the Article 3.1 assigns the competent authorities – not the panel – the obligation to "publish a report setting forth *their* findings and reasoned conclusions reached on all pertinent issues of fact and law."

56. However, the Panel made fundamental errors in its application of these principles to many of the determinations made by the USITC.

a. The Safeguards Agreement does not require a particular length or "extent" in the competent authorities' explanations.

57. The Panel recognized that an explanation need not be voluminous to be consistent with WTO rules. As it stated with regard to one finding, "[t]he requirement under the Agreement on Safeguards is not to present the data in all kinds of possible ways."[19] In evaluating the USITC's unforeseen developments analysis, the Panel noted that "[i]n some cases, the explanation may be as simple as bringing two sets of facts together."[20]

58. However, immediately after noting that an explanation may be simple, the Panel added that "[t]he timing of the explanation, its extent and its quality are all factors that can affect whether an explanation is reasoned and adequate."[21] The Panel cites no basis in the Safeguards

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4.2(c) in relation to the Panel's findings on increased imports or causation would enhance the complainants' rights." Panel Reports, paras. 9.31-9.32.

[16] Panel Reports, para. 10.23, *citing US – Wheat Gluten*, Panel Report, para. 8.5; *US – Line Pipe*, para. 7.194.

[17] Panel Reports, para. 10.23, *citing US – Lamb Meat*, AB Report, para. 106.

[18] Panel Reports, para. 10.25.

[19] Panel Reports, para. 10.237.

[20] Panel Reports, para. 10.115.

[21] Panel Reports, para. 10.115.

Agreement for finding that "timing"[22] or "extent" are relevant to whether the competent authorities' explanations are reasoned and adequate. In fact, there is none.

59. The "fundamental rule of treaty interpretation" is "that a treaty shall be interpreted in good faith in accordance with the ordinary meaning of its terms, in their context and in light of the object and purpose of the treaty."[23] The Safeguards Agreement itself does not contain the word "explanation," or any form of the word "explain." That concept was introduced by the Appellate Body's finding in *Argentina – Footwear* that "the Panel was obliged, by the very terms of Article 4, to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination."[24] Since the Safeguards Agreement does not explicitly require an "explanation," that term can only be understood as a shorthand for the obligations that *are* in the Agreement – that the published report contain "reasoned conclusions" on "all pertinent issues" and "a detailed analysis of the case," including "a demonstration of the relevance of the factors examined."[25]

60. Article 3.1 implies an explanation only in requiring "reasoned conclusions on all pertinent issues of fact and law." The ordinary meaning of the verb "reason" in this context is "[t]hink in a connected or logical manner; use one's reason in forming conclusions . . . Arrange the thought of in a logical manner, embody reason in; express in a logical form."[26] Thus, the key consideration is whether the authorities present a logical basis for their conclusion, and not whether they achieve a particular length or timing.[27] As the United States demonstrates in the more detailed discussion that follows, the ITC's Report provided a logical basis for the various conclusions that underpin its ultimate conclusion that increased imports of ten distinct products were causing serious injury to the affected domestic industries.

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[22] It is not even clear what the Panel means by "timing." If that term refers to the sequence in which the competent authorities present elements of their explanation, that is already addressed by the "quality" of the explanation, *i.e.*, whether it is "reasoned." If "timing" refers to the schedule of release of various volumes of the competent authorities' report, the Panel considered and rejected the notion that the report must take a particular form.

[23] *US – Line Pipe*, AB Report, para. 244.

[24] *Argentina – Footwear*, AB Report, para. 121.

[25] *See US – Wheat Gluten*, Panel Report, para. 160.

[26] The New Shorter Oxford English Dictionary, 1993 Edition pp. 2495-2496. Other definitions of "reason" equate it with "discussion" or "argument," a sense similar to the definition quoted in the text. *Ibid.*

[27] Article 4.2(c) cannot have formed the basis for this particular conclusion, as the Panel affirmatively stated that it made no findings under that provision. Panel Reports, para. 9.31. In any event, that Article does not support the Panel's view that a timeliness and extent are relevant to whether an explanation is "reasoned and adequate." The only timing element of Article 4.2(c) is its requirement that the *report* be published promptly. It is silent as to the timing of particular explanations within the report, and does not suggest that timeliness is relevant to the substantive question as to whether an explanation is "reasoned."

61. Past panels and the Appellate Body have themselves found that a succinct explanation may satisfy obligations under the WTO Agreement to provide reasoning. For example, in *Mexico – HFCS*, the Appellate Body found that the obligation under Article 12.7 of the DSU for a panel to provide the "basic rationale behind any findings" does *not* require it to "expound at length on the reasons for their findings and recommendations."[28] In *EC – Pipe Fittings*, the panel concluded that Article 12.2.2 of the Antidumping Agreement required an "explanation" as to the lack of relevance or significance of certain factors, and that "it must be discernible from the published determination that an investigating authority reflect this explanation . . . ." Thus, it is what the explanation states, and not its length, that determines whether it provides reasoned conclusions.

62. These findings from past WTO reports raise another important point – that the competent authorities' report need not contain findings or conclusions beyond those needed to support the determination. If an explanation is reasoned and adequate,[29] it is irrelevant that the competent authorities might have made additional observations, or elaborated further on their conclusions. The Appellate Body affirmed this point in *US – Wheat Gluten*, in which it upheld a panel's finding that the USITC considered "productivity" in a manner consistent with Article 4.2(a), even though the Appellate Body considered that "the USITC could have provided a more comprehensive analysis of 'productivity'."[30] Similarly, in *EC – Cast Iron Fittings*, the Appellate Body found that the investigating authorities could meet their obligation under the Antidumping Agreement to address "growth" by addressing other factors that indicated "growth." It found "that the analysis of a factor is implicit in the analyses of other factors does not necessarily lead to the conclusion that such a factor was not evaluated."[31]

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[28] *Mexico – HFCS*, AB Report, para. 109.

[29] In this regard, it is also significant that the Safeguards Agreement does not employ the word "adequate" in describing the requirements associated with the competent authorities' report, conclusions, or analysis. Therefore, that term can only be understood as a shorthand for the obligations that *are* in the Agreement. More specifically, the Agreement requires that the published report contain "reasoned conclusions" on "all pertinent issues" and "a detailed analysis of the case," including a demonstration of the relevance of the factors examined." Actions by competent authorities consonant with those explicit obligations are by definition consistent with the Safeguards Agreement.

[30] *US – Wheat Gluten*, AB Report, para. 155. In this conclusion, the Appellate Body was interpreting the Panel's obligations under DSU Article 11, rather than the competent authorities' obligations under Article 3.1 or 4.2(c). *Ibid.*, para. 153. However, it is difficult to imagine that the Appellate Body could have upheld the Panel's finding of compliance with Article 4.2(a) if the USITC Report failed to provide a reasoned and adequate explanation with regard to that very issue.

[31] *EC – Cast Iron Fittings*, AB Report, paras. 160-161. The Appellate Body again noted that it was not addressing the "manner" in which the explanation is presented. However, the fact that an explanation can demonstrate that the investigating authorities conducted an investigation suggests strongly that it is reasoned and adequate at least as to the fact that the evaluation occurred.

b. The competent authorities' findings are sufficiently "explicit" if they provide the findings and reasoned conclusions required under Article 3.1.

63. The Appellate Body found in *US - Line Pipe* that "to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish expressly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports."[32] The Panel cited this concept repeatedly in its analyses of causation and parallelism.[33] However, the term "explicit" does not appear in the Safeguards Agreement. Instead, it was introduced in *US – Wheat Gluten*, when the Appellate Body found that the United States "did not make any explicit determination relating to increased imports, *excluding imports from Canada*."[34]

64. Since the Safeguards Agreement does not expressly require that the competent authorities' determination, findings, or conclusions be "explicit," that term can only be understood as a shorthand for the obligations that *are* in the Agreement – that the published report contain "reasoned conclusions" on "all pertinent issues" and "a detailed analysis of the case," including "a demonstration of the relevance of the factors examined."[35] (Indeed, if the Panel or the Appellate Body were to view "explicit" as an autonomous requirement, it would be acting in contravention of Article 3.2 of the DSU, which provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.")

c. The Safeguards Agreement Does Not Dictate the Structure of the Competent Authorities' Report, As Long As the Report Provides the Necessary Findings and Reasoned Conclusions.

65. Articles 3.1 and 4.2(c) do not obligate the competent authorities to present their report in any particular form. The Panel recognized this point in finding that

> In the end, it is left to the discretion of the Members to determine the format of the report, including whether it is published in parts, so long as it contains all of the necessary elements, including findings and reasoned conclusions on all pertinent issues of fact and law.[36]

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[32] *US – Line Pipe*, AB Report, para. 217.
[33] *E.g.*, Panel Reports, paras. 10.284, 10.330, and 10.595.
[34] *US – Wheat Gluten*, AB Report, para. 98.
[35] *See US – Wheat Gluten*, Panel Report, para. 160.
[36] Panel Reports, para. 10.49.

The Article 4.2(c) obligation that the report contain a "detailed analysis of the case under investigation" indicates that the findings and reasoned conclusions of the competent authorities form part of the "analysis" for a single case. The panel also recognized this point in finding that different parts of the report must be "integrated logically in the overall explanation as to how the importing Member's safeguard measure satisfies the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards."

66. However, the Panel neglected these principles in many of its findings. At various points, it found the USITC failed to provide a reasoned and adequate explanation because the USITC Report did not cite specifically to data or reasoning in another section of the report that supported a particular conclusion. The Panel's reasoning finds no support in the Safeguards Agreement.

67. As noted above, Articles 3.1 and 4.2(c) require a detailed analysis of the case, including the findings and reasoned conclusions of the competent authorities. Beyond these broad guidelines, the competent authorities have discretion as to the format of the report. Therefore, they may choose any structure, any order of analysis, and any format for explanation that they see fit, as long as the report complies with Articles 3.1 and 4.2(c).

68. It is instructive in this regard that, even under the Antidumping Agreement, which specifies the contents of the investigating authorities' report in much greater detail than does the Safeguards Agreement, the panel in *EC – Cast Iron Fittings* found that it could consider an analysis presented in the injury section of the report to determine whether the competent authorities had addressed a factor relevant to the causation analysis. The panel stated that, "[p]rovided that it is clear that a determination takes a given factor into account, it is immaterial where in the determination such attention is indicated."[37]

69. Thus, the Safeguards Agreement permits the competent authorities in a safeguards proceeding to rely on findings made or evidence presented in one section of the report when they are drafting another section. Moreover, when a Member is defending the report of the competent authorities before a WTO panel, that Member may cite all relevant sections in demonstrating that the report as a whole presents a reasoned and adequate explanation of the competent authorities' conclusions on any one issue.

70. However, the Panel here, for example, erred in failing to consider for purposes of its analysis of the ITC's unforeseen developments conclusions, information regarding increased imports from all countries exporting the relevant steel products to the United States even though the ITC specifically referred to it, albeit in the context of other aspects of its Report.

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[37] *EC – Cast Iron Fittings*, Panel Report, para. 7.405.

2. In Some Instances, the Panel Even Failed to Provide the Findings of Fact, Applicability of Relevant Provisions, or Basic Rationale Required by Article 12.7 of the DSU.

71. A panel itself bears the obligation to adequately explain its findings concerning a competent authority's conclusions. In this regard, Article 12.7 of the DSU requires that the panel include in its report its "findings of fact, the applicability of relevant provisions, *and the basic rationale behind any findings and recommendations it makes*."[38] The Appellate Body has stated that Article 12.7 therefore requires a panel to "set forth [in its report] explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations."[39] Accordingly, in their reports, panels must "identify the relevant facts and the applicable legal norms. In applying those legal norms to the relevant facts, the reasoning of the panel must reveal how and why the law applies to the facts."[40]

72. The Panel failed to meet this standard in several instances. In some cases, it failed to provide any rationale whatsoever for its findings. In other cases, the Panel provided reasoning so cursory or conclusory that it is impossible to discern how and why the Panel reached its conclusion. We identify these instances specifically in subsequent sections.

3. The Panel Incorrectly Merged the Article 3.1 Obligation for the Competent Authorities to Provide "Findings and Reasoned Conclusions on All Pertinent Issues of Fact and Law" With the Competent Authorities' Obligations Under Article 4.2.

73. As previously noted, the Panel based many of its findings against the United States on its conclusions that the USITC Report failed to provide a "reasoned and adequate explanation" of certain findings. If correct, which they are not, such findings would obviously indicate a breach of the competent authorities' Article 3.1 obligation to provide findings and reasoned conclusions. But the Panel went further. In each case that the Panel found that the USITC failed to explain its analysis, the Panel made a follow-on finding, without any further analysis, that the Commissioners did not actually *perform* the analysis correctly, thereby breaching Article 2.1, 4.2, or 4.2(b). This presumption is inconsistent with the terms of the Safeguards Agreement, and is also incorrect.

74. Articles 2.1, 4.1, 4.2(a), and 4.2(b) obligate the competent authorities to perform certain analyses as part of their determination as to serious injury. These provisions apply to what the competent authorities *do* in investigating the case and reaching a determination. The last sentence of Article 3.1 and Article 4.2(c), in contrast, apply to how the competent authorities

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[38] DSU, Article 12.7.
[39] *Mexico - High Fructose Corn Syrup*, AB Report - Recourse to Article 21.5, para. 106.
[40] *Mexico - High Fructose Corn Syrup*, AB Report - Recourse to Article 21.5, para. 108.

explain what they did in reaching that determination. The obligations are legally distinct. Articles 2.1, 4.1, 4.2(a), and 4.2(b) set out the substantive requirements for establishing the right to take a safeguard measure, while Articles 3.1 and 4.2(c) set out the procedural requirements. The Panel improperly merged them by presuming, without further consideration of the facts of the case, that a failure to explain a finding automatically proved that the USITC Commissioners had not performed the analysis necessary to make the finding.

75. In *Thailand – Angles*, the Appellate Body found that a division of obligations similar to that in the Safeguards Agreement prevented the conclusion that the breach of an obligation to explain an analysis automatically resulted in the breach of an obligation to perform that analysis. In that dispute, the Appellate Body characterized Article 3 of the Antidumping Agreement, which covers the volume of dumped imports, effect on prices, impact on the domestic injury, causality, the assessment of domestic production of the like product, and the determination of threat of serious injury as containing "the *substantive* obligations."[41] It then differentiated these from the "procedural and due process obligations," including the Article 12.2.2 requirement that a final determination contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures." The Appellate Body found that "there is no justification for reading these obligations into the substantive provisions of Article 3.1"[42] and that, accordingly,

> the Panel erred in finding that Article 3.1 of the *Anti-Dumping Agreement*, "requires that the reasoning supporting the determination [must be] 'formally or explicitly stated' in documents in the record of the AD investigation to which the interested parties (and/or their legal counsel) have access at least from the time of the final determination.[43]

76. In the Safeguards Agreement, Articles 2.1, 4.1, 4.2(a), and 4.2(b) contain obligations analogous to the "substantive provisions" of Article 3 of the Antidumping Agreement. Articles 3.1 and 4.2(c) of the Safeguards Agreement contain the "procedural" obligations. As under the Antidumping Agreement, the substantive provisions require the competent authorities to perform a particular analysis and make particular determinations.[44] They do not require that the reasoning supporting their determinations expressly appear in the written report. Therefore, the putative absence of such reasoning from the report cannot constitute a breach of Articles 2.1, 4.1, 4.2(a), or 4.2(b). Since this was the only basis asserted by the Panel for several of its findings

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[41] *Thailand – Angles*, AB Report, para. 106 (emphasis in original).

[42] *Thailand – Angles*, AB Report, para. 110.

[43] *Thailand – Angles*, AB Report, para. 111.

[44] Article 2.1 provides for the application of a safeguard measure "only if that Member has determined, pursuant to the provisions set out below," that the conditions for applying a measure exist. Since the obligation to explain accrues only *after* the competent authorities make their determination, the any requirement to explain is not part of the process of reaching that determination, and does not become incorporated into Article 2.1 by the reference to the determination.

that the United States breached Articles 2.1, 4.1, 4.2(a), and 4.2(b), the Appellate Body should reverse those findings.

B. The Panel Erred in Finding That the ITC's Conclusions on Unforeseen Developments Were Inconsistent With Article XIX and Article 3.1.

1. The Panel Failed to Take Into Account the Differences Between the Unforeseen Developments Requirement and the Article 2 and 4 Conditions for Applying a Safeguard Measure and, Therefore, Applied the Standard of Review Incorrectly.

77. From the time that the Appellate Body found that the "unforeseen developments" language of Article XIX:1(a) continues to constitutes a distinct obligation under the WTO Agreements, it has recognized that this requirement is different from obligations under the Safeguards Agreement. The *Korea – Dairy* and *Argentina – Footwear* reports explain:

> Although we do not view the first clause in Article XIX:1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the *conditions* set forth in the second clause of that paragraph, we 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.[45]

In *US – Lamb Meat*, the Appellate Body found that "the fulfilment of these conditions" – namely, increased imports, injury, and causation – "must be the central element of the report of the competent authorities." A demonstration of the "circumstances" of unforeseen developments "must also feature in the same report" because it has a "logical connection" to the conditions.[46]

78. However, the Panel paid no heed to these differences. In laying out the standard of review applicable to the competent authorities' findings regarding unforeseen developments, it quoted passages describing how to apply the standard of review under Article 11 of the DSU to claims arising under *Article 4* of the Safeguards Agreement. Specifically, the Panel quoted the finding from *Argentina – Footwear* that a panel must evaluate "whether the competent authorities 'considered all the relevant facts and had adequately explained how the facts supported the determinations that were made.'"[47] But the Panel omitted the Appellate Body's statements that

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[45] *Korea – Dairy*, AB Report, para. 85 (emphasis added); *Argentina – Footwear*, AB Report, para. 92 (emphasis in original).

[46] *US – Lamb Meat*, AB Report, para. 76.

[47] Panel Reports, para. 10.39, *quoting*, *Argentina – Footwear*, AB Report, para 121; *US – Lamb Meat*, AB Report, para. 102.

> the precise nature of the examination to be conducted by a panel, in reviewing a claim under Article 4.2 of the *Agreement on Safeguards*, stems, in part, from the panel's obligation to make an "objective assessment of the matter" under Article 11 of the DSU and, in part, from the obligations imposed by Article 4.2.[48]

Thus, the standard adopted by the Panel errs in two ways – it mistakenly reflects concerns relevant to Article 4.2, and disregards concerns relevant to the "unforeseen developments" requirement under Article XIX:1(a).

79. These are important differences. Article 4.2 indicates factors the competent authorities must evaluate and outlines the causation analysis. In contrast, as the *US – Lamb Meat* report states, "Article XIX provides no express guidance" on "when, where or how that demonstration [of unforeseen developments] should occur."[49] Thus, the appropriate standard is not one derived from Article 4.2, but from Article XIX:1(a). The Panel's analysis, starting from a flawed premise regarding the exact nature of the examination it was to perform, was from the outset misdirected.

2. The Panel Erred in Finding That the ITC Was Required to Differentiate the Degree of Impact of the Unforeseen Developments on Each Product and on Each Country from Which the Imports Originated.

80. The Panel concluded that the ITC was obligated "to differentiate between the impact that the alleged unforeseen developments had on the different product sectors to which the various safeguard measures related" and "made no attempt" to do so.[50] This conclusion reflects two serious misconceptions. First, Article XIX does not specify a particular type of analysis to demonstrate unforeseen developments, and certainly does not require the competent authorities to differentiate their various impacts on particular imports. Second, even if such a requirement did exist, the relevant question for a panel would be whether the competent authorities' conclusions met the requirement, and not whether the competent authorities "attempted" to do so.

81. The Panel cited no authority for its finding that the ITC was obliged to "differentiate" the impact of various unforeseen developments on each product. Nor could it. To perform such an analysis, the competent authorities would have to identify the effects of each unforeseen development on subsequent increases in imports of a product. But to read such a requirement into Article XIX would obligate the competent authorities to evaluate unforeseen developments in the same way as imports themselves. This is manifestly incorrect, as the Safeguards Agreement describes the analysis of imports in a more detailed – and entirely different – manner

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[48] *US – Lamb Meat*, AB Report, para. 105.
[49] *US – Lamb Meat*, AB Report, para. 72.
[50] Panel Reports, para. 10.128.

than Article XIX describes the unforeseen developments obligation. While Article XIX:1(a) requires that increased imports be a "result of" unforeseen developments, in contrast, it requires that those imports "cause" serious injury. Article 4.2 specifies further that there be a "causal link" between increased imports and serious injury, and lists factors that must be considered in the analysis. It, and the remainder of the Safeguards Agreement, is silent as to unforeseen developments.

82. The Panel also erred in failing to make the findings necessary for the application of its erroneous standard. The Panel cited no facts suggesting that the ITC's general conclusions as to unforeseen developments was in any way unrepresentative of the specific steel industries and imports covered by the various measures. In fact, the Panel explicitly accepted that macroeconomic developments, such as those cited by the ITC, could in fact be Article XIX unforeseen developments.[51] But the Panel did not then explain why the ITC was incorrect in concluding that the effects of these macroeconomic developments were fairly consistent across the respective steel industries and, accordingly, were relevant to each one. It simply assumed that the ITC's demonstration, which focused on macroeconomic events and relied on broad economic indicators, could not suffice as a demonstration for any specific measure. Accordingly, the Panel made no specific factual findings indicating that the ITC's demonstration was in some way inaccurate or unsupported by fact.

83. The Panel may have felt that the ITC ought to have issued multiple demonstrations, specific to each product subject to a separate measure, but that did not mean that the Panel could make an across-the-board dismissal of the "plausible" explanation that the ITC provided. In short, the Panel's finding that more specific information might have been useful simply does not establish that the ITC failed to provide reasoned conclusions demonstrating unforeseen developments that led to an injurious increase in imports. This by itself is sufficient basis for the Appellate Body to reverse the Panel's findings. Consequently, the Panel Reports do not establish that the ITC findings of unforeseen developments were inconsistent with either Article XIX or Article 3.1.

84. Moreover, the Panel's analysis did not satisfy the Panel's duty under the DSU to set out the record facts and basic rationales justifying its findings that the competent authorities' analysis was not consistent with the relevant obligations. Thus, the Appellate Body should also reverse the Panel's findings as being inconsistent with Article 12.7 of the DSU.

85. The Panel also mistakenly indicated that a competent authority had to "differentiate the impact" of various unforeseen developments on the individual industries and even economies of other countries.[52] Again, no authority is cited for this finding. Nor can there be. Article

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[51] Panel Reports, paras. 10.80, 10.84, 10.99.
[52] Panel Reports, para. 10.127.

XIX:1(a) does not differentiate among Members, or among imports from Members. Indeed, that provision addresses imports in general, and not merely imports from Members.

86. Finally, the Panel erred in finding that "an economic analysis was called for" in the ITC's demonstration of unforeseen developments.[53] Nothing in Article XIX or the Agreement on Safeguards suggests a particular type of analysis, such as an "economic" one, is required. Appellate Body reports construing the unforeseen developments have called for a factual demonstration.[54]

87. Nonetheless, an economic analysis was exactly what the ITC demonstration presented. The ITC found that the steel products under investigation were fungible and sold largely on the basis of price; that countries both in Southeast Asia and in the former USSR republics were increasingly dependent on exports; and that currency disruptions in those same countries reduced consumption and increased exports, while favorable exchange rates and continued economic expansion made the United States an unusually attractive market for steel products displaced from other markets. The Panel does not point to anything in the ITC's demonstration that does not accord with general macroeconomic theory or with the record evidence.

88. In short, the Panel found that the ITC's demonstration of unforseen developments was not reasoned and adequate because it did not distinguish the specific effects of the various unforeseen developments on each product and the economies of each country producing the product. This finding was based on a mistaken standard that is without basis in Article XIX, mistakenly incorporates the standard of review for claims based on Article 4 of the Agreement on Safeguards, and fails to provide the necessary justification required by Article 12.7 of the DSU. The Panel erred and should be reversed.

3. The Panel Erred in Finding That Data and Analysis in the ITC Report, but Outside the Unforeseen Developments Section, Were Irrelevant to an Evaluation of the ITC's Unforeseen Development Findings.

89. The Panel asserted that the ITC's demonstration of unforeseen developments was unsupported.[55] In particular, the Panel asserted that the ITC provided no data in support of the conclusion that imports increased in the wake of the unforeseen developments. As the Panel recognized, however, the ITC made increased import findings for each product,[56] and the ITC Report cited to data tables showing imports into the United States for each country and for each product over the entire period of investigation.[57]

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[53] Panel Reports, para. 10.125.
[54] *Korea – Dairy*, AB Report, para. 85.
[55] Panel Reports, para. 10.124.
[56] Panel Reports, para. 10.124.
[57] Panel Reports, para. 10.117.

90. In addressing unforeseen developments, the Panel did not address these specific increased import findings. Furthermore, the Panel never addressed whether the data contained in the tables in Memorandum INV-Y-180, which showed imports by every product from every country for every year and interim periods of the investigation, supported the ITC's conclusion. The Panel was clearly aware of the existence and potential significance of the data. However, it merely noted that the ITC's demonstration of unforeseen developments did not specifically cite these tables, and took the position that the Panel itself had no responsibility to address the data.

91. In these disputes, the Panel was not required to guess whether the ITC had in fact considered the evidence; the ITC cited the very evidence in another section of the report. Thus, the Panel had clear and incontrovertible evidence that the ITC used the data showing imports by country and by product in its analysis. Moreover, those data were available to any interested person or to the Panel for the purpose of understanding the ITC's conclusions and evaluating their consistency with WTO rules.

92. The Panel found that, because these data tables were cited only in regard to statements about NAFTA imports, "they cannot be used before the Panel to fill gaps in the ITC's reasoning."[58] The tables were not cited to fill in a gap in the ITC's reasoning, but to identify the evidence on the record that the ITC used in reaching its conclusions and to demonstrate how the evidence supported those conclusions. The Safeguards Agreement did not require the exclusion of this information from the Panel's analysis. Indeed, as part of the findings and reasoned conclusions of the competent authorities, the information was something the Panel was *required* to consider in evaluating whether the unforeseen developments finding was consistent with Article 3.1.

93. The Appellate Body's findings in *EC – Cast Iron Fittings* are instructive on this issue. In that dispute, the report of the investigating authority failed to mention one of the factors specifically listed in the Antidumping Agreement at all in its discussion. Despite this omission, the Appellate Body determined, by virtue of a close reading of the remainder of the report, that the investigating authority had in fact "considered" the enumerated factor.[59] If this is a permissible analysis of whether the necessary evaluation was performed by national authorities, then the ITC's reliance on data tables actually referenced in the Report (although not in the unforeseen development section) is surely also permissible.

94. Although the Panel itself insisted on the need for the demonstration of unforeseen developments to be "integrated" with the remainder of a competent authority's report, the Panel evaluated the ITC's demonstration in a vacuum, as if the ITC had made no other findings, consulted no other data, and considered no other theories. Thus, it is the Panel's findings – and not the ITC's reasoned conclusions – that are not integrated. The data tables in question were

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[58] Panel Reports, para. 10.117.

[59] *EC – Cast Iron Fittings*, AB Report, paras. 161-163.

cited in the ITC Report, relied upon by the ITC in reaching its determinations, and demonstrate the validity of those determinations. In failing to address these tables, the Panel failed to provide any basis for finding that the ITC analysis was "unsupported" by record evidence. Therefore, it has failed to demonstrate any inadequacy in the reasoned conclusions provided by the ITC, and failed to demonstrate any inconsistency with Article XIX or Article 3.1.

4. In Addition to the Substantive Inconsistencies with Article XIX:1(a) and Article 3.1 in the Panel's Unforeseen Developments Analysis, the Panel Also Violated its Own Obligations under Article 12.7.

95. The Panel did not undertake the analyses of the evidence required of it and failed to articulate, except in conclusory fashion, why the ITC's findings failed to provide the requisite reasoned conclusions. Rather, the Panel contented itself with announcing that the ITC's demonstration of unforeseen developments was "plausible, but . . . not sufficiently supported and explained."[60] In support of this finding, the Panel cited no evidence that contradicted the ITC's conclusions. It pointed to no evidence that undermined any of the ITC conclusions, and it found no alternative explanation. By failing to make any findings of fact, or even to point to any facts that made the ITC's demonstration seem not adequate, the Panel failed to set forth explanations and reasons sufficient to disclose its justifications for its findings and recommendations.[61] Its findings should be rejected as deficient under Article 12.7 of the DSU.

5. Conclusion

96. The Panel's findings that all ten safeguard measures were inconsistent with the requirements of Article XIX:1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards was reached by applying the standard of review incorrectly, and the finding was also unsupported by necessary and specific findings of fact. The Panel's findings were not made in accordance with Article XIX of GATT 1994 or with Article 12.7 of the DSU.

C. The Panel Erred in Finding That the "Increased Imports" Requirement Was Not Satisfied for CCFRS, Hot-Rolled Bar and Stainless Steel Rod.

97. The Panel found that the ITC failed to provide a reasoned and adequate explanation for its increased imports findings for five of the steel products covered by safeguard measures. For three of these products (CCFRS, hot-rolled bar and stainless steel rod) the Panel found that the ITC did not provide an adequate or reasoned explanation of how the facts supported its increased imports finding. For the other two products (tin mill and stainless steel wire) the Panel found that the ITC did not provide an adequate or reasoned explanation because the Commissioners

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[60] Panel Reports, para. 10.144.

[61] *Mexico – HFCS*, AB Report, para. 106.

making affirmative determinations did not all define the like or directly competitive product in the same way. As discussed below and in Section F of this submission, the Panel erred in its conclusions with respect to the increased imports findings for these five products.

98. The Panel found that imports of CCFRS, hot-rolled bar and stainless steel rod did not "increase" for purposes of the Safeguards Agreement because those imports did not demonstrate "a certain degree of recentness, suddenness, sharpness and significance."[62] The standard applied by the Panel is not supported by the text of the Safeguards Agreement. Moreover, the Panel erred in its analysis of the import data for CCFRS, hot-rolled bar and stainless steel rod.

99. The Panel also erred in concluding that the increased imports requirement was not met for tin mill products and stainless steel wire because the Commissioners making affirmative determinations for these products did not all define the like product in the same way. This issue is discussed in Section F of this submission.

1. The Standard Applied by the Panel in Evaluating Whether the "Increased Imports" Requirement Was Met Is Not Supported by the Text of the Safeguards Agreement or Article XIX of GATT 1994.

100. After reviewing the relevant provisions of the Safeguards Agreement and prior reports of the Appellate Body and panels addressing the "increased imports" requirement, the Panel concluded that "the determination that imports have increased pursuant to Article 2.1 can be made only when an increase evidences a certain degree of recentness, suddenness, sharpness and significance."[63] However, the Safeguards Agreement and Article XIX of GATT 1994 contain no language that would justify the imposition of such a requirement for satisfying the increased imports obligation.

101. Article 2.1 provides:

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.[64]

The words "recent, sudden, sharp, or significant" do not appear in this provision, or anywhere else in the Safeguards Agreement.

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[62] Panel Reports, para. 10.167.
[63] Panel Reports, para. 10.167.
[64] Safeguards Agreement, Article 2.1 (footnote 1 omitted).

102. The only basis provided by the Panel for its conclusion that an increase in imports must be "recent" is the use of the present tense in the phrase "is being imported."[65] However, the word "is" must be read in the context in which it appears. Article 2.1 speaks of a product that "*is* being imported . . . in *such* increased quantities . . . *as to cause or threaten to cause serious injury*" (emphasis added). The phrase "in such increased quantities" simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time.

103. The text of Article 2.1 does not support an interpretation that an increase in imports must be otherwise "recent" in any sense other than the ability of the imports to cause or threaten serious injury. In other words, the increase in imports must be recent enough to cause injury or threat at the time of the competent authority's determination. The notion of "recentness" derives its specific meaning from the ability of increased imports to cause or threaten serious injury. The only way to assess whether an increase in imports was "recent" enough is to examine whether it was sufficient to cause present serious injury or threaten serious injury. The Panel's application of a standard calling for "a certain degree of recentness" in the abstract is not supported by the text of Article 2.1

104. The Panel based its conclusion that increased imports must be "sudden" on the reference to "unforeseen developments" in Article XIX of GATT 1994. According to the Panel: "[t]his unforeseen and unexpected character of the developments resulting in the increased imports as well as the emergency nature of safeguard measures calls for an assessment of whether imports increased suddenly so that the situation became one of emergency for which safeguard measures became necessary."[66] The Panel was reading into Article XIX a requirement that it does not contain. Article XIX speaks of "unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement." It does not require that an increase in imports be "sudden." By reading this "suddenness" requirement into Article XIX, the Panel violated customary rules of treaty interpretation, which "neither require nor condone the imputation into a treaty of words that are not there."[67]

105. The Panel's imputation of a "suddenness" requirement also is at odds with the manner in which serious injury often occurs. In *US–Line Pipe* the Appellate Body described "the reality of how injury occurs" as "a continuous progression of injurious effects eventually rising and culminating in what can be determined to be 'serious injury.'" According to the Appellate Body, "[s]erious injury does not generally occur suddenly."[68]

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[65] Panel Reports, para. 10.159.
[66] Panel Reports, para. 10.166.
[67] *India – Patent Protection*, AB Report, para. 45.
[68] *US – Line Pipe*, AB Report, para. 168.

106. In its *Argentina – Footwear* report the Appellate Body was clear that the attributes of recentness, suddenness, sharpness, and significance are inexorably linked to the ability of imports to cause or threaten serious injury. The Appellate Body explained:

> [T]he determination of whether the requirement of imports 'in such increased quantities' is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be "*such* increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure. . . . [T]he increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury."[69]

107. Article 2.1 of the Safeguards Agreement, which the Appellate Body was interpreting when it spoke of "recent enough, sudden enough, sharp enough, and significant enough," encompasses the entire investigative responsibility of the competent authorities under the Safeguards Agreement. Whether an increase in imports has been recent, sudden, sharp, and significant enough to cause or threaten serious injury are questions that are answered as the competent authorities go beyond the question of increased imports and proceed with the remainder of their analysis (*i.e.*, with their consideration of serious injury/threat and causation).

108. The ITC makes a threshold determination as to whether there have been increased imports before examining injury and causation. If in this threshold determination the ITC finds that there have not been increased imports, it does not proceed to the injury and causation analysis. The "Increased Imports" section of the report is just the beginning of the ITC's analysis and must be read together with the "Serious Injury" and "Substantial Cause" sections to evaluate the ITC's determination that a product is "being imported . . . in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry." In other words, an analysis of the "Increased Imports" section alone is not sufficient to determine whether the ITC has satisfied all the requirements of Article 2.1 of the Safeguards Agreement. But it is enough to satisfy the "increased imports" component.

109. In sum, the standard applied by the Panel for assessing whether the increased imports requirement had been met – whether the increase shows "a certain degree of recentness, suddenness, sharpness and significance" – is at odds with the relevant provisions of the Safeguards Agreement. Accordingly, the Appellate Body should reverse the Panel's findings that the ITC acted inconsistently with Article 3.1 by failing to provide a "reasoned and adequate

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[69] *Argentina – Footwear*, AB Report, para. 131 (emphasis in original).

explanation" for its increased imports determinations for CCFRS, hot-rolled bar and stainless steel rod.

2. The Panel's Increased Imports Analysis with Respect to Certain Carbon Flat-Rolled Steel Was Erroneous.

110. There is no dispute that imports of CCFRS increased from 1996 to 2000, the five full years covered by the ITC's investigation. On an absolute basis, imports increased from 18.4 million short tons in 1996 to 20.9 million short tons in 2000, an increase of 13.7 percent.[70] In relative terms, the ratio of imports to domestic production (including production for captive consumption) also increased from 10.0 percent in 1996 to 10.5 percent in 2000.[71] Together, these facts present strong evidence that the United States satisfied all WTO obligations with respect to finding that imports of CCFRS had entered its territory in "increased quantities."[72]

111. The Panel did not disagree with any of this evidence, but still concluded that the ITC Report had failed to provide "an adequate and reasoned explanation of how the facts support the determination."[73] This conclusion rests in large measure on the Panel's determination that the ITC "did not seem to focus on, or at least account for" the fact that there was a decrease in imports, on both an absolute and a relative basis, from interim 2000 to interim 2001.[74] But the Panel did not – and could not – point to any provision of the WTO Agreements that required the ITC to address interim 2001 import levels as part of its increased imports determination or, in particular, to give the change between interim periods dispositive weight. Indeed, the Panel's own analysis of the relevant WTO provisions makes it clear that no such requirement exists.

112. After reviewing the relevant Agreement provisions, the Panel concluded that "imports need not be increas*ing* at the time of the determination; what is necessary is that imports *have* increas*ed*, if the products continue 'being imported' in (such) increas*ed* quantities."[75] Here, the ITC found that imports had increased from 1996 volumes, and that for full year 2000 CCFRS continued to be imported in quantities above 1996 levels. These findings satisfy the requirements of the Safeguards Agreement, and the Panel's findings to the contrary were in error.

113. The Panel committed further error in its discussion of the surge in CCFRS imports that occurred in 1998. The Panel asserted that this increase, in itself, "was no longer recent enough at the time of the determination" to support a finding of increased imports.[76] Once again, the Panel cites no provision of the WTO Agreements to support its finding. In fact, the Panel itself

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[70] ITC Report, p. 49.
[71] ITC Report, p. 50.
[72] Safeguards Agreement, Article 2.1
[73] Panel Reports, para.10.186.
[74] Panel Reports, paras.10.181 and 10.183.
[75] Panel Reports, para. 10.162 (emphasis in original).
[76] Panel Reports, paras. 10.182 and 10.185.

recognized that "there are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an 'increase' in the sense of Article 2.1."[77] As the Panel explained, "the inquiry is not whether imports have increased 'recently and suddenly' *in the abstract*. A *concrete* evaluation is what is called for."[78]

114. In this case, the ITC conducted just such an evaluation. It explained in detail how the 1998 import surge had long-term effects that were still occurring at the time of its determination. The ITC found that the 1998 increase coincided with sharp declines in the domestic industry's performance and condition.[79] It found that after 1998, imports consistently remained above levels seen in 1996 and 1997.[80] It found that the "import surge in 1998 altered the competitive strategy of domestic producers," forcing them to combat imports by cutting their prices.[81] Accordingly, the ITC concluded that "[t]he impact of the 1998 surge in imports on the domestic industry is undeniable."[82] The ITC also noted that imports were significantly higher in 1999 and 2000 than in 1996.[83]

115. These findings provide exactly the sort of "concrete" analysis that the Panel found to be necessary. But instead of considering the evidence that the effects of the 1998 import surge (and of imports in later years at increased levels and lower prices) were still occurring at the time of the ITC's determination, the Panel simply declared that 1998 was "not recent enough." In other words, the Panel applied an absolute standard that the Safeguards Agreement simply does not contain. Accordingly, the Panel's finding on this point was in error.

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[77] Panel Reports, para.10.168 (emphasis in original).
[78] Panel Reports, para. 10.168 (emphasis in original).
[79] ITC Report, p. 59.
[80] ITC Report, p. 60.
[81] ITC Report, p. 61.
[82] ITC Report, p. 60.
[83] ITC Report, p. 50.

3. The Panel's Increased Imports Analysis with Respect to Hot-Rolled Bar Was Erroneous.

a. Background

116. The ITC found that imports of hot-rolled bar increased both on an absolute and a relative basis. The import data were as follows:

	Absolute Imports (million tons)	**Relative Imports (percentage)**
1996	1.66	19.2
1997	1.81	18.4
1998	2.34	23.8
1999	2.26	24.9
2000	2.53	27.5
January-June 2000	1.34	27.0
January-June 2001	0.95	24.6

Source: ITC Report, p. 92.

117. The ITC noted that imports were higher, both in absolute terms and relative to U.S. production, in 2000 than in any prior year of the period examined and showed a rapid and dramatic increase from 1999. While imports declined in the interim period comparison, the ratio of imports to U.S. production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level.[84]

b. The Findings of the Panel

118. The Panel found that the increased imports requirement was not met for hot-rolled bar. In examining absolute import levels, the Panel focused on the 28.9 percent decline in imports from interim 2000 to interim 2001. It found this decline to be more significant than both the 11.9 percent increase between 1999 and 2000, and the 52.5 percent increase from 1996 to 2000. The Panel characterized the overall development of absolute imports as an "up-and-down movement ending with a decrease of 28.9 percent."[85] The Panel noted, with respect to absolute imports, that

[84] ITC Report, p. 92.
[85] Panel Reports, paras. 10.204-10.206.

the increase from 1996 or 1997 to 1998 might have been sufficient to satisfy the requirements of the Safeguards Agreement, but that this increase was no longer recent enough.[86]

119. In examining relative import levels of hot-rolled bar, the Panel focused again on the decline from interim 2000 to interim 2001 (from 27.0 percent to 24.6 percent), and found it to be more significant than the increase (from 24.9 percent to 27.5 percent) from 1999 to 2000 or the increase (from 19.2 percent to 24.6 percent) from 1996 to 2000.[87]

c. The Panel Placed Too Much Reliance on Imports in Interim 2001, and Essentially Disregarded the Increase in Imports Over the Preceding Five Years.

120. Even if the legal standard applied by the Panel was correct (and we have argued above that it was not), the Panel erred in its application of this standard to the import data for hot-rolled bar.

121. The Panel focused on the data for the first half of 2001 and concluded that the ITC failed to explain adequately how it reached a finding of increased imports. In doing so, the Panel disregarded its own guidelines, and those of the Appellate Body, by failing to place data for the end of the investigation period in the context of data from an earlier period.

i. Imports on an Absolute Basis

122. As described above, on an absolute basis, imports of hot-rolled bar increased from 1.66 million tons to 2.53 million tons, or by 52.5 percent, in the period 1996-2000. Imports rose in three out of the four year-to-year comparisons, including a sizable increase from 1999 to 2000, the last full year of the period of review. Although absolute imports declined over the interim periods (from the first half of 2000 to the first half of 2001), falling by 28.9 percent, that was still less than the preceding increase.

123. The Panel discounted the sharp increase in absolute imports in the five full years of the period of investigation, and focused almost exclusively on a smaller decline in imports over the interim periods. According to the Panel:

> In light of this decrease in the most recent period, the Panel does not believe that the trend of imports from 1996 to 2000 (an increase of 52.5%) is sufficient to provide a basis for a finding that, at the moment of the determination, hot-rolled bar 'is being imported in such increased quantities'."[88]

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[86] Panel Reports, para. 10.207.
[87] Panel Reports, paras. 10.208-10.209.
[88] Panel Reports, para. 10.205.

124. It is impossible to reconcile the Panel's characterization of the absolute import data for hot-rolled bar as "an alternation of increases and decreases from year to year"[89] with the actual data. As the graph in paragraph 10.202 of the Panel Reports makes clear, the absolute import data show a clear rising trend with increases in three of the four year-to-year comparisons.[90] Essentially, imports surged twice – once in 1998, and again in 2000 – and reached even higher levels the second time.

125. The Panel's analysis also is at odds with its own discussion of the significance of a decrease in imports at the very end of a period of investigation. Elsewhere in its report the Panel explained:

> As regards the question of *how* recently the imports must have increased, the Panel notes, as the Panel in *US – Line Pipe* did, that Article 2.1 of the Agreement on Safeguards speaks of a product that "is being imported . . . in such increased quantities". Thus, imports need not be increas*ing* at the time of the determination; what is necessary is that imports *have* increas*ed*, if the products continue "being imported" in (such) increas*ed* quantities. The Panel therefore, agrees with the *US – Line Pipe* Panel's view that *the fact that the increase in imports must be "recent" does not mean that it must continue up to the period immediately preceding the investigating authority's determination, nor up to the very end of the period of investigation*. As pointed out by the Panel in *US – Line Pipe*, the most recent data must be the focus, but should not be considered *in isolation* from the data pertaining to the less recent portion of the period of investigation. However, as indicated by the present continuous "are being", there is an implication that imports, in the present, remain at higher (i.e., increased) levels.
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> *Whether a decrease in imports at the end of the period of investigation, in the individual case, prevents a finding of increased imports in the sense of Article 2.1 of the Agreement on Safeguards will, therefore, depend on whether, despite the later decrease, a previous increase nevertheless results in the product (still) "being imported in (such) increased quantities". In this evaluation, factors that must be taken into account are the duration and the degree of the decrease at the end of the relevant period of investigation, as well as the nature, for instance the sharpness and the extent, of the increase that intervened beforehand.*[91]

126. The Panel failed to apply these principles to the absolute import data for hot-rolled bar. Had it done so, it would have found that:

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[89] Panel Reports, para. 10.206.

[90] All of the charts with absolute import data in the Panel's Reports are misleading insofar as they put data for the six-month interim periods on par with annual data.

[91] Panel Reports, paras. 10.162 and 10.163 (emphasis added, footnotes omitted).

- the decrease in imports in interim 2001, while large, was limited to only one six-month period; and

- this six-month period was preceded by five years of almost uninterrupted increases in imports, which in the aggregate far exceeded the decrease in interim 2001.

127. The Panel found the United States in breach of Article 2.1 because "the Panel does not believe that the facts support a conclusion of increased imports, nor has the ITC provided an explanation to that effect."[92] However, the Panel improperly disregarded the nature and magnitude of preceding changes in imports in reaching these conclusions. Therefore, the Appellate Body should reverse the Panel's findings in this regard, as they fail to establish an inconsistency with Article 2.1, or any inadequacy in the findings and reasoned conclusions required under Article 3.1.

ii. Imports on a Relative Basis

128. On a relative basis, imports of hot-rolled bar increased from 19.2 percent in 1996 to 27.5 percent in 2000, or by 43.23 percent. Imports rose in three out of the four year-to-year comparisons, including a sizable increase from 1999 to 2000, the last full year of the period of review. Relative imports declined over the interim periods, falling from 27.0 percent in interim 2000 to 24.6 percent in interim 2001.

129. Again, the Panel discounted the development of relative imports in the five full years of the period of investigation, and focused almost exclusively on a decline in imports in the first six months of 2001 as compared with the first six months of 2000.[93] As it did in its analysis of absolute imports, the Panel failed to consider that the decrease in relative imports in the first six months of 2001 was of limited duration when compared with the preceding three years of rising import levels, and that even in interim 2001 relative import levels remained at higher levels than in the first three years of the period of investigation.

130. As with absolute imports, the Panel improperly disregarded the nature and magnitude of changes in relative imports preceding the first half of 2001. The Appellate Body should reverse the Panel's findings in this regard, as they fail to establish an inconsistency with Article 2.1, or any inadequacy in the findings and reasoned conclusions required under Article 3.1.

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[92] Panel Reports, para. 10.206.
[93] Panel Reports, paras. 10.208 and 10.209.

4. The Panel's Increased Imports Analysis with Respect to Stainless Steel Rod Was Erroneous.

a. Background

131. The ITC found that imports of stainless steel rod increased both on an absolute and a relative basis, with the largest increase occurring in the last full year of the period of investigation. The absolute import data were as follows:

	Absolute Imports (thousand short tons)
1996	60.5
1997	78.3
1998	61.4
1999	65.8
2000	82.3
January-June 2000	45.6
January-June 2001	31.4

Source: ITC Report, p. 214 and Table Stainless-7.

132. In connection with this decline in the absolute level of imports over the interim periods, the ITC noted that the market share of imports remained essentially stable in interim 2001.[94] This is an important observation because it underscores the fact that the decline in imports in interim 2001 was accompanied by a substantial decline in consumption in interim 2001.[95]

133. On a relative basis, imports of stainless steel rod to domestic production also increased significantly during the period of investigation. The actual data are business confidential, but the ITC explained that the largest single increase in the ratio of imports to domestic production occurred in 2000. The ITC also noted that there was a decline in relative import levels between interim 2000 and interim 2001.[96]

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[94] ITC Report, pp. 214-215.

[95] The ITC Report (p. 217) explains: "[w]ith the overall decline in the economy in interim 2001, apparent consumption of stainless rod also declined . . . ."

[96] ITC Report, p. 215.

b. The Findings of the Panel

134. The Panel found that the increased imports requirement was not met for stainless steel rod. With respect to absolute imports, the Panel relied principally on the fact that the 31.3 percent decline in imports between interim 2000 and interim 2001 was sharper than the 25 percent increase from 1999 to 2000. The Panel characterized the development of absolute imports during the period of investigation as "a double up-and-down movement (returning to the low point at the end)."[97]

c. The Panel Placed Too Much Reliance on Absolute Imports in Interim 2001, and Improperly Rejected the ITC's Analysis of This Decline in Interim 2001 Data.

135. Even if the legal standard applied by the Panel was correct (and we have argued above that it was not), the Panel erred in its application of this standard to the absolute import data for stainless steel rod. The Panel erred in two respects in evaluating the increase in absolute imports for stainless steel rod.

136. First, it arbitrarily decided that the decline in the first six months of 2001 was more significant than the increase of the prior two years, without considering the different durations and magnitudes of the increases and decrease.[98] The Panel thereby failed to place data for the end of the investigation period in the context of data from an earlier period.

137. The Panel's second error was its rejection of the ITC's reasoning as to why the decline in absolute imports in interim 2001 did not outweigh the increases of the previous two years. The ITC acknowledged the 31.3 percent decline in imports in interim 2001, but it also explained that, despite this decline, the market share of imports remained essentially stable in interim 2001.[99] In other words, there was good reason to discount the significance of the decline in absolute imports in interim 2001, because the effect on the U.S. industry in terms of market share was essentially unchanged at the increased level of 1999-2000. The Panel rejected the ITC's reasoning, saying that "[t]he market share, however, is the relative notion of imports *vis-à-vis* domestic sales, and is not related to absolute import volumes."[100] The Panel's critique misses the point. The ITC was not equating market share with absolute import levels; rather, it was evaluating the significance of the decline in absolute imports in interim 2001 in comparison to the increase in these imports in the previous two years.

138. The Panel improperly disregarded the nature and magnitude of preceding changes in imports in concluding that the increased imports requirement had not been met. Therefore, the

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[97] Panel Reports, para. 10.267-10.269.
[98] Panel Reports, para. 10.267.
[99] ITC Report, p. 215.
[100] Panel Reports, para. 10.268.

Appellate Body should reverse the Panel's findings in this regard, as they fail to establish an inconsistency with Article 2.1, or any inadequacy in the findings and reasoned conclusions required under Article 3.1.

D. The Panel Erred In Finding that the ITC's Causation Analysis for Seven Products Covered by the Steel Safeguard Measures Was Inconsistent with Articles 2.1, 3.1, and 4.2(b) of the Safeguards Agreement.

139. In its reports, the Panel concluded that the ITC did not provide a reasoned and adequate causation analysis for seven of the ten products covered by the steel safeguard measures under Articles 2.1, 3.1, and 4.2(b) of the Safeguards Agreement.[101]

140. The Panel erred in finding that the ITC's causation findings for these seven products were not consistent with the requirements of the Safeguards Agreement. As we describe below, the ITC thoroughly, objectively and reasonably evaluated the record evidence in its investigation and established that there was a "genuine and substantial" causal link between increased imports and serious injury for all seven products. Moreover, the ITC correctly ensured that it did not attribute to imports any injury caused by other factors, and provided a reasoned and adequate analysis in support of all its findings for the products.

141. As we discuss below, the Panel did not establish that the ITC failed to consider all the relevant facts or to provide findings and reasoned conclusions as to how the facts supported its causation findings for these products. The Panel's conclusions should be reversed by the Appellate Body.

1. The Causation Requirements of the Safeguards Agreement

142. As an initial matter, it is useful to reiterate briefly the legal principles applicable to the ITC's causation analysis in the safeguards investigation involving these ten products, as well as the principles applicable to the Panel's review of that analysis. We also briefly describe the ITC's own methodological approach to causation in that proceeding.

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[101] The Panel concluded that the ITC's causation analyses for CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar were not consistent with Articles 2.1, 3.1, and 4.2(b) of the Safeguards Agreement. *See generally* Panel Reports, paras. 10.278-10.573. The Panel found the ITC's causation analysis for one product, stainless steel rod, was consistent with the requirements of Articles 2.1, 3.1, and 4.2. Panel Reports, paras. 10.574-10.586. For two products, tin mill products and stainless steel wire, the Panel concluded that the ITC's causation analysis was not reasoned and adequate because the President imposed remedies on these products on the basis of differing like product definitions whose causation analyses could "not be reconciled as a matter of substance." The United States discusses this in section F below.

a. Articles 2.1 and 4.2 of the Safeguards Agreement

143. As the Panel correctly recognized in its reports,[102] Articles 2.1 and 4.2 of the Safeguards Agreement set forth the basic principles that govern a competent authority's causation analysis under the Agreement.[103]

144. Under Article 2.1 of the Agreement, a Member may only apply a safeguard remedy on an imported article if "such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."

145. Article 4.2(b) of the Agreement sets forth the general analytical parameters applicable to a competent authority's causation analysis in a safeguards proceeding. Article 4.2(b), first sentence, provides that a Member may not find that increased imports have caused or are threatening to cause serious injury to an industry unless its "investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof." Article 4.2(b), second sentence, cautions that, when "factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports."

146. Article 4.2(a) provides a more specific discussion of the causation analysis that is expected under Articles 2.1 and 4.2. Article 4.2(a) states that, when determining "whether increased imports have caused or are threatening to cause serious injury to a domestic industry," a competent authority shall evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry," including:

- the rate and amount of the increase in imports of the product concerned in absolute and relative terms;
- the share of the domestic market taken by increased imports; and
- changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.[104]

147. The Appellate Body has emphasized that Articles 4.2(a) and 4.2(b) "must be given a mutually consistent interpretation, particularly in light of the explicit textual connection between the[] two provisions."[105] As the Appellate Body has noted previously, a panel reviewing a

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[102] Panel Reports, para. 10.280-10.282.
[103] *See US - Wheat Gluten*, AB Report, para. 73.
[104] Safeguards Agreement, Article 4.2(a).
[105] *US – Wheat Gluten*, AB Report, para. 73.

competent authority's analysis must recognize that "both provisions lay down rules governing a single determination, made under Article 4.2(a)."

b. The Appellate Body's Description of the Causation Requirements of the Safeguards Agreement

148. The Appellate Body has described its understanding of the basic requirements for a competent authority's causation analysis under the Safeguards Agreement on a number of occasions.[106] In general, the Appellate Body has stated that Article 4.2(b) of the Safeguards Agreement contains "two distinct legal requirements" that must be satisfied for a safeguard action to comply with the Agreement.[107] First, as indicated in the first sentence of Article 4.2(b), the authority must demonstrate the "'existence of the causal link between increased imports of the product concerned and serious injury or threat thereof.'"[108] Second, as set forth in the second sentence of Article 4.2(b), the competent authority must ensure that the "injury caused by factors other than the increased imports [is] . . . not . . . attributed to increased imports."[109]

i. Existence of the Requisite Causal Link between Imports and Serious Injury

149. The Appellate Body has consistently stated that the "primary objective" of a competent authority when performing its causation analysis in a safeguards investigation is to "determine whether there is 'a genuine and substantial relationship of cause and effect' between increased imports and serious injury and threat thereof."[110] Accordingly, the Appellate Body has explained that the "central" consideration in a causation analysis is assessing whether there is a "'relationship between the movements in imports (volume and market share) and the movement in injury factors."[111] In this regard, the Appellate Body has stated, "the trends -- in both the injury factors and imports -- matter as much as their absolute levels."[112]

150. However, the Appellate Body has indicated that, even in the absence of a "coincidence between an increase in imports and a decline in the relevant injury factors," a competent authority is not precluded from finding that there is the requisite causal link between increased imports and serious injury;[113] instead, the competent authority may still find the causal link

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[106] *See US – Line Pipe*, AB Report, paras. 200-222; *US – Lamb Meat*, AB Report, paras. 162-188; *U.S. – Wheat Gluten*, AB Report, paras. 60-92; *Argentina – Footwear*, AB Report, paras. 140-47.
[107] *US – Line Pipe*, AB Report, para. 208.
[108] *US – Line Pipe*, AB Report, para. 208.
[109] *US – Line Pipe*, AB Report, para. 208.
[110] *US – Lamb Meat*, AB Report, para. 179.
[111] *Argentina – Footwear*, AB Report, para. 144.
[112] *Argentina – Footwear*, AB Report, para. 144.
[113] *Argentina – Footwear*, AB Report, para. 144.

needed to justify a safeguard action if the authority provides a "compelling analysis of why causation is still present."[114]

ii. The Obligation Not to Attribute to Imports the Effects of Other Injurious Factors

151. Under the second sentence of Article 4.2(b) of the Safeguards Agreement, any "injury caused by factors other than the increased imports must not be attributed to increased imports."[115] In its reports discussing this requirements, the Appellate Body has explained that the second sentence of Article 4.2(b) provides that:

> 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."[116]

152. For the purpose of this appeal, it is important to point out several critical aspects of the Appellate Body's prior discussions of Article 4.2(b), second sentence. First, the Appellate Body has emphasized that the "method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is *not* specified by the Agreement on Safeguards."[117] Accordingly, it is up to the competent authorities – and not a reviewing panel – to identify and develop analytical methodologies that will satisfy the requirements of the second sentence of Article 4.2(b).

153. Second, the Appellate Body has made clear that the non-attribution obligation in Article 4.2(b) is not applicable to a particular "other" factor if the factor did not cause injury to the industry during the period of investigation or did not cause injury to the industry *at the same time* as imports.[118] Accordingly, as a first step in its non-attribution analysis, "it is essential for the

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[114] *Argentina – Footwear*, AB Report, para. 144.
[115] *US – Line Pipe*, AB Report, para. 208.
[116] *US – Line Pipe,* AB Report, para. 211 (quoting *US – Lamb Meat*, AB Report, para. 179).
[117] *US – Lamb Meat*, AB Report, para. 181.
[118] *US – Wheat Gluten*, AB Report, para. 68; *US – Lamb Meat*, AB Report, para. 179; *see also US – Hot-Rolled Steel,* AB Report, para. 223 (quoted with approval in *US – Line Pipe*, AB Report, para.

competent authorities to examine whether factors other than imports are simultaneously causing injury" to the industry.[119] If a competent authority properly concludes that a factor is not a cause of injury to the industry or that the factor is not causing injury at the same time as imports, the only issue for review is whether that conclusion is "reasoned" within the meaning of Article 3.1. There is no need for a panel to inquire whether the competent authority appropriately "separated and distinguished" the effects of that factor from those of imports. As the Appellate Body recently stated in *EC - Cast Iron Fittings*, this principle extends to factors that an authority has stated are causing "minimal" or "not significant" amounts of injury to the industry.[120]

154. Third, the Appellate Body has also consistently stated that imports need not be the "sole cause of serious injury."[121] Instead, the Appellate Body has stated that the Agreement's requirement of a "genuine and substantial" causal link between imports and serious injury is satisfied if imports simply "*contribute to* 'bringing about,' 'producing' or 'inducing' the serious injury" being suffered by an industry.[122] In other words, "the causation requirement of Article 4.2(b) can be met where the serious injury [suffered by an industry] is caused by the *interplay of increased imports and other factors*."[123] Thus, it is permissible under the Agreement for the competent authorities to conclude that increased imports are causing serious injury to an industry, even if other factors are also causing injury, so long as imports themselves contribute substantially to bringing about serious injury.

155. Finally, Article 4.2(b), second sentence, of the Safeguards Agreement provides only that, "when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to imports." As noted by the Appellate Body, the competent authorities satisfy this requirement by identifying and explaining in a satisfactory way the "nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of imports.'"[124] However, the language of Article 4.2(b), second sentence, does *not* contain any language suggesting that the competent authorities should *weigh* the effects of "other" factors against those of imports in its analysis, either individually or collectively, nor has the Appellate Body interpreted the Article as requiring such an analysis.

156. Instead, the Appellate Body has stated:

> [T]o fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This

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212).

[119] *US – Wheat Gluten*, AB Report, para. 91.
[120] *See EC – Cast Iron Fittings*, AB Report, para. 178.
[121] *US – Line Pipe*, AB Report, paras. 209; *US – Wheat Gluten*, AB Report, para. 67.
[122] *US – Wheat Gluten*, AB Report, para. 67 (emphasis added).
[123] *US – Line Pipe*, AB Report, para. 209.
[124] *See US – Line Pipe*, AB Report, paras. 213 & 217.

explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms.[125]

iii. The Requirement to Provide A "Reasoned and Adequate" Explanation Under Article 4.2 of the Safeguards Agreement

157. The Appellate Body has stated that, under Article 4.2, a competent authority must provide "a reasoned and adequate explanation as to how the facts support their determination."[126] As indicated above, the Appellate Body has stated that this "reasoned and adequate" explanation "must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms."[127]

158. When describing the analysis expected of a competent authority under this standard, the Appellate Body has not suggested that the authority must exhaust all possible factual permutations relating to the issue, that its analysis must be of a particular length or style, or that the analysis meet the requirements applied to a doctoral dissertation. What the Appellate Body has required of a competent authority is more straightforward. It is an analysis that is "adequate,"[128] "appropriate,"[129] "meaningful,"[130] and "clear."[131]

159. In essence, if the competent authorities reach a conclusion based on a clear, adequate, and meaningful analysis, a reviewing panel must affirm that conclusion. A panel simply may not reject the analysis on the grounds that more explanation was possible or that additional facts could have been inserted into the discussion.

iv. The Panel's Responsibilities In its Review of the ITC's Determination under Article 4.2 of the Agreement

160. As the Appellate Body has consistently stated, under Article 4.2(b) of the Safeguards Agreement and Article 11 of the DSU, a panel may not conduct a *de novo* review of the evidence or substitute its analysis and judgment for that of the competent authorities.[132] Instead, the panel should examine whether the competent authorities "examined all the relevant facts" and "provided a reasoned explanation of how the facts supported the determinations that were made."[133] Accordingly, even though a panel is entitled to perform a critical review of the

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[125] *US – Line Pipe*, AB Report, para. 217.
[126] *US – Lamb Meat*, AB Report, para. 175.
[127] *US – Line Pipe*, AB Report, para. 217.
[128] *US – Line Pipe*, AB Report, para. 217.
[129] *US – Lamb Meat*, AB Report, para. 179.
[130] *US – Lamb Meat*, AB Report, para. 186.
[131] *US – Line Pipe*, AB Report, para. 217.
[132] *Argentina – Footwear*, AB Report, paras. 116-121.
[133] *Argentina – Footwear*, AB Report, para. 121; *see US – Lamb Meat*, AB Report, para. 97.

authority's analysis and factual findings,[134] the *panel must nonetheless focus its analysis on the findings of the authority as set forth in its report*. It may not simply examine the evidence on its own and provide its own assessment of whether increased imports caused serious injury.

161. Of course, a necessary corollary of this obligation is that a reviewing panel must accurately evaluate and understand the findings of the competent authority that are under examination. If the panel misunderstands, misstates or ignores critical aspects of a competent authority's analysis, it will not be able to properly evaluate an authority's findings under Article 4.2(b). As the Appellate Body has stated, DSU Article 11 requires "panels to take account of the evidence put before them and forbids them to willfully disregard or distort such evidence. Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record."[135]

162. Finally, a panel is itself under an obligation to adequately explain its findings concerning a competent authority's causation analysis. In this regard, Article 12.7 of the DSU requires that the panel include in its report its "findings of fact, the applicability of relevant provisions, *and the basic rationale behind any findings and recommendations it makes*."[136] The Appellate Body has stated that Article 12.7 therefore requires a panel to "set forth [in its report] explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations."[137] Accordingly, in their reports, panels must "identify the relevant facts and the applicable legal norms. [Moreover,] in applying those legal norms to the relevant facts, the reasoning of the panel must reveal how and why the law applies to the facts.[138]

2. The ITC's Analytical Methodology

163. Consistent with the Safeguards Agreement, the U.S. safeguards statute requires that the ITC determine "whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."[139]

164. In a safeguards proceeding, the ITC generally conducts a two-step causation analysis.[140] As the first step in this analysis, the ITC examines trends in the volume and pricing movements of imports and trends in the financial and trade indicia of the industry. By doing so, the ITC

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[134] *US – Lamb Meat,* AB Report, para. 106.

[135] *EC – Bedlinen*, AB Report, Article 21.5 Proceeding, para. 161 (citing *US – Corrosion-Resistant Steel*, AB Report, para. 142.)

[136] DSU, Article 12.7.

[137] *Mexico – HFCS*, AB Report, Recourse to Article 21.5, para. 106.

[138] *Mexico – HFCS*, AB Report, Recourse to Article 21.5, para. 108.

[139] 19 U.S.C. §2252(b)(1)(A).

[140] We note that, while this two-step analysis is generally applied by members of the ITC, it is not necessarily the only methodology that could be applied consistent with the statute.

assesses whether there is an "important" correlation between import trends and declines in the overall condition of the industry, which is consistent with the guidelines articulated by the Appellate Body. As can be seen from the face of its determination, the ITC described this entire process in its steel determination and conducted such an analysis for each of the steel products for which the President imposed a remedy.[141]

165. In the second step in this analysis, the ITC assesses the injury attributable to other factors and distinguishes the effects of those factors from those of imports.[142] More specifically:

- The ITC identifies other factors that may be contributing to declines in the industry's condition. It identifies these factors based upon arguments of the parties and its own review of the record.[143]

- The ITC then examines the manner in which these other factors have (or have not) caused declines in the individual injury indicia of the industry. When doing so, it takes into account the particular record evidence that shows how each factor affected the industry. In its report, the ITC describes the possible and actual injurious effects of the factors addressed and explicitly evaluates the extent to which these injurious effects were caused by the factor as distinguished from imports.

- After assessing the injurious effects of non-import factors, the ITC compares the effects of imports to those of the other factors and assesses whether imports had a more significant impact on the injury indicia in question.[144]

166. It is only after performing these steps that the ITC can finally conclude whether increased imports contributed in a genuine and substantial way to serious injury.[145] As the Panel noted in its report, "there is nothing in the substantial cause test applied by the USITC, in itself, that would necessarily mean that the obligation to 'separate and distinguish' the effects of other causes on the state of the industry cannot be fulfilled and was not fulfilled in the case of the safeguard measures that are the subject of our review in this case. Nor do we consider that it

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[141] *See, e.g.,* ITC Report, pp. 29-35 (description of general analysis); 56-63 (certain carbon flat-rolled steel analysis); 95-99 (hot-rolled bar), 104-107 (cold-finished bar), 111-115 (rebar), 158-166 (welded pipe), 174-178 (fittings, flanges, and tool joints), & 208-213 (stainless steel bar).

[142] *See, e.g.,* ITC Report, pp. 29-35 (description of general analysis); 63-65 (certain carbon flat-rolled steel analysis); 97-99 (hot-rolled bar), 107 (cold-finished bar), 114-115 (rebar), 165-166 (welded pipe), 177-178 (fittings, flanges, and tool joints), & 212-213 (stainless steel bar).

[143] The fact that the ITC addresses a particular factor does not reflect an initial conclusion as to whether that factor is causing injury.

[144] *See, e.g.,* ITC Report, pp. 63-65.

[145] *See, e.g.,* ITC Report, pp. 63-65.

would necessarily preclude the consideration and evaluation of the nature and extent of the effects of those factors as required by the Agreement on Safeguards."[146]

3. Despite The Panel's Conclusions to the Contrary, the ITC's Causation Analyses for the Products Covered by Steel Safeguard Measures Were Fully Consistent With Articles 2.1, 3.1, and 4.2(b) of the Safeguards Agreement

167. In its report, the Panel concluded that for two products, CCFRS and cold-finished bar, the ITC failed to establish that there was evidence of a "causal link" between imports of the product and the serious injury or threat thereof suffered by the industry.[147] For seven of the ten products covered by the steel measures – CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar – the Panel also concluded that the ITC failed to separate and distinguish, in a reasoned and adequate manner, the injurious effects of "other" factors from the effects of increased imports in its causation analysis.[148]

168. The Panel erred in concluding that the ITC's causation analyses for these products were not consistent with the requirements of Articles 2.1, 3.1, and 4.2(b) of the Safeguards Agreement. Most importantly, the Panel erred in finding that the ITC did not provide a reasoned and adequate assessment of its causation findings for these nine products. In its report, the Panel consistently read into the ITC's analysis findings the ITC did not make, misstated or ignored critical findings of the ITC that formed the basis for its causation analysis, and even substituted its own views of the record for that of the ITC. The Panel also incorrectly stated that Article 4.2(b) requires a collective, as well as individual, assessment of the effects of non-import factors. The Panel's conclusions are flawed under the Agreement and should be reversed.

a. The Panel Incorrectly Concluded that Article 4.2(b) Requires the Competent Authorities to Perform a "Collective" Assessment of the Injurious Effects of "Other" Factors

169. In its report, the Panel asserted that Article 4.2(b) requires a competent authority to perform an "*overall*," in addition to an individualized, assessment of the injury caused by "other" factors to the industry as part of its causation analysis.[149] The Panel stated that Article 4.2(b) of the Agreement "is not concerned with the relative importance of *individual* factors as between themselves or as compared with increased imports" but "with the injurious effects of increased imports on the situation of the domestic industry as distinct from the injurious effects of *all*

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[146] Panel Reports, para. 10.334.

[147] Panel Reports, paras. 10.360-381 & 10.447-10.458.

[148] Panel Reports, paras. 10.382–10.411, 10.431-10.445, 10.459-10.466, 10.478-10.484, 10.491-10.500, 10.523-10-529, 10.523-10.529, 10.555-10.565.

[149] *See* Panel Reports, paras. 10.332, 10.346,10.409, & 10.567.

'other factors.'"[150] It added that a competent authority must analyze and assess "the cumulative effects of individual factors" if it finds that "individually, each of [these other factors] are acknowledged to have caused some injury to the relevant domestic industry."[151]

170. The Panel's interpretation is clearly inconsistent with the requirements of Article 4.2(b). Indeed, the Appellate Body has explicitly rejected such an approach in the context of the non-attribution provisions of the Antidumping Agreement. In *EC – Cast Iron Fittings,*[152] the Appellate Body stated that "an investigating authority is *not* required to examine the collective impact of other causal factors, provided that, under the specific factual circumstances of the case, it fulfills its obligation not to attribute to dumped imports the injuries caused by other causal factors."[153] Given that the Appellate Body has asserted that its conclusions concerning an authority's causation analysis under the *Antidumping Agreement* provide general guidance to it in the safeguards area,[154] it is clear that the competent authorities need not perform a "collective," "cumulative" or "overall" assessment of the injurious effects of other factors under Article 4.2(b), as long as they adequately assess the nature and extent of the injury caused by these other factors on an individual basis in their analysis.[155]

171. Moreover, the Panel's interpretation is inconsistent with the Appellate Body's prior reports in the Safeguards area, all of which indicate the competent authorities are expected to perform their assessment of the nature and extent of the effects of "other" factors on an *individual*, rather than collective, basis. For example, in *US – Wheat Gluten*, the Appellate Body emphasized that "what is important in this process is separating and distinguishing the effects caused by the *different* factors in bringing about the 'injury'" being suffered by the industry.[156] Similarly, in *US – Lamb Meat*, the Appellate Body explained that:

> 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.[157]

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[150] Panel Reports, para.10.328.
[151] Panel Reports, paras. 10.409 and 10.567.
[152] *EC – Cast Iron Fittings*, AB Report, para. 190.
[153] *EC – Cast Iron Fittings*, AB Report, para. 192.
[154] *US – Line Pipe*, AB Report, para. 214.
[155] The United States recognizes that, in *EC – Cast Iron Fittings*, the Appellate Body stated that there may be "specific factual circumstances" in a particular case that warrant a collective analysis. *EC – Cast Iron Fittings*, AB Report, para.191-192. However, the Panel's findings on this issue for CCFRS and stainless steel bar did not indicate in any way that there were special factual circumstances warranting a "collective" analysis of "other" factors in the steel investigation. *See* Panel Reports, paras. 10.409 & 10.568.
[156] *US – Wheat Gluten*, AB Report, para. 231.
[157] *US – Lamb Meat*, AB Report, paras. 179-180.

The Appellate Body's emphasis in its reports on the need to "separate" or "disentangle" the effects of "different" causal factors from those of imports strongly suggests that the Appellate Body expects the competent authorities to perform their analysis of the effects of "other" factors on an individual, rather than "collective," basis.[158]

172. Further, a collective analysis of the effects of "other" factors would be an unnecessary and redundant step if the competent authority has properly separated and distinguished the effects of other factors from those of imports on an *individual* basis. As the Appellate Body has stated, the competent authorities should separate and distinguish the effects of "other" factors from those of imports by describing the nature and extent of the injury caused by these "other" factors. If the authority has accurately identified the extent and nature of the injury caused by a particular factor, it has, by definition, separated and distinguished the effects of that factor from those of imports and has therefore ensured that it is not attributing those effects to imports, as required by Article 4.2(b).[159] Quite simply, performing a collective analysis of the effects of the "other" factors will not permit an authority to disentangle the effects of "other" factors any more accurately or completely than an individual analysis.

173. Finally, the Panel's application of this standard strongly suggests that the Panel believes that a competent authority should assess whether the effects of all "other" factors found to be causing injury to the industry "outweigh" the effects of imports as a final step in its analysis. This approach is clearly mistaken. Article 4.2(b), second sentence, only specifies that, when "factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports."[160] As is clear from this language, the second sentence of Article 4.2(b) is intended to ensure that the competent authorities do not attribute to imports injury caused by other factors. However, this sentence simply does not contain any language indicating that the competent authorities must weigh the effects of imports against those of "other" injurious factors, either individually or collectively, before ultimately concluding whether imports genuinely and substantially contribute to serious injury. As long as imports genuinely and substantially contribute to serious injury and as long as the competent authority does not attribute the effects of other factors causing injury to imports, the requirements of the Safeguards Agreement are satisfied.

174. In sum, the Panel's finding that Article 4.2(b) requires an "overall" or cumulative assessment of the injurious effects of "other" factors, in addition to an individual assessment, is

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[158] In the context of the AD Agreement, the Appellate Body has also stated that, even though "the different causal factors [including imports] operating on a domestic industry may interact, and their effects may well be inter-related, such that they produce a *combined* effect on the domestic industry," the investigating authority must still perform an analysis to "separate and distinguish the injurious effects of different causal factors," even though it may not be "easy, as a practical matter" to do so. *US – Hot-Rolled Steel*, AB Report, para. 223; *see also EC – Cast Iron Fittings*, AB Report, para. 188.

[159] *US – Wheat Gluten*, AB Report, para. 68-69.

[160] Safeguards Agreement, Article 4.2(b).

unfounded. It is inconsistent with the language of the Safeguards Agreement and with the Appellate Body's reports in this area. The Panel erred in making this finding and its interpretation should be reversed.[161]

b. The Panel Erred By Frequently Misreading or Misunderstanding the ITC's Findings and By Failing to Evaluate the ITC's Analysis in Entirety

175. In the remainder of this section, the United States will describe the legal errors that render the Panel's causation findings for specific steel products flawed. As an initial matter, however, it is worth noting that the Panel's errors of analysis can, to a great extent, be classified as falling into one of three categories of error.

176. First, the Panel consistently reads into the ITC's analysis findings the ITC did not make. To take perhaps the most obvious example of this error, the Panel often concludes that the ITC acknowledges a particular factor to be a source of injury to the industry, even when the ITC clearly did not consider the factor to be a source of injury to the industry. For example, in its discussion of the effects of legacy costs on the CCFRS industry, the Panel concluded that the ITC "effectively" acknowledged that these costs were a source of injury to the industry.[162] However, the ITC did not make such a finding. Instead, the ITC rejected the argument that these costs had increased during the period of investigation and that they had not been a source of injury to the industry during the period of investigation.[163] In other words, the Panel has read into the ITC's analysis a finding that is not there. The Panel makes similar mistaken findings throughout its causation discussion. In essence, by relying on conclusions that are not reflected in the ITC's analysis, the Panel prevented itself from properly evaluating whether the ITC's findings and reasoned conclusions supported its determinations.

177. Second, the Panel's analysis is frequently premised on incorrect or incomplete understandings of the ITC's analysis. For example, when assessing the ITC's pricing analysis for CCFRS was consistent with Article 4.2(b), the Panel interprets the ITC's underselling finding to mean that imports undersold the domestic merchandise in every single quarter of the period of investigation.[164] However, the Panel misinterpreted the ITC's actual underselling finding. In its underselling analysis, the ITC's finding was to the effect that imports generally undersold domestic merchandise throughout the period of investigation, rather than in every single

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[161] In its analysis, the Panel made specific findings that the ITC failed to perform a "collective" analysis only for CCFRS and stainless steel bar. Panel Reports, paras. 10.409 & 10.567. Accordingly, the United States requests that these findings be reversed, as well as the Panel's general discussions of the issue at paras. 10.332 and 10.346 of the report. It is not clear whether the Panel's interpretation also applied to other products. To the extent it did, the Appellate Body should reverse those findings as well.

[162] Panel Reports, para. 10.405.

[163] ITC Report, p. 64.

[164] Panel Reports, para. 10.379.

quarter.[165] Similar misunderstandings occur frequently in the Panel's analysis. By premising its analysis on mistaken interpretations of the ITC's findings, the Panel prevented itself from properly evaluating whether the ITC's findings and reasoned conclusions supported its determinations.

178. Finally, the Panel frequently errs by failing to take into account *all* of the findings made by the ITC on a particular issue. For example, in its discussion of the ITC's CCFRS causation analysis, the Panel found the ITC's assessment of the injurious effect of the industry's capacity increases to be "simplistic" because it was – in the Panel's view – based solely on a finding by the ITC that, "'if increased capacity were, in fact, the source of injury to the industry, [the ITC] would have expected to see the domestic industry lead prices downward, and wrest market share from imports.'"[166] The ITC's analysis was significantly more detailed and complex than the Panel acknowledged in its report. The ITC examined and discussed at some length the impact of capacity increases on the industry's capacity utilization declines during the period as well as the impact these increases had on pricing trends in the market.[167] Clearly, the Panel's analysis was flawed because it did not take into account all of the ITC's findings on the matter. Similar mistakes crop up throughout the Panel's analysis. By failing to evaluate the entirety of the ITC's analysis on a number of issues, the Panel prevented itself from properly assessing whether the ITC provided findings and reasoned conclusions regarding these issues.

179. We discuss these errors in more detail below, beginning with the Panel's analysis of the ITC's causation findings for CCFRS.

c. The ITC Provided Findings and Reasoned Conclusions Establishing that Increased Imports of CCFRS Caused Serious Injury to the Domestic CCFRS Industry

180. The Panel erred in finding that the ITC's causation analysis for CCFRS was not consistent with the requirements of Articles 2.1, 3.1 and 4.2 of the Safeguards Agreement.[168] In its analysis, the Panel first erred in finding that the ITC did not establish, in a reasoned and adequate manner, that there was a "causal link" between imports of CCFRS and declines in the condition of the industry during the period.[169] The Panel also erred in finding that ITC did not adequately distinguish the effects of other factors in the CCFRS market – including demand declines, capacity increases, intra-industry competition, and legacy cost changes – from the effects of imports in its analysis.[170]

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[165] ITC report, pp. 61-62.
[166] Panel Reports, para. 10.394.
[167] ITC Report, p. 63-64.
[168] Panel Reports, paras. 10.363-381.
[169] Panel Reports, paras. 10.363-381.
[170] Panel Reports, paras. 10.382-10.410.

181. As we describe below, in its report, the Panel's findings with respect to the ITC's analysis do not establish that the ITC failed to consider relevant facts or to provide findings and reasoned conclusions as to how the facts supported its determination. On the contrary, as we describe below, the ITC provided the findings and reasoned conclusions required under Article 3.1 with regard to its causation findings for CCFRS in its report. The Panel's findings to the contrary should be reversed by the Appellate Body.

i. The Panel Erred In Finding That the ITC Did Not Establish through a Reasoned and Adequate Explanation, a Causal Link Between CCFRS Imports and Serious Injury

182. The Panel rejected the ITC's finding that there was a causal link between increased imports of CCFRS and the domestic industry on two general grounds. First, the Panel asserted that the ITC failed to establish that there was a "coincidence" between import trends and declines in the industry's condition during the period of investigation.[171] Second, the Panel asserted, the ITC failed to establish that the conditions of competition between CCFRS imports and the domestic industry indicated that there was a link between imports and the injury being suffered by the industry.[172] The Panel's conclusions lack any foundation in the ITC's reasoning and the record of the proceeding, and should be reversed by the Appellate Body.

A. The Panel Erred in Finding That There Was Not a Coincidence of Trends Between CCFRS Imports and Industry Declines

183. In its report, the Panel concluded that the ITC did not establish that there was a "coincidence in trends" between import increases and declines in the industry's condition during the period. To perform its analysis of this issue, the Panel prepared a series of six charts, which compared annual trends in the absolute volume of imports with six separate indicia of the industry's condition, including the industry's annual production levels, net commercial sales quantities, employment levels, operating margin levels, productivity levels, and capacity utilization levels.[173] After reviewing these charts, the Panel concluded that "coincidence did not exist between import trends for CCFRS and the serious injury being suffered by the domestic industry."[174]

184. The Panel's analysis of this issue is flawed because it fails to address, in any significant manner, the ITC's reasoned conclusions as to why it found a correlation between import trends

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[171] Panel Reports, paras. 10.363-375.
[172] Panel Reports, paras. 10.376-381.
[173] Panel Reports, paras. 10.376-10.381.
[174] Panel Reports, para. 10.375.

and industry declines during the period of investigation.[175] As can be seen from its determination, the ITC provided a lengthy analysis of the record evidence, that established that:

- In 1996 and 1997, the domestic industry earned reasonable operating profits and made substantial capital investments in a growing domestic market.

- In 1998, there was a "dramatic increase" in the volume and market share of imports in 1998.[176] Import volumes increased by more than 30 percent in that one year alone, far outstripping the 3.2 percent growth in demand in the CCFRS market. These imports entered the market at significantly lower prices than domestic merchandise and consistently undersold that merchandise.[177]

- This surge in low-price imports in 1998 coincided with "sharp declines in the industry's performance and condition" in that year.[178] In 1998, despite an increase in net commercial sales and a modest decrease in costs, the industry's operating income margin declined to 4.0 percent, a drop of 2.1 percentage points from its 1997 level.[179]

- Import volumes lessened in 1999 and 2000 but remained above their 1996 and 1997 levels.[180] Even with this decline in import volume and market share, imports continued to undersell the domestic merchandise and depress and suppress domestic prices in 1999 and 2000.[181]

- Coincident with aggressive import underselling in 1999 and 2000, the industry's operating income margins declined to a loss of 0.7 percent in 1999 and then to an even larger loss of 1.4 percent in 2000. The industry's operating loss became 11.5 percent in interim 2001. These losses correlated with continued depression and suppression of domestic prices in these years.[182]

185. In sum, as the ITC correctly found, the record evidence established that the industry was first seriously affected by a large surge of CCFRS imports in 1998. In 1998, the record showed, the industry lost significant amounts of market share and saw its price levels decline. Thereafter, as the ITC also correctly found, the industry chose to regain market share by competing with low-

[175] ITC Report, pp. 51, 56-61.
[176] ITC Report, p. 59.
[177] ITC Report, p. 60.
[178] ITC Report, p. 59.
[179] ITC Report, p. 60.
[180] ITC Report, p. 60.
[181] ITC Report, pp. 60-61.
[182] ITC Report, pp. 60-61.

priced imports on the basis of price.[183] The record evidence showed that the industry's strategy improved the industry's market share levels but led to substantial declines in the industry's pricing and profitability levels.[184]

186. In essence, as the ITC correctly concluded, the record showed a substantial and clear correlation between import pricing and volume trends during the years between 1998 and 2000.[185] The ITC considered all the relevant facts and provided more than adequate findings and reasoned conclusions as to how the facts supported the determinations that were made. Moreover, its findings on this issue were clear, unambiguous, and fully consistent with the record data.

187. Despite the length and detail of the ITC's findings, the Panel chose not to examine any of them when assessing whether there was a "coincidence in trends" between increased imports and the industry's declines.[186] Rather than examining the specifics of the ITC's findings on this matter, the Panel simply prepared its own data set (i.e., the series of six charts showing the relationship between the absolute quantities of imports and the industry's production, sales, operating margin, employment, capacity utilization, and productivity levels)[187] and proceeded to use this data set to assess whether, in its opinion, a "coincidence of trends" existed.[188] Then, after reviewing data sets it prepared, the Panel came to its own conclusion on the issue, asserting that these six charts showed that no "coincidence of trends" existed between imports and domestic declines during the period of investigation.[189]

188. The flaw in the Panel's approach is plain. As the Panel itself acknowledged,[190] "panels are not entitled to conduct a *de novo* review of the evidence, [or] substitute their own conclusions for those of the competent authorities" under Article 4.2 of the Safeguards Agreement.[191] On the contrary, the Appellate Body has stated that Article 4.2(b) requires a reviewing panel to perform its assessment of the authorities' causation analysis by examining whether the "[*competent*] *authorities* considered all the relevant facts and . . . adequately explained how the facts

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[183] ITC Report, p. 61.
[184] ITC Report, p. 61.
[185] ITC Report, pp. 57-61.
[186] Panel Reports, paras. 10.363-10.375.
[187] In this respect, we note that the Panel specifically discussed in its "coincidence of trends" analysis only one aspect of the ITC's correlations findings for CCFRS: the ITC's discussion of inventory trends during the period. Panel Reports, para. 10.373. However, the Panel's discussion of a minor aspect of the ITC's causation analysis for CCFRS does not satisfy its obligation to evaluate the ITC's entire "correlations" analysis in its report.
[188] Panel Reports, paras. 10.363-10.375.
[189] Panel Reports, para. 10.375.
[190] Panel Reports, para. 10.22.
[191] *US – Lamb Meat*, AB Report, para. 106.

supported the determinations that were made."[192] In other words, the Panel was supposed to focus on the ITC's analysis of the record data in its report; it was not supposed to prepare its own data on this issue and issue its own conclusion as to whether there was a "coincidence of trends" between increased imports and declines in the industry's condition.

189. The Panel did not comply with this obligation. In its analysis, the Panel did not address any of the major factual findings or analytical statements that the ITC made when explaining that there was a "correlation" between import and industry trends during the period. Indeed, the Panel's "coincidence" analysis did not address the most important part of the ITC's correlation findings, that is, the ITC's finding that increased CCFRS imports were the primary cause of the industry's price and profitability declines in 1998, 1999, and 2000. Instead, the Panel chose to focus only on six injury factors and, moreover, did so using information and charts that it prepared. By doing so, and by failing at the same time to evaluate the most important aspect of the ITC's "coincidence" findings, the Panel was simply unable to assess whether the ITC's findings and reasoned conclusions established whether there was a correlation between import trends and industry declines.

190. Given the foregoing, the Panel failed to establish whether the *ITC* considered all the relevant facts and whether the *ITC* made findings and reasoned conclusions as to how the facts supported the determinations made. Instead, the Panel improperly performed a *de novo* review of the record evidence and substituted its own conclusions on "coincidence" for those of the ITC. The Panel's analysis is clearly flawed in this regard and should be reversed by the Appellate Body.

191. The Panel's "coincidence" analysis is also flawed because it is premised on a faulty understanding of the requirements of Article 4.2(a). Under Article 4.2(a), the competent authorities must consider in their "causal link" analysis "*all* relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry," including the "rate and amount of the increase in imports of the product concerned in absolute and relative terms," the "share of the domestic market taken by increased imports," and changes in the industry's "sales, production, productivity, capacity utilization, profits and losses, and employment" levels.[193]

192. The Panel's "coincidence" analysis for CCFRS is clearly not in accordance with this requirement. As noted above, the Panel considered in its analysis only six indicators of the industry's condition[194] and their relationship to changes in the absolute volume of imports.[195] It is true, as the Panel noted, that these six factors are explicitly listed in Article 4.2(a) as injury

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[192] *Argentina – Footwear*, AB Report, para. 121; *see US – Lamb Meat*, AB Report, para. 97.

[193] Safeguards Agreement, Article 4.2(a).

[194] As previously noted, the six factors in question were the industry's production, sales, operating margins, employment, productivity, and capacity utilization levels. Panel Reports, paras. 10.363-370.

[195] Panel Reports, paras. 10.363-10.370.

factors that should be included in a causation analysis.[196] However, it is also true that several other factors clearly had a bearing on the situation of the CCFRS industry during the period of investigation, including the changes in the market share level of imports[197] and of the industry, changes in the industry's costs, import and domestic pricing levels in the market, and the nature of demand changes in the market.[198] Unlike the ITC,[199] the Panel failed to evaluate any of these factors in its "coincidence" analysis.[200] Perhaps the most significant omission in this regard is the Panel's failure to evaluate in this analysis whether declines in the industry's condition were correlated with import pricing trends over the period of investigation, which formed an important aspect of the ITC's own correlations analysis. The Panel's failure to include import pricing trends in its analysis is particularly significant, given that the Panel itself acknowledged that "relative price trends between imports and domestic merchandise will often be a good indicator of whether injury is being transmitted to the domestic industry."[201] By failing to include these factors in its "coincidence" analysis, the Panel was precluded from properly assessing whether the ITC's findings were consistent with the requirements of Article 4.2(a).

193. In this regard, moreover, the Panel's failure to include these factors in its analysis prevented it from assessing properly whether imports impacted the *overall* situation of the industry, as is required under Article 4.2(a). As the Appellate Body has stated, when evaluating the relevance of a particular factor to the situation of the industry under Article 4.2(a), the competent authorities must "assess the 'bearing', or the 'influence' or 'effect' that factor has *on the overall situation of the domestic industry*," and should perform this analysis "against the background of all the other relevant factors."[202] By examining only the six factors described above in its "coincidence" analysis *without* considering whether and how these factors were affected by, or had an effect on, such other relevant factors as domestic pricing, market share changes, cost levels or demand increases, the Panel's analysis failed to properly evaluate the effect that these factors had on the *overall* situation of the industry. As we have previously discussed, the ITC did not make a similar mistake in its own correlations analysis.[203]

194. To take one example of the impact that this mistake had on the Panel's analysis, the Panel concluded in its "coincidence" analysis that there was not a correlation between import trends and declines in the industry's operating margins.[204] The Panel based this conclusion on the fact

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[196] Panel Reports, para. 10.365.

[197] Indeed, import market share is listed explicitly as a factor that should be considered to have a bearing on the situation of the industry by Article 4.2(a). Despite this, the Panel did not include this factor in its "coincidence" analysis.

[198] Panel Reports, paras. 10.363-10.375.

[199] ITC Report, pp. 59-62.

[200] Panel Reports, paras. 10.363-10.375.

[201] Panel Reports, para. 10.320

[202] *US – Wheat Gluten*, AB Report, para. 71.

[203] ITC Report, pp. 59-62.

[204] Panel Reports, para. 10.370.

that the industry's operating margins decreased in both 1999 and 2000 when imports were not increasing. The Panel's analysis is flawed, however, because it failed to take account of the fact that operating income margins can drop as a result of lost sales volume *or* declines in price. By focusing only on correlations between import volumes and the industry's operating margins trends, the Panel ignored the fact that the industry's operating margin declines in 1999 and 2000 were primarily the result of significant *price competition* from imports during these years rather than being the result of significant lost sales volumes.[205] By ignoring the impact that import pricing had on the industry's operating results, the Panel was prevented from properly assessing whether there was, in fact, a correlation between import trends during these years and declines in the industry's operating income levels.[206]

195. In sum, the Panel's analysis fails to support its finding that the ITC erred in concluding there was a "coincidence of trends" between import trends and industry declines during the period of investigation. In particular, unlike the ITC's own analysis, the Panel's "coincidence" analysis failed to assess whether there was a correlation between import volume and pricing trends and declines in all of the factors bearing on the industry's condition. Moreover, unlike the ITC, the Panel's analysis failed to place its consideration of these factors within the proper analytical context. The Panel's findings should be reversed and the ITC's findings affirmed.

B. The ITC Pricing Analysis for CCFRS Was Reasoned and Adequate

196. The Panel also concluded that the ITC failed to show that the "conditions of competition" in the CCFRS market established a causal link between imports and declines in the industry's condition.[207] In particular, the Panel found that the ITC failed to establish that imports of CCFRS consistently undersold domestic merchandise between 1998 and 2000, thereby causing serious declines in the industry's pricing and profitability levels during these years.[208]

197. The Panel rejected the ITC's underselling analysis on three separate grounds. First, the Panel found that the ITC's finding of import underselling was not supported by the record evidence.[209] Second, the Panel claimed that the ITC failed to explain why it had relied on average unit data for five "constituent" items within the CCFRS like product to assess pricing trends in price analysis.[210] Third, the Panel asserted that the ITC's choice of like product in the

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[205] *See, e.g.,* ITC Report , p. 61-62.
[206] Panel Reports, para. 10.370.
[207] Panel Reports, paras. 10.376-10.381.
[208] Panel Reports, paras. 10.376-10.381.
[209] Panel Reports, para. 10.379.
[210] Panel Reports, para. 10.377. The United States notes that it is using the term "constituent" item to refer to the five types of steel that make up the CCFRS like product (i.e., slab, plate, hot-rolled,, cold-rolled, and coated carbon flat steel) because that is the term used by the Panel in its analysis of this issue. The United States notes that the ITC did not use this term to refer to the types of CCFRS in its

investigation prevented it from performing its pricing analysis correctly.[211] As we describe below, these findings lack any basis in the record of the proceeding and do not, therefore, cast doubt on the reasonableness or adequacy of the ITC's underselling findings.

1. The ITC's Underselling Findings Were Fully Consistent With The Record Evidence

198. As indicated above, the Panel rejected the ITC's underselling finding on the grounds it was not consistent with the record price comparison data.[212] After reviewing the underselling evidence, the Panel concluded that "it was not necessarily the case that imports were found to be underselling the domestic product on all products during all periods of the investigation."[213] The Panel also questioned the ITC's findings because the ITC was – in the Panel's view – "conveniently selective" in discussing only price comparison data for hot-rolled and cold-rolled items in its underselling analysis.[214] The Panel's findings are based on a mistaken understanding of the ITC's findings and the price comparison data.

199. First, the ITC simply did not find that imports had undersold the domestic merchandise on *all* of the price comparison items and in *every* quarter of the period of the investigation, as the Panel seems to believe. Instead, the ITC's underselling finding was more general. In particular, the ITC expressly stated that "a review of the price comparison data supports the claims of the domestic producers that imports were priced below domestically produced steel and that imports led to price declines."[215] Nothing in this sentence indicates that the ITC specifically found that imports were underselling domestic merchandise on all of the price comparison items in every quarter of the period of investigation. On the contrary, the ITC was simply asserting that the record data showed that imports were generally underselling the domestic merchandise during the period of investigation.[216] By failing to correctly understand the specific meaning of the ITC's finding, the Panel was thereby precluded from properly assessing whether the record evidence supported that finding.

200. And, in fact, the publicly available pricing data clearly does support the ITC's finding. That data showed that imports undersold domestic merchandise by substantial margins for the

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analysis, however.

[211] Panel Reports, para. 10.378.

[212] Panel Reports, para. 10.379.

[213] Panel Reports, para. 10.379.

[214] Panel Reports, para. 10.379.

[215] ITC Report, p. 61.

[216] In this regard, we note that the panel in *US – Wheat Gluten* specifically found that, when a pricing analysis is performed in a safeguards proceeding, that analysis "need not necessarily demonstrate consistent underselling by the imported product in the domestic market of the importing Member in order to make a finding of serious injury." *US – Wheat Gluten*, Panel Report, para. 8.110.

large majority of price comparisons from the beginning of 1998 to the end of 2000.[217] In particular, the price comparison data showed that:

- Imported slab undersold domestic slab in 10 of 11 quarters, at margins ranging from 1.2 to 17.3 percent.
- Imported plate undersold domestic plate in 11 of 12 quarters, at margins ranging from 0.9 to 22.2 percent.
- Imported hot-rolled steel undersold domestic hot-rolled steel in 21 of 26 quarters, at margins ranging from 2.7 to 19.6 percent.
- Imported cold-rolled steel undersold domestic cold-rolled steel in 21 of 27 quarters, at margins ranging from 5.0 to 23.3 percent.
- Imported coated steel undersold domestic coated steel in 4 of 11 quarters, at margins ranging from 1.5 percent to 11.2 percent.[218]

In other words, imports undersold the comparable domestic merchandise in *77 percent* of the publicly available price comparisons from the beginning of 1998 through the end of 2000,[219] which is the period when the ITC found that imports had driven down domestic pricing.[220]

201. Given the foregoing, it is absolutely clear that the ITC correctly found that there was a general and clear pattern of underselling by imports through domestic merchandise throughout the period. Accordingly, the Panel's finding that underselling did not occur on "all products" in "all periods" does not cast any doubt on the of the ITC's underselling conclusions, or indicate that the ITC failed to provide the findings and reasoned conclusions required under Article 3.1.

202. Secondly, the Panel also mistakenly concluded that the ITC had been "conveniently selective" by specifically discussing in its underselling analysis the price comparison data for only the hot-rolled and two cold-rolled comparison products.[221] According to the Panel, the ITC should have explained why it did not evaluate pricing data for the other three CCFRS products

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[217] ITC Report, Tables FLAT-66-71, 73-74.

[218] ITC Report, Tables FLAT-66-71, 73-74.

[219] The United States has focused in this discussion on the period between 1998 and 2000 because that was the period in which the ITC found that imports had seriously injured the industry. However, the United States notes that the publicly available underselling data for the entire period of investigation shows consistent underselling as well, with imports underselling the domestic merchandise in 137 out of 177 possible comparisons, or 78 percent of the time. ITC Report, Tables FLAT-66-71, 73-74.

[220] ITC report, pp. 60-62.

[221] Panel Reports, para. 10.379.

or, in the alternative, explain why it felt hot-rolled and cold-rolled merchandise were representative of CCFRS.

203. Again, the Panel appears to misunderstand the nature of the ITC's analysis and discussion of the issue. In its underselling analysis, the ITC did not ignore the record pricing data for slab, plate and coated steel products, as the Panel seems to believe. Instead, the ITC's Report of Investigation contained quarterly pricing data for all five of the "constituent" items in the CCFRS like product.[222] As we discussed above, that pricing data – which covered slabs, plate, and coated steel products in addition to hot- and cold-rolled steel – showed that imports of CCFRS undersold the domestic merchandise in more than three-quarters of all possible price comparisons during the period of the period of investigation. It also showed that import and domestic prices generally declined between the beginning of 1998 and the end of 2000, with prices declining significantly in 1998 and 1999, and then generally recovering somewhat in 2000 but remaining at suppressed levels in 2000.[223]

204. Accordingly, it is clear that the ITC correctly and reasonably concluded, as it stated in its report, that "[a] review of the product specific data supports the claims of domestic producers that imports were priced significant below domestically produced steel, and that imports led to the decline in prices" between 1998 and 2000.[224] The fact that the ITC did not specifically discuss the price comparison data for three of the five "constituent" items (i.e., for slab, plate, and coated steel) does not mean that it failed to evaluate that data, or that the data was not consistent with, and provide support for, its finding of underselling by imports throughout the period.

205. Indeed, the Panel's analysis is based on a misunderstanding of the ITC's discussion of the pricing data for the hot-rolled and cold-rolled comparison products. In its analysis, the ITC specifically stated that it was discussing the hot- and cold-rolled price comparison data in its determination as an "*example*" of the manner in which imports underselling affected domestic prices during the period of investigation.[225] As the ITC noted, the price comparison data for the hot-rolled and cold-rolled products very clearly illustrated the ITC's statements that consistent import price underselling led to significant domestic price declines and lost domestic sales between 1998 and 2000. However, the ITC could just as easily have chosen to discuss pricing data for slab and plate products as well to support its finding. The price comparison data for those products also showed there was consistent underselling by imports during this period and that prices declined in response to that underselling. In essence, the ITC was not being "conveniently selective" when it discussed this data; it was simply using these products as

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[222] ITC Report, Tables FLAT-66-71 and 73-74.

[223] ITC Report, Tables FLAT-66-71, and 73-74.

[224] ITC Report, p. 61.

[225] ITC Report, p. 61 ("A review of product specific data supports the claims of the domestic producers that imports were priced below domestic produced steel and that imports led to the decline in prices. For example, for hot-rolled product 3A, . . .")

illustrations of its general point about the prevalence of underselling in the CCFRS market between 1998 and 2000.

2. The ITC's Evaluation of Aggregate and Disaggregated Average Unit Value Data In Its Pricing Analysis Was Consistent with Article 4.2(b)

206. The Panel also rejected the ITC's pricing analysis on the grounds that the ITC failed to explain why it had relied on annual average unit value ("AUV") data for the five "constituent" products in its analysis.[226] According to the Panel, the ITC acknowledged itself that there were "double-counting" issues related to the aggregation of certain data for the CCFRS industry.[227] Noting that these difficulties "presumably" also applied to the aggregate AUVs for CCFRS, the Panel asserted that the ITC should have explained why the aggregate AUV data could not be relied upon and why it had, instead, relied on the data for these "constituent" products in its analysis.[228]

207. Again, the Panel's findings reflect a fundamental misunderstanding of the ITC's analysis and findings. First, the Panel's reasoning is premised on the mistaken notion that the ITC did not rely on aggregate AUV data (that is, AUV data for the entire CCFRS like product) in its pricing analysis. Clearly, this assumption is wrong. As can be seen from the report, the ITC evaluated and discussed in its pricing analysis AUV data for the five "constituent" items making up the CCFRS like product *as well as* AUV data for the CCFRS like product category as a whole.[229] Moreover, the ITC relied on both categories of data to support its findings that imports were generally lower-priced than domestic merchandise and that import and domestic prices generally declined between 1998 and 2000.[230] Accordingly, it is unclear why the ITC should have felt it necessary to explain "why aggregate data could not be relied upon," since the ITC very clearly did rely on that data to support its assessment of general pricing trends in the CCFRS market.

208. Second, the Panel is also mistaken in believing that the ITC found that there were "difficulties" issues associated with the industry's AUV data.[231] The Panel is again mistaken in making this finding. At no point in its analysis did the ITC suggest that there were difficulties associated with the AUV data for the CCFRS market. It is true that the ITC explicitly noted in its determination there was "difficulty measuring *consumption, production, capacity, and import penetration*" data for the CCFRS industry as a whole due to the fact that "a significant portion of [CCFRS] production is consumed in the production of other, downstream materials included in

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[226] Panel Reports, para. 10.377.
[227] Panel Reports, para. 10.377.
[228] Panel Reports, para. 10.377.
[229] ITC Report, p. 61.
[230] *See* ITC Report, pp. 60-61.
[231] Panel Reports, para. 10.377.

the like product."[232] As the ITC acknowledged, including upstream and downstream products in one like product will result in the "double-counting" of production, capacity, and import volumes when aggregating this data for the upstream and downstream products.[233] However, this "double-counting" issue does not apply to the calculation of average unit values for CCFRS and its five "constituent" items because the calculation of AUV data inherently results in an elimination of this "double-counting" issue.[234] Given this, there were no double-counting "difficulties" associated with the AUV data for the CCFRS like product and no need, therefore, for the ITC to explain the nature of those "difficulties."

209. Finally, the Panel appears not to recognize that the ITC's reliance on AUV data for the five "constituent" CCFRS items is an entirely appropriate method of analyzing the nature of the price competition in the CCFRS market. In this regard, both the Appellate Body and other panels have stated that a competent authority may clearly examine the impact of imports in individual market segments as a means of assessing whether imports are causing injury to an industry.[235] Indeed, as one panel stated, an analysis that examined the impact of imports in individual market segments "can yield a better understanding of the effects or imports, [as well as a] more thoroughly reasoned analysis and conclusion."[236] The ITC's analysis, which evaluated both AUVs on an industry-wide and sectoral basis, was clearly designed to enable to the ITC more thoroughly understand the competition between imports and domestic merchandise in the CCFRS market. As such, no additional explanation was needed by the ITC.

ii. The ITC's Definition of the Like Product Did Not Prevent It From Properly Performing its Pricing Analysis.

210. Finally, the Panel rejected the ITC's pricing analysis on the grounds that the ITC's definition of CCFRS was so broad that it prevented the ITC from properly performing that analysis.[237] According to the Panel, the ITC's definition of CCFRS as a like product meant that "'that the statistics for the industry and the imports as a whole [would] only show averages'" and that this data would not "provide sufficiently specific information on the locus of competition in the market.'"[238] The Panel found that this "rendered it difficult, if not impossible, for the ITC to

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[232] ITC Report, p. 56 n. 232; see also p. 51, n. 193.

[233] ITC Report, p. 56 n. 232; see also p. 51, n. 193.

[234] More specifically, average unit values are calculated by dividing the aggregate sales values for a product by its aggregate sales quantity. Because both the numerator, i.e., aggregate sales value, and the denominator, i.e., aggregate sales quantity, in the calculation reflect the same level of double-counting, any double-counting issue is substantially eliminated when the calculation is performed.

[235] *See Mexico – HFCS,* Panel Report, para. 7.154; *Argentina – Footwear,* Panel Report, para. 8.261, n. 557; *US – Hot-Rolled Steel*, AB Report, para. 195.

[236] *Mexico – HFCS,* Panel Report, para. 7.154.

[237] Panel Reports, para. 10.378.

[238] Panel Reports, para. 10.378 (quoting *Argentina – Footwear*, Panel Report, para. 8.261, n. 557).

identify the proper locus of competition in the market."[239] Accordingly, the Panel concluded, the ITC's definition of CCFRS as a like product cast "serious doubt . . . on the validity of the ITC's price analysis for CCFRS."[240]

211. The Panel's reasoning is flawed in a number of respects. First, the Panel's finding is simply not consonant with the basic analytical framework contemplated under Articles 2.1, 4.1 and 4.2 of the Agreement. Under Articles 2.1 and 4.2, the competent authorities are required to assess whether increased imports are causing serious injury to a "domestic industry."[241] As a result of this language, it is incumbent on the competent authorities to define the "industry" in question as a pre-condition to performing its causation analysis in a safeguards investigation. Since the industry is, in turn, defined in Article 4.1(c) as the "producers as a whole of the like or directly competitive product,"[242] it is also obvious that the competent authorities must define the domestic like product before it can begin assessing whether increased imports have harmed the industry producing that like or directly competitive product. As the panel in *Argentina – Footwear* stated, "it is [the definition of the like or directly competitive product] that controls the definition of the 'domestic industry' in the sense of Article 4.1(c) *as well as the manner in which the data must be analyzed in an investigation* . . ."[243]

212. Given the analytical framework that is set forth in Articles 4.1(c) and 4.2, it is clear that the Panel got its analysis backwards. As can be seen from the above, the definition of the like product and industry are pre-conditions to an assessment of the existence of a causal link. Accordingly, once the competent authorities define the like product and the industry, they are specifically required to perform their causation analysis for that industry, as it is defined, no matter how broad the industry or how difficult the analysis.[244] The Agreement nowhere suggests that any analytical difficulties in performing a causation analysis must, or should, play a role in the definition of the like product. As a corollary to this analysis, it is also clear that, when a reviewing panel does not question or reverse an authority's like product definition, the panel may

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[239] Panel Reports, para. 10.378. The United States notes that the Panel also made a separate finding that the ITC's definition of CCFRS as one like product "prevented the proper application of the [other] causation requirements of Article 4.2(b)" because it rendered it difficult for the ITC to identify the "locus of competition" in the CCFRS market. Panel Reports, para. 10.413-417. The points made by the Panel in that analysis are essentially the same as those made the Panel for the ITC's pricing analysis. The Panel's findings in these paragraphs should be reversed for the reasons set forth in the rest of this section of this brief.

[240] Panel Reports, para. 10.378.

[241] Safeguards Agreement, Articles 2.1 and 4.2.

[242] Safeguards Agreement, Article 4.1(c).

[243] *Argentina – Footwear*, Panel Report, para. 8.137.

[244] *Argentina – Footwear*, Panel Report, para. 8.137 ("given the undisputed definition of the like or directly competitive product as all footwear, [the competent authority] was required at a minimum to consider each injury factor with respect to all footwear. . .".

not then turn around and conclude that the authority's causation analysis was rendered inherently flawed due to its choice of that like product.

213. Here, the ITC defined CCFRS as the like product. The Panel did not reject that conclusion. On the contrary, the Panel specifically stated that it was assuming for purposes of its causation analysis that the ITC had defined the like product and industry correctly for all of the steel products in question.[245] Given this, and given the analytical framework of Articles 4.1(c) and 4.2(b), the Panel was necessarily obligated to presume that the ITC was required to perform its causation analysis for the CCFRS like product. The Panel simply cannot turn around after making its initial findings and assert, without significant analysis, that the like product definition rendered the ITC's analysis inherently flawed. For these reasons, the Panel's finding that the Safeguards Agreement forbade use of CCFRS is plainly inconsistent with the analytical framework required by the Agreement.

214. Second, the Panel's analysis of this issue is premised on a significant misconstruction of the panel report in *Argentina – Footwear*. According to the Panel, in *Argentina – Footwear*, the panel found that a broadly defined like product will render an authority's causation analysis flawed because the statistics for that broadly defined industry "will not be able to provide sufficiently specific information on the locus of competition in the market."[246] This is simply *not* what the *Argentina Footwear* report stands for. On the contrary, that report stands for the exact opposite proposition: no matter how broadly defined the like product and industry, the competent authority must perform its causation analysis, at a minimum, for that industry as a whole.[247]

215. In *Argentina – Footwear,* Argentina's competent authority defined the like product "broadly," by including all footwear in the like product. As a result, the competent authority generally relied on aggregate industry-specific data to perform its causation analysis for the footwear industry, while performing a sectoral analysis of the data in some instances. The panel rejected the EC's argument that the competent authority was required to conduct its analysis on a "disaggregated" sector-specific analysis, rather than an analysis of the industry as a whole, because the authority had chosen such a broad definition of the industry. In rejecting this argument, the Panel stated:

> In our view, since in this case the definition of the like or directly competitive article is not challenged, *it is this definition that controls the definition of the "domestic industry" in the sense of Article 4.1(c) as well as the manner in which the data must be analyzed in an investigation*. While Argentina could have considered the data on a disaggregated basis (and in fact did so in some instances), in our view, *it was not required to do so.*

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[245] Panel Reports, para. 10.278.
[246] Panel Reports, para. 10.378 (citing *Argentina – Footwear*, Panel Report, para. 8.261, n. 557..
[247] *Argentina – Footwear*, Panel Report, para. 8.137.

> Rather, given the undisputed definition of the like or directly competitive product as all footwear, Argentina was required at a minimum to consider each injury factor with respect to *all footwear*. By the same token, the European Communities, having accepted Argentina's aggregate like product definition, has no basis to insist on a disaggregated analysis in which injury and causation must be proven with respect to each individual segment."[248]

Given this language in the *Footwear* report, it is clear that *Argentina Footwear* does not stand for the proposition that a broadly defined industry will inherently lead to a flawed causation analysis, as the Panel believed. On the contrary, under *Argentina – Footwear*, once the Panel effectively accepted the ITC's like product definition as a threshold finding in its causation analysis, the Panel was precluded from asserting that that definition, by itself, rendered the ITC's analysis inherently suspect.

216. Moreover, it must be pointed out that the Panel's analysis of the *Argentina Footwear* report is based on a statement by that panel which has been taken out of context.[249] The full text of the passage cited by the Panel in its report states:

> [w]here as here a very broad definition of the like product is used, within which there is considerable heterogeneity, the *analysis of the conditions of competition must go considerably beyond mere statistical comparisons for imports and the industry as a whole* as given their breadth, the statistics for the industry and imports as a whole will only show averages, and therefore will not be able to provide sufficiently specific information on the locus of competition in the market."[250]

The Panel quoted only the underscored portion of this passage as support for the conclusion that the "product breadth" of CCFRS cast "serious doubt" on the validity of the pricing analysis. However, when placed in context, it is clear that the *Argentina Footwear* panel was not suggesting with this language that a competent authority could not perform a proper causation analysis for a broadly defined industry. Instead, the panel was simply stating that, when an industry is broadly defined, the competent authority may properly evaluate data for that industry on both an aggregate and disaggregated (i.e, sectoral) basis, as may be necessary under the facts of the case.

217. And that is exactly what the ITC did here. In its causation analysis, as it was required to do, the ITC explicitly evaluated and discussed the impact of imports on the production, shipment, market share, sales revenues, pricing, profitability, and employment levels for the CCFRS industry as whole.[251] As a supplement to this analysis, it also explicitly evaluated the impact of

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[248] *Argentina – Footwear*, Panel Report, para. 8.137.
[249] Panel Reports, para. 10.378.
[250] *Argentina – Footwear*, Panel Report, para. 8.261, n. 557 (emphasis and underscoring added).
[251] ITC Report, pp. 51-62.

CCFRS imports on domestic capacity utilization, pricing, and the operating margins of the industry in each of the five sectors[252] of the overall CCFRS market.[253] It took into account demand trends and import volume patterns in each of these sectors as well.[254] By examining this data for the industry and market as a whole as well for the for the industry's performance in the five sectors of the CCFRS, the ITC was very clearly able to evaluate in detail the "loci of competition" in the CCFRS market. By doing so, the ITC was able to obtain a "better understanding of the effects of imports" in the CCFRS market and to provide a "more thoroughly reasoned analysis" in its determination.[255] Given the foregoing, it is clear that the Panel was mistaken in asserting that this choice of like product prevented the ITC from assessing the "locus of competition" in the CCFRS market.

218. Finally, the Panel's analysis does not reflect the appropriate review methodology. The Appellate Body has stated that, when reviewing an authority's causation findings, the reviewing Panel must assume that the authorities' findings on like product and industry were proper.[256] In its *US – Lamb Meat* report, the Appellate Body stated that:

> Having reversed the {Lamb Meat} Panel's "general interpretive analysis" of "causation", we go on to consider whether the Panel was correct nonetheless in concluding that the United States acted inconsistently with the causation requirements in Article 4.2 of the Agreement on Safeguards . . . *[N]otwithstanding the findings we have made previously in this appeal {i.e., invalidating the lamb meat industry definition}, we must assume in our examination: first, that the definition of the domestic industry given by the USITC is correct, and second, that the USITC correctly found that the domestic industry is threatened with serious injury.* On this basis, we must examine whether the USITC properly established, in accordance with the Agreement on Safeguards, the existence of the causal link between increased imports and threatened serious injury.[257]

Accordingly, even if the Panel had actually performed an analysis of the ITC's like product findings, it would have been obligated to treat the ITC's finding as though it were proper for purposes of analyzing the ITC causation analysis.

219. In sum, the Panel was clearly mistaken in finding that the ITC improperly relied on overly broad and problematic pricing data in its analysis. The Panel's conclusions on these issue do not, therefore, support a finding that the ITC failed to examine all the relevant facts or provided reasoned conclusions as to how the facts supported the determinations that were made.[258] On the

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[252] That is, the slab, plate, hot-rolled, cold-rolled and coated steel sectors of the CCFRS market.
[253] ITC Report, pp. 52-54 and 59-62.
[254] ITC Report, pp. 59-60.
[255] *Mexico – HFCS,* Panel Report, para. 7.154.
[256] *US – Lamb Meat*, AB Report, para. 172.
[257] *US – Lamb Meat*, AB Report, para. 172.
[258] *Argentina – Footwear*, AB Report, para. 121; *see US – Lamb Meat*, AB Report, para. 97.

contrary, the ITC's findings were detailed, reasoned, and fully consistent with the record evidence. The ITC's findings should be affirmed.

iii. The Panel Erred in Finding that the ITC Failed to Adequately Distinguish the Effects of "Other" Factors From The Effects of Imports In its CCFRS Analysis

220. The Panel also erred in finding that the ITC failed to adequately separate and distinguish the effects of "other" factors (including demand declines, capacity increases, intra-industry competition, and legacy costs) from those of imports when performing its causation analysis for CCFRS.[259] As we describe below in detail, in its analysis, the Panel failed to establish that the ITC did not consider all the relevant facts or provide findings and reasoned conclusions as to how the facts supports its determinations. The ITC adequately distinguished the effects of these other factors from those of imports. Its findings were fully consistent with the requirements of Article 4.2(b) and should be affirmed.

A. The ITC Adequately Distinguished the Injurious Effects of Demand Declines from Those of Imports In its Causation Analysis

221. In its report, the Panel found the ITC did not adequately distinguish the effects of demand declines from those of imports in its causation analysis for CCFRS.[260] The Panel stated that the ITC examined the nature of demand declines during the period and found that they had contributed to the injury being experienced by the industry in late 2000 and early 2001.[261] The Panel concluded that the ITC improperly dismissed demand declines as a cause of injury to the industry "on the basis that the industry was already injured when demand began to decline."[262] According to the Panel, this analysis was flawed because:

> [t]he fact that the contribution of a factor to the injury suffered may have only occurred late in the period of investigation or for only a relatively short period within that time frame does not relieve a competent authority of its obligation to ensure that the injury caused by that factor is not attributed to the increased imports. It may be the case that such a factor may inflict considerable damage on the industry, even though its effects appeared late in the period and/or for a relatively short duration.[263]

222. The Panel's analysis is flawed in several respects. First, and most importantly, the ITC did, in fact, provide findings and reasoned conclusions as to the nature and the extent of the

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[259] Panel Reports, para. 10.382-10.410.
[260] Panel Reports, paras. 10.384-389.
[261] Panel Reports, paras. 10.384.
[262] Panel Reports, paras. 10.388.
[263] Panel Reports, paras. 10.387.

effects of demand declines on the industry during the period of investigation and adequately distinguished those effects from the effects of imports in its analysis.[264] In its analysis, the ITC correctly noted that demand declines only became evident in the CCFRS market during the final three quarters of the period of investigation.[265] The ITC also recognized, however, the industry had been suffering serious injury during the period before the last three quarters of the period, even though there was actually a consistent growth in demand during this period.[266]

223. In particular, the ITC correctly noted, the industry's operating margins first began to decline in 1998, when demand was increasing, and continued to decline in 1999 and 2000 as well, when demand continued to grow on an annual basis. Because these declines in the industry's performance and profitability levels began with the first surge of imports into the market in 1998 and continued as imports engaged in aggressive price competition with the industry in 1999 and 2000, the ITC correctly recognized that the demand declines that occurred during the last three quarters of the period had only exacerbated the industry's level of serious injury during that period,[267] and had not been the cause of the serious injury that the industry had experienced during 1998, 1999, and 2000.

224. By performing an analysis that assessed whether demand declines correlated with deterioration in the industry's performance levels, the ITC properly assessed the effects of late period demand declines and distinguished them from those of imports during the period between 1998 and 2000. In essence, in its analysis, the ITC separated the period of investigation into two periods, one in which demand was growing and one in which demand was declining. By examining whether the industry was seriously injured during the period in which demand was growing, the ITC was able to conclude that the serious injury suffered by the industry during this period was *not* caused by demand declines and was therefore able to specifically determine that the industry's deterioration was not attributable to demand changes during this period. Clearly, the ITC's analysis did, in fact, separate and distinguish the effects of imports from those of demand declines between 1998 and 2000. To put it another way, the ITC reasonably found that, for the period between 1998 and 2000, imports and demand declines were not causing injury to the industry *at the same time*. Accordingly, it reasonably chose not to attribute any injury during that period to declines in demand.

225. In fact, the United States notes that the Panel itself appeared to suggest elsewhere in its report that the analysis performed by the ITC for demand declines in the CCFRS would satisfy the requirements of Article 4.2(b), second sentence. In its discussion of the ITC's stainless steel bar causation analysis, the Panel concluded that the ITC did not properly distinguish the effects of demand declines from the effects of imports. In its discussion, the Panel specifically stated, however, the ITC could have satisfied its non-attribution obligation by showing that there was

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[264] ITC Report, p. 63.
[265] ITC Report, p. 63.
[266] ITC Report, p. 63.
[267] ITC Report, p. 63.

"no linkage between demand declines during the period and injury suffered" and by showing that "operating margin, perhaps the most relevant injury factor in this regard, *declined irrespective of demand trends*."[268] The Panel added that the ITC could have "bolstered [this analysis with] an explanation that *declines in operating margins coincided with increases in imports* rather than declines in demand." [269]

226. That is exactly what the ITC did. After examining the changes in demand during the period and finding that demand declined only in the last three quarters of the period, the ITC explicitly stated that:

> [T]he [CCFRS] domestic industry showed the signs of injury described above well before the latter portion of 2000 when demand began to drop off. The domestic industry first saw its *operating income* decline in 1998, at a time when demand was increasing and would continue to increase for another two years. The period of increasing demand was also when imports surged. We thus find that the domestic industry was already injured by increased imports when demand began to decline and, declining demand, while not the cause of injury found here, contributed to the industry's continued deterioration at the end of the period. Indeed, the *losses* experienced by the industry in 1999 and 2000 as a result of imports left the industry in a much weakened position to face the slowdown in demand.[270]

Clearly, as the Panel suggested in its stainless steel bar discussion, the ITC did, in fact, assess whether declines in the industry's operating margins correlated with increases in imports rather than changes in demand, and whether the industry's margins declined irrespective of changes in demand. Given its own statements about the sort of methodology that would satisfy Article 4.2(b), second sentence, the Panel clearly had no basis for rejecting the ITC's analysis.

227. Finally, the United States notes that the Panel appears to be requiring a more extensive analysis under Article 4.2(b), second sentence, than the Appellate Body has indicated is necessary. In its discussion, the Panel asserts that, even though the ITC had properly concluded that the injury being suffered by the industry could not properly be attributed to demand declines (given that there were no demand declines), the ITC should nonetheless have distinguished the effects of the demand declines during the last three quarters of the period of investigation from those of imports.[271] The Panel's approach on this issue is not consistent with the Appellate Body's previous discussions of the requirements under Article 4.2(b). Although the Appellate Body has stated that a competent authority must distinguish the effects of "other" factors from those of imports in a "clear," "explicit" and "reasoned" way,[272] it has never suggested that Article

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[268] Panel Reports, para. 10.558.
[269] Panel Reports, para. 10.558.
[270] ITC Report, p. 63.
[271] Panel Reports, para. 10.387.
[272] *See, e.g., US – Line Pipe*, AB Report, para. 217.

4.2(b) requires the competent authority to perform an analysis that distinguishes the effects of imports from those of other factors *for each and every moment during the period of investigation*, no matter how small that period of time may be. Instead, the Appellate Body has simply stated that Article 4.2(b) requires a "reasoned and adequate" explanation, of the *nature and extent* of the injurious effects of other factors, as distinguished from imports.[273] The ITC did provide such a description of the nature and extent of the injurious effects of demand declines and performed an analysis that distinguished those effects from those of imports.

228. Nothing more is required under Article 4.2(b).

B. The ITC Adequately Distinguished the Effects of Capacity Increases from The Effects of Imports In its CCFRS Analysis

229. In its report, the Panel concluded that the ITC failed to distinguish adequately the effect of the carbon flat-rolled steel industry's capacity increases during the period of investigation.[274] According to the Panel, the ITC improperly dismissed the industry's capacity increases as a source of injury merely on the basis of its finding that, "if increased capacity were, in fact, the source of injury to the industry, [the ITC] would have expected to see the domestic industry lead prices downward, and wrest market share from imports."[275] According to the Panel, this analysis was "simplistic" and did not "address the complexities associated" with these capacity increases."[276] According to the Panel, the ITC should have evaluated whether the industry's capacity increases had been primarily responsible for the increased "idling" of the industry's capacity during the period rather than imports.[277]

230. The Panel's analysis is premised on a significant misreading of the ITC's analysis. Quite clearly, the ITC did evaluate the "complexities" associated with these capacity increases and did provide findings and reasoned conclusions as to the manner in which those capacity increases affected the industry. For example, the ITC specifically examined whether the industry's capacity additions affected its capacity utilization rates during the period. In its analysis, the ITC explicitly acknowledged that the industry's capacity levels increased by 15.9 percent from 1996 to 2000, a faster rate than the rate at which consumption grew during the same period.[278] The ITC also stated that the industry's production levels, while growing, had not kept pace with the increases in the industry's capacity levels.[279] As a result of this evaluation, the ITC correctly concluded – and explicitly stated in its analysis – that declines in the industry's capacity

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[273] *See, e.g., US – Line Pipe*, AB Report, para. 217.
[274] Panel Reports, para. 10.391-396.
[275] Panel Reports, para. 10.394.
[276] Panel Reports, para. 10.394.
[277] Panel Reports, para. 10.395.
[278] ITC Report, p. 63.
[279] ITC Report, p. 63.

utilization rates were due primarily to the industry's capacity increases during the period, not to the impact of imports.[280] By performing this analysis, the ITC did, in fact, properly attribute to capacity increases the declines in the industry's capacity utilization rates during the period.

231. Moreover, the ITC also addressed the issue of whether these capacity increases caused price declines in the market during the last half of the period of investigation.[281] In particular, the ITC acknowledged that the increases provided the industry with "a significant incentive to maximize the use of steel making assets" and that this incentive would have "affect producers' pricing behavior."[282] The ITC therefore examined the record evidence to assess whether some or all of the domestic producers had used this capacity in a manner that caused the price declines in the market.[283] As the ITC correctly stated in its report, the record data on pricing – both the price comparison data and the data on average unit values – showed that imports consistently undersold the domestic industry (even with this additional capacity) during the period of investigation.[284] The ITC also noted that the record data indicated that the large surge of lower-priced imports in 1998 had correlated with a significant drop in prices in that year, and that imports continued to lead prices down, or keep them suppressed, by consistent underselling through 1999 and 2000.[285] Accordingly, as the ITC explained in detail, the record established that it was imports, and not the capacity added by the industry during the period, that were the primary cause of domestic price declines during the period of investigation.[286]

232. In other words, the ITC's analysis was not "simplistic," as the Panel asserted, but addressed the complex effects that capacity had on the condition of the industry. In particular, the ITC evaluated the nature and extent of the industry's capacity rates, found that they had been primarily responsible for the declines in the industry's capacity utilization rates, and therefore explicitly chose not to attribute the bulk of these declines to imports. Similarly, the ITC's evaluated the nature and extent of the industry's capacity increases on prices in the market and reasonably concluded that the record pricing data established that imports had a far more significant and negative impact on prices than did capacity increases, specifically and correctly noting that "imports, rather than domestically produced steel, led prices downward during the POI."[287] This analysis was detailed, reasoned, and fully consistent with the record evidence. Indeed, in its analysis, the Panel does not even challenge any of the specific factual findings made by the ITC or the data underlying that conclusion.

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[280] ITC Report, p. 63.
[281] ITC Report, p. 63.
[282] ITC Report, p. 63.
[283] ITC Report, p. 63-64.
[284] ITC Report, p. 63-64, *see also* ITC Report, Tables FLAT-66 to FLAT-71 & FLAT-73-74.
[285] ITC Report at 63-64 and 60-62.
[286] Given this, it is difficult to understand why the Panel appeared to believe that the ITC did not address whether the "idling [of the domestic industry's capacity during the period] may have been caused by increased capacity." Panel Reports, paras. 10.395-10.396.
[287] ITC Report, p. 63-64.

233. In essence, the Panel's analysis does not indicate in any reasoned way that the ITC failed to consider all the relevant facts or that it failed to show how those facts supported its determination. The ITC reasonably and correctly found that the industry's capacity utilization declines were caused primarily by its capacity increases during the period, and therefore properly did not attribute these declines to imports. However, it also reasonably concluded that imports, rather than capacity increases, directly caused the declines in domestic pricing between 1998 and 2000 and, therefore, properly attributed those declines to imports. The ITC adequately separated and distinguished the effects of demand declines from the effects of imports in its analysis. Its analysis was consistent with the requirements of Article 4.2(b) and should be affirmed by the Appellate Body.

C. The ITC Adequately Distinguished the Effects of Intra-Industry (i.e., Minimill) Competition from The Effects of Imports In its CCFRS Analysis

234. The Panel also concluded that the ITC failed to distinguish the effect of the intra-industry competition (that is, pricing competition between integrated and minimill producers) from the effects of imports during the period of investigation.[288] In its analysis of this issue, the Panel acknowledged that the ITC evaluated whether the cost advantages enjoyed by minimill producers caused them to compete aggressively on price during the period and drive domestic prices down.[289] The Panel rejected the ITC's analysis, however, asserting that the ITC dismissed this factor solely on the grounds that these cost advantages existed throughout the period of investigation. In the Panel's view:

> [T]he fact that a factor existed throughout the period of investigation does not mean that it cannot play a role in causing serious injury. Moreover, changing circumstances in the market may result in a number of factors, that previously seemed harmless, playing a significant role in causing serious injury.[290]

As a result, the Panel found that the ITC's "analysis does not provide sufficient insight into the effects that intra-industry competition had on the market."[291]

235. The Panel's analysis is premised on a flawed understanding of the ITC's findings. The ITC clearly did distinguish, in a reasoned and adequate way, the effects of minimill competition from those of imports in its CCFRS causation analysis.[292] In particular, the ITC correctly recognized that the record data showed that minimill producers had lower raw materials costs and different product mixes than integrated producers and that minimills therefore "did typically

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[288] Panel Reports, para. 10.398-10.401.
[289] Panel Reports, para. 10.399.
[290] Panel Reports, para. 10.400.
[291] Panel Reports, para. 10.399.
[292] ITC Report, p. 65.

enjoy cost advantages over integrated producers,"[293] The ITC also correctly noted that the record evidence concerning the relative cost structures of minimill and integrated producers showed that minimill "cost advantages existed throughout the POI, and integrated producers as well as minimills enjoyed declining costs throughout the period." As a result, the ITC reasonably concluded, there was no change in minimills' relative cost advantage that would have caused them to drive domestic prices down. As a result, the ITC rejected their cost advantages as a significant factor in domestic price declines during the period.[294]

236. The ITC then examined whether, aside from these cost advantages, the additional capacity added by minimills during the period might have had a significant effect on domestic pricing during the period of investigation.[295] After evaluating record evidence showing the quarterly price comparison data for minimills, imports and integrated producers,[296] the ITC found that the data showed imports consistently underselling minimills on sales hot-rolled merchandise, which was the primary commercial product for minimill producers during the period.[297] The record data also showed that imports undersold minimills consistently on plate and cold-rolled as well during the period as well.[298] Given this data, the ITC reasonably concluded that, while minimill producers were lower-cost producers than integrated producers and had some impact on prices, it was imports – not minimills – that were the price leaders in the market place and that were responsible for leading prices downward throughout the latter part of the period of investigation.[299]

237. Finally, the Panel's analysis is clearly based on an incomplete understanding of the ITC's analysis of the cost advantage issue. Quite simply, the ITC did not dismiss minimill cost advantages as a source of injury to the industry merely because the advantages "existed throughout the period of investigation." Clearly, the ITC examined minimill and integrated producers' relative cost structures to assess whether the minimills cost advantage improved to an extent that they were able to compete more aggressively on price with the integrated producers.[300] Because this cost advantage did not improve over the period, minimills' cost advantage relative

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[293] ITC Report, p. 65.
[294] ITC Report, p. 65.
[295] ITC Report, p. 65.
[296] ITC Report, p. 65 and nn. 301-303.
[297] ITC Report, p. 65.
[298] As the United States noted before the Panel, although these quarterly pricing comparisons were confidential, they showed that imports undersold minimills on their sales of plate, hot-rolled and cold-rolled steel in the large majority of possible price comparisons during the period, with imports underselling minimills in 64 percent of possible comparisons (70 of 110 comparisons), at margins ranging up to 30.6 percent. Imports undersold minimills in 76 percent of possible comparisons (50 of 66) involving plate and hot-rolled merchandise. Panel Reports, para. 7.1139, n. 2768. None of the parties challenged these facts before the Panel.
[299] ITC Report, p. 65.
[300] ITC Report, para. 65.

to the integrated producers provided no incentive for minimill producers to increase their underselling of the integrated producers during the period and drive down prices. As a result, even though this cost advantage existed throughout the period, the record evidence indicated that there was not a change in the factor sufficient to affect the behavior, or condition, of any members of the industry. The Panel's assertion to the contrary does not reflect the ITC's actual analysis and does not, therefore, constitute an objective examination of the ITC's findings.

238. The Panel's analysis fails to address and consider the complexity of the ITC's discussion of this issue. The ITC addressed the effects of minimills and their cost advantages in the market in a reasoned and adequate manner. The Panel's analysis simply does not indicate that the ITC's analysis of this was not sufficient under Article 4.2(b). The ITC's discussion of this issue was reasoned and adequate and should be affirmed.

D. The ITC Demonstrated That Legacy Costs Were Not a Source of Injury to the Industry

239. Finally, the Panel concluded that the ITC failed to distinguish adequately the nature and extent of the effects of legacy costs on the CCFRS industry.[301] In its analysis, the Panel stated that the ITC implicitly acknowledged that the carbon steel industry's "legacy costs"[302] caused injury to the industry during the period.[303] The Panel asserted that the ITC improperly dismissed this factor on the grounds that it "existed before the period of investigation." According to the Panel:

> In the Panel's view, that a factor pre-dated the period of investigation does not necessarily mean that it cannot play a role in causing serious injury during the period of investigation itself. Nor does the Panel consider that a reduction in the level of legacy costs during the period of investigation will necessarily mean that such costs could not and did not cause injury to the relevant domestic producers."[304]

240. The Panel's conclusions do not establish sufficiently that the ITC's analysis of the legacy cost issue was inconsistent with its obligations under Article 4.2(b). In its report, the ITC specifically evaluated whether the industry's legacy costs had increased the industry's costs substantially during the period of investigation, as the foreign respondents contended. The ITC prepared an analysis of the financial impact these costs had on the financial results of the industry in its Report.[305] That analysis showed that the aggregate net periodic cost of the post-

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[301] Panel Reports, para. 10.403-10.406.

[302] The term "legacy costs" is used by the parties to refer to the pension and non-pension benefit costs that are paid by an industry on behalf of its retired employees. *See* ITC Report, pp. OVERVIEW-31-35.

[303] Panel Reports, para. 10.403.

[304] Panel Reports, para. 10.405.

[305] ITC Report, Table OVERVIEW-9 & pp OVERVIEW 31-35.

employment pension and non-pension benefits (i.e., "legacy costs") for steel producers fell by $447 million during the period from 1996 to 2000.[306] In other words, the industry's legacy costs had actually improved over the period from 1996 to 2000, thus providing a net benefit to the industry with respect to its operating results during this period.[307]

241. As a result of this analysis, the ITC rejected the arguments made by respondents that the these legacy costs had increased the industry's costs and caused many of the bankruptcies that occurred during the period of investigation. While the ITC did acknowledge that legacy costs had been, and continued to be, a long-term obstacle to the prospects of consolidation in the industry,[308] the ITC correctly noted that the industry's legacy costs predated the period of investigation and had not prevented the industry from earning a reasonable rate of return in 1996 and 1997, before the surge of imports in 1998.[309] Although the ITC explicitly recognized that the burden of legacy costs varied between producers and had left certain producers more vulnerable to injury from imports, it found that there was no record evidence linking legacy costs to the price declines that caused serious injury to the industry during the latter part of the period of investigation.[310] The ITC correctly rejected the concept that these costs had been a cause of the serious injury to the industry that occurred during the period between 1998 and 2000.

242. Given the foregoing, it is clear that the Panel's finding is premised on the mistaken notion that the ITC found the industry's legacy costs to be a source of injury during the period of investigation. The Panel correctly notes that the ITC recognized that legacy costs represented a "vexing problem" for the industry.[311] However, the Panel does not fully appreciate the fact that this finding simply indicates that the ITC concluded that legacy costs had been a problem for the industry since before the period of investigation and that they would hinder the industry's efforts to adjust to import competition in the future. However, neither of these factual findings of the ITC bear on the issue of *whether legacy costs had caused the declines in the industry's condition that occurred during the period between 1998 and 2000*, which was the period that the ITC focused on when finding that the industry was suffering serious injury as a result of import competition. Because the industry's legacy costs did not contribute to the declines in the

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[306] ITC Report, Table OVERVIEW-9. In this regard, the aggregate net periodic cost for these firms for legacy costs consistently declined during the period, from 1.123 billion dollars in 1996 to 834 million dollars in 1998 to 676 million dollars in 2000. *Id*. The aggregate net periodic cost of these expenses is calculated by adding the net periodic costs (or benefits) of post-employment pension and non-pension benefits for defined benefit plan employers to the net pension plan expense and other post-employment benefits for defined contribution plan employers. *Id*. These are the amounts recognized in a company's operating income statements. *Id*.

[307] ITC Report, Table OVERVIEW-9.

[308] ITC Report, p. 64. Indeed, the ITC's factual report sets forth a lengthy discussion of the impact these costs have had on the industry's condition. ITC Report, p. OVERVIEW-31-35.

[309] ITC Report, p. 64.

[310] ITC Report, p. 64.

[311] Panel Reports, para. 10.403.

industry's pricing or profitability that occurred during this period, they were not properly causing injury to the industry *at the same time* as imports and therefore cannot be considered a cause of injury subject to the requirements of Article 4.2(b), second sentence.[312]

243. Finally, the Panel mistakenly asserts that it was incumbent upon the ITC to provide a further explanation of its statement that the industry's legacy costs were "not responsible for the low prices that . . . injured the industry" during the period.[313] On the contrary, the ITC's analysis is a complete discussion of this issue. As should be obvious, an increase or decrease in an industry's costs will not inherently lead to a *decline* in prices, in the absence of some other causal factor. For example, an industry will only reduce its prices in response to a cost increase if it is forced to by purchaser pressure or competition from other sources. Similarly, and more obviously, an increase in the industry's cost structure would be expected to lead to the industry increasing its prices, but it certainly could not be expected to cause an industry to initiate price *declines*, in the absence of some other causal factor. The ITC's analysis was brief because it did not need to be more extensive.

244. The Panel's analysis of this issue simply does not call into question the consistency of the ITC's analysis with the requirements of Article 4.2(b). The Panel based its entire analysis on a finding that the ITC did not make, that is, that legacy costs were a source of injury to the industry. The ITC's finding that these costs were not a cause of the industry's declines during the period was reasoned, detailed, and complete. The Appellate Body should affirm them.

iii. Conclusion

245. In sum, the Panel's criticisms of the ITC's causation analysis for CCFRS have little merit and fail to show that the ITC's findings were not consistent with Article 4.2(b). The ITC thoroughly, objectively and reasonably evaluated the record evidence in its investigation and established that there was a "genuine and substantial" causal link between increased imports of CCFRS and serious injury. Moreover, the ITC correctly ensured that it did not attribute to imports any injury caused by other factors in the CCFRS market, and provided a reasoned and adequate analysis in support of all its findings. The ITC's findings should be affirmed by the Appellate Body.

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[312] Given this, it is clear that the Panel is mistaken analytically when it contended that "a reduction in the level of legacy costs during the period of investigation will not necessarily mean that such costs could not and did not cause injury to the relevant domestic producers." Panel Reports, para. 10.405. Obviously, because these costs declined during the period, they could not have contributed, by themselves, to the serious declines in the industry's price or profitability levels during this period which formed the primary basis for the ITC's finding of serious injury.

[313] Panel Reports, para. 10.406.

d. The ITC Established, in a Reasoned and Adequate Manner, That Increased Imports of Hot-rolled Bar Caused Serious Injury to the Hot-Rolled Bar Industry

246. The Panel found that the ITC's causation analysis for hot-rolled bar was not consistent with the requirements of Articles 2.1, 3.1, and 4.2(b) of the Safeguards Agreement. The Panel found that most elements of the ITC's causation analysis were, in fact, consistent with these requirements, including its finding that there was a causal link between imports of hot-rolled bar and the serious injury suffered by the industry[314] and its analysis of the effects of demand declines, intra-industry competition, and the operations of inefficient producers on the domestic industry.[315]

247. However, the Panel rejected the ITC's finding that increases in the industry's costs of goods sold had not been a source of serious injury to the industry during the period of investigation.[316] In its analysis, the Panel concluded that the ITC's finding on this issue was not "adequately reasoned" because the ITC supposedly dismissed these costs by "merely stat[ing] that the only reason why the domestic industry did not increase prices to recoup growing COGS was the import surge that occurred in the year 2000."[317] Even though it found the ITC's analysis not to be "reasoned and adequate," the Panel nonetheless concluded that the "ITC was probably correct in concluding that changes in input costs were not a cause of serious injury" to the industry" during the period, citing in support of this statement record evidence showing that there was not a correlation between declines in the industry's operating margins and changes in its costs of goods sold during the period from 1996 through 2000.[318]

248. While the United States agrees with the Panel that the ITC was "probably correct" in finding that these cost changes were not a source of injury to the industry during the period of investigation, the Panel clearly erred in concluding that the ITC's analysis was not reasoned and adequate. The ITC evaluated all of the record evidence concerning the impact of cost increases on the industry's pricing and profitability levels and justifiably concluded that the evidence showed that COGS increases in 2000 were not a cause of injury to the industry.[319] In particular, that record showed:

- Demand for hot-rolled bar was higher in 1999 than in 1996 and higher in 2000 than 1999. As the ITC noted, producers do not normally need to cut their prices

[314] Panel Reports, paras. 10.424-430.
[315] Panel Reports, paras. 10.431-437 and 10.441-442.
[316] Panel Reports, paras. 10.438-440.
[317] Panel Reports, para. 10.440.
[318] Panel Reports, para. 10.436.
[319] ITC Report, p. 99.

to fully reflect declines in the costs of goods sold in times of increasing demand.[320]

- The industry's unit cost of goods sold (COGS) declined from 1996 to 1999. Despite the demand increases in these years, the domestic industry's average unit sales values declined at a greater rate than its COGS between 1996 to 1999.[321]

- The industry's unit COGS increased in 2000, a year when demand continued to increase. Despite the fact that the industry attempted to raise prices in 2000 in the face of demand increases and increases in its unit COGS in 2000, the industry's average unit sales values remained flat in that year.[322]

- As the ITC noted, the industry should have been able to increase its pricing to account for its cost increases in 2000 because demand was increasing in that year. However, it was unable to do so. The industry was therefore unable to maintain positive operating margins in 2000 that it had experienced in the prior years of the period of investigation.[323]

Given these pricing, cost and profitability trends, the ITC concluded, it could not "attribute the domestic industry's declines in operating performance in 2000 to increases in COGS," a finding that was amply supported by its analysis and the record evidence. Instead, since the ITC found that all of the "other" factors were not sources of injury to the industry, the ITC's finding that imports were responsible for suppressing necessary industry pricing increases was the only possible explanation of the industry's declines in 2000. In sum, the ITC's analysis was reasoned, detailed and fully consistent with the record data.[324] The Panel's analysis and findings do not detract in any way from the sufficiency of the ITC's analysis under Article 4.2(b).

249. In this regard, the Panel's conclusions are premised on the notion that the ITC did not examine whether the industry's profitability and pricing declines coincided with increases in its costs.[325] However, the ITC did, in fact, perform this very analysis. In its determination, the ITC examined the spread between the industry's COGS and its unit sales values to assess whether changes in sales values were keeping pace with changes in its costs.[326] The ITC found, as did the Panel, that the changes in the industry's unit sales values were not keeping pace with changes in

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[320] ITC Report, p. 99.
[321] ITC Report, p. 99.
[322] ITC Report, p. 99.
[323] ITC Report, p. 99.
[324] Indeed, given the discussion cited above, it is clear that the ITC's analysis did not consist "merely" of the statement that the "only reason why the industry did not increase prices to recoup growing COGS was the import surge that occurred in 2000," as the Panel asserted.
[325] Panel Reports, para. 10.440.
[326] ITC Report, p. 99.

its unit costs during the period between 1996 and 2000, especially in 2000, and that the industry's profitability levels declined as a result of this trend.[327] Accordingly, the ITC expressly found:

> If the industry had been able to increase its average unit sales values in 2000 to reflect its increasing unit COGS - a reasonable expectation in a year of increasing demand – *the industry could have maintained positive operating margins of at least the levels of 1999.* As explained above, however, the industry could not sustain whatever price increases it initiated in 2000 because of that years import surge. . . [W]e cannot attribute the domestic industry's declines in operating income in 2000 to increases in COGS . . .[328]

In other words, although the Panel appeared to believe otherwise, the ITC did in fact evaluate whether the trends "in operating income were independent of trends in COGS." Accordingly, it is clear that the Panel's analysis simply misunderstands the ITC's analysis of this issue.

250. In sum, the Panel's findings do not support its conclusion that the ITC's analysis was not reasoned and adequate. The ITC provided a detailed, clear, and – as the Panel itself agreed – demonstrably correct assessment of the injurious effect of costs increases on the industry's condition. The ITC's findings were consistent with the requirements of Article 4.2(b) and should be affirmed by the Appellate Body.

e. The ITC's Causation Analysis for Cold-Finished Bar Was Consistent With Articles 2.1, 3.1 and 4.2 of the Safeguards Agreement

251. The Panel also found that the ITC's causation analysis for cold-finished bar was not consistent with the requirements of Articles 2.1, 3.1 and 4.2 of the Safeguards Agreement.[329] The Panel concluded that the ITC failed to establish a causal link between increased imports and declines in the industry's condition.[330] The Panel also concluded that the ITC failed to distinguish the effects of demand declines in the cold-finished bar market from those of imports during the period of investigation.[331] As we discuss below, the Panel's findings on these issues are unfounded and should be reversed by the Appellate Body.

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[327] ITC Report, p. 99.
[328] ITC Report, p. 99 (emphasis added).
[329] Panel Reports, paras. 10.446-10.469.
[330] Panel Reports, paras. 10.447-10.458.
[331] Panel Reports, paras. 10.460-10.466.

i. The ITC Provided Findings and Reasoned Conclusions Demonstrating the Existence of A Causal Link Between Imports of Cold-Finished Bar and Serious Injury

252. In its report, the Panel concluded that the ITC failed to provide a reasoned and adequate explanation of its finding of a causal link between imports of cold-finished bar and the serious injury being suffered by the industry. The Panel contended that the "essential premise" of the ITC's causal link finding was that "aggressive" underselling by imports caused the industry to lose market share and revenues.[332] The Panel rejected this finding on two grounds. First, the Panel asserted, the record did not adequately support the ITC's finding of "aggressive" underselling by imports during the period.[333] Second, the Panel concluded that the ITC did not adequately establish that market share gains by low-priced imports in 2000 directly led to a corresponding decline in the industry's revenue and continued poor operating performance by the industry in that year.[334]

A. The ITC Correctly Concluded That Increased Import Volumes in 2000 Led to Declines in the Industry's Production, Shipment, and Revenue Levels in that Year

253. The Panel rejected the ITC's finding that aggressive underselling by imports in 2000 and 2001 caused the industry to lose market share during this period and to suffer corresponding declines in its production, shipment, and sales revenues levels.[335] The Panel asserted that the ITC's findings were undermined by the fact that "the significant declines in revenues and operating margin began well in advance of 2000, the year when, according to the USITC, continued underselling by the imports led to significant increases in import volume and market share."[336]

254. The Panel's reasoning on this issue is not well-founded. First of all, it appears to assume that the ITC did not evaluate whether the declines in the industry's revenue and profitability levels before 2000 were caused by imports or other factors in the market. Quite clearly, the ITC did. In its analysis, the ITC explicitly found that the industry had experienced significant declines in its profitability and revenue levels in 1999 but found also that these declines occurred at the same time that import volumes and market share were declining.[337] Given that demand declined in that year and that the domestic industry acknowledged that cold-finished bar pricing historically tracked demand, the ITC correctly concluded that the substantial declines in the

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[332] Panel Reports, paras. 10.450-10.451.
[333] Panel Reports, paras. 10.452-10.453.
[334] Panel Reports, paras. 10.454-10.458.
[335] Panel Reports, pars. 10.454-10.450.
[336] Panel Reports, para. 10.457.
[337] ITC Report, p. 107.

industry's profitability and revenue levels in 1999 were caused primarily by demand declines in that year.[338]

255. The ITC correctly rejected demand declines as a source of the substantial additional declines in the industry's revenue levels in 2000, however. In this regard, it is incontrovertible that, in 2000, import volumes increased by 33.6 percent and imports took 4.5 percentage points of market share from the domestic industry,[339] while the domestic industry saw its production levels drop by 3.9 percent, and its shipment levels drop by 3.4 percent.[340] It is also incontrovertible that domestic shipment prices declined in 2000 (by 1.1 percent), that the industry's net commercial sale revenues declined by 2.9 percent, and that the industry's operating performance in 2000 remained at a relatively "poor" level of 2.8 percent.[341] The declines in the industry's production, shipment and sales revenue levels occurred, moreover, in a market in which *demand grew* by 2.1 percent. Given all of this, the ITC quite reasonably found that the declines in the industry's profitability and sales revenue levels in 2000 were caused not by demand declines in that year (especially given that demand increased) but as a result of substantial volumes of sales that were lost to imports.[342]

256. Given these facts, the Panel simply had no basis for rejecting the ITC's finding that increased volumes of low-priced imports caused significant declines in the industry's production, shipment and sales quantities in 2000 or that these declines, in turn, led to significant declines in the industry's revenues as well as its continued poor operating performance in 2000. It is an elementary aspect of financial analysis that an industry's sales revenues and profits will decline as a direct result of sales and shipment declines in any year, even if the spread between the industry's costs and its prices remain essentially stable. That is exactly what happened to the domestic cold-finished bar industry in 2000.

257. In the face of an increase in import market share of 4.5 percent and an increase in import shipment levels of 33.6 percent in 2000,[343] the industry experienced significant and corresponding declines in its production, shipment and sales levels in 2000. Because the industry had more than sufficient unused capacity to supply product for the sales taken by imports in that year, it is not subject to dispute that the industry's production and shipment levels would have been substantially larger if the imports had not increased their volumes and share of the market in 2000.

258. Moreover, even though the spread between the industry's units sales values and its unit costs improved slightly in 2000 (which alleviated somewhat the impact of these lost sales on the

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[338] ITC Report, p. 107.
[339] ITC Report, p. 107 and Table LONG-C-4.
[340] ITC Report, p. 106, & Table Long-C-4.
[341] ITC Report p. 106 & Table Long-C-4.
[342] ITC Report, p. 106.
[343] ITC Report, Table LONG-C-4.

industry's operating margins) the industry's substantially lower production, shipment and sales levels in 2000 directly caused the industry's aggregate revenue levels to decline and its aggregate operating margins to remain at a "poor" level. In other words, the ITC reasonably concluded that, unlike 1999, the declines in the industry's condition and its continuing poor operating performance level in 2000 were the direct result of volume-based competition from imports. The ITC's conclusions on this issue were reasoned, adequate, and fully consistent with the record data. It is the Panel's finding to the contrary that is not reasoned or consistent with the record data.

259. In this regard, the Panel's findings are flawed because they appear to be premised on the belief that the industry's declines in 1999 and 2000 necessarily were caused by the same factor. However, this analysis does not recognize, as did the ITC, that the declines in the two years were caused by entirely separate events. In 1999, as the ITC found, the declines in the industry's condition were due primarily to *demand declines* in the market that had an adverse affect on the pricing and profitability levels of the industry. In 2000, however, the industry's condition was primarily affected by a surge in imports volume, which reduced the industry's production, sales, and revenue levels, and kept its profits at a low level. There is, quite simply, no particular connection between the events that led to the declines in the industry's performance in 1999 and 2000.

260. The Panel's reasoning on this issue is founded on an imprecise understanding of the ITC's findings and a less than complete appreciation of the record evidence. The ITC's finding that import market share increases in 2000 and 2001 led directly to declines in the industry's production, shipments, and revenues levels is, quite frankly, incontrovertible. The Appellate Body should reverse the Panel's finding and affirm the conclusions of the ITC.

B. The ITC's Underselling Findings Are Fully Consistent with the Record Evidence

261. The Panel also mistakenly rejected the ITC's finding of "aggressive" underselling by imports in 1999 and 2000. In its analysis, the Panel rejected the ITC's finding because the ITC relied on quarterly price comparison data, rather than annual AUV data, to assess whether imports were underselling the domestic merchandise.[344] According to the Panel, it was incumbent on the ITC to explain why it relied on the quarterly pricing data to the exclusion of the annual AUV data, given that it had – according to the Panel – relied on annual AUV data to perform its underselling analysis for other products covered by the steel measures.[345]

262. There are several flaws in the Panel's reasoning. First, the ITC did not generally rely on AUV data to perform its underselling analysis for other products subject to the steel safeguard

[344] Panel Reports, para. 10.452
[345] Panel Reports, para. 10.452

measures, as the Panel asserts. While it is true that the ITC referred to annual average unit values for domestic and imported merchandise as part of its pricing analysis for other products covered by the steel investigation,[346] the ITC only used these annual average unit values to assess *general* pricing trends for imports and domestic merchandise in the market place.[347] It did *not* use annual AUV data to make specific *underselling* findings because the AUV data can, and often does, reflect product mix variations between the imported and domestic merchandise. As a result, what might appear to be underselling or overselling by imports may simply reflect differences in product mix between the two sources of supply.

263. Instead, consistent with its usual practice, the ITC performed its underselling analysis for all products covered by the steel measures by examining the *quarterly price comparison data* contained in the ITC's Report.[348] The ITC relies on these comparisons, rather than annual AUVs, to perform its underselling analysis because the data are compiled for individual items within the like product categories. The use of item-specific pricing data ensures that the underselling/overselling reflects actual price competition for a particular, representative product in the like product category. Moreover, it lessens the likelihood that the pricing data would reflect product-mix differentials between the imported and domestic merchandise rather than actual underselling. Moreover, the use of quarterly, rather than annual data, allows the ITC to perform its analysis on a more detailed temporal basis as well.

264. Second, despite the Panel's finding to the contrary, the ITC clearly did provide findings and reasoned conclusions as to why it relied on the quarterly pricing data to perform its underselling analysis for cold-finished bar. In its analysis, the ITC stated that it was appropriate to rely on quarterly pricing data rather than AUV data for this purpose because:

> [I]n an analysis of whether there is overselling and underselling, pricing data for a specific product can provide more probative information than average unit value data, where comparisons between values for imports and domestically-produced products can reflect variations in product mix. This is particularly true for a product such as cold-finished bar which covers a broad range of product types and values.[349]

265. Given these considerations, it is clear that the ITC properly relied on its quarterly price comparison data, rather than AUV data, to assess whether imports were aggressively underselling domestic cold-finished bar merchandise. That evidence fully supported the ITC's findings that

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[346] *See, e.g.,* ITC Report, p. 60-62 (CCFRS), p. 97 (hot-rolled bar) pp. 106-107 (cold finished bar), p. 113 (rebar), 163 (welded pipe), 176 (FFTJ).

[347] *See, e.g.,* ITC Report, p. 60-62 (CCFRS), p. 97 (hot-rolled bar) pp. 106-107 (cold finished bar), p. 113 (rebar), 163 (welded pipe), 176 (FFTJ).

[348] *See, e.g,* ITC Report, pp. 61-62 (CCFRS), p. 97 (hot-rolled bar), pp. 105-106 (cold-finished bar), p. 113-14 (rebar), p. 163 (welded pipe), p. 176 (FFTJ), p. 211 (stainless steel bar), p. 220 (stainless steel rod).

[349] ITC Report, p. 105, n. 627.

cold-finished bar imports consistently undersold the domestic merchandise during 1999 and 2000, that the margins of underselling by imports increased substantially beginning in the second quarter of 1999, and that imports continued to undersell domestic merchandise by significant margins in 2000. The Panel's findings to the contrary are unfounded and, are, in essence, an improper attempt to question the ITC's choice of methodology to assess the existence of underselling. The Appellate Body should, therefore, reject the Panel's finding that the ITC's underselling analysis was not reasoned and adequate.

ii. The ITC Properly Separated and Distinguished the Effects of Demand Declines from the Effects of Cold-finished Bar Imports In its Analysis

266. The Panel also concluded that the ITC failed to adequately distinguish the effects of demand declines from the effects of imports in its causation analysis.[350] According to the Panel, the ITC acknowledged that demand declines were a source of injury to the industry, but then improperly dismissed this factor as a source of injury to the industry in 2000 on the grounds that there were no declines in demand in that year.[351] According to the Panel:

> [T]he mere fact that demand increased during a segment of the period of investigation during which injury persisted does not detract from the conclusion reached by the USITC itself that decline in demand contributed to injury that was being suffered by the domestic industry.[352]

The Panel asserted that there was nothing in the ITC's report to indicate whether and how the injury caused by this factor was not attributed to increased imports.[353]

267. As the United States noted above in its discussion of the ITC's causal link analysis, the ITC carefully evaluated the effects of demand declines during the period and distinguished those effects from the effects of imports. For 1999, the year in which the industry first saw its operating margins decline significantly, the ITC correctly found that imports lost market share and that demand declined.[354] As a result, the ITC concluded, declining demand in 1999 had caused the industry's pricing, revenues, and profitability levels to fall from their levels in 1998.[355] As for 2000, when the industry saw significant declines in its production, shipment, and revenues levels, the ITC correctly found that the deterioration in the industry's condition could not possibly be attributed to demand declines because demand actually increased in that year.[356]

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[350] Panel Reports, paras. 10.461-10.466.
[351] Panel Reports, para. 10.462.
[352] Panel Reports, para. 10.463.
[353] Panel Reports, para. 10.464.
[354] ITC Report, p. 106.
[355] ITC Report, p. 107.
[356] ITC Report, p. 107.

Because imports increased their market share considerably in that year, the ITC reasonably concluded that the serious declines in the industry's condition in 2000 were more directly attributable to imports than changes in demand.

268. In other words, the ITC separated and distinguished the effects of demand declines from those of imports by examining whether the industry's profitability and revenue declines correlated with demand declines during 1999 and 2000. By doing so, it was able to determine that demand declines caused the deterioration in the industry's condition in 1999 but could not explain the industry's continued deterioration in 2000. By examining these factors and noting that they had an impact on the industry at different points in the period, the ITC was able to determine that demand declines and imports were not causing injury to the industry *at the same time*. Accordingly, the ITC reasonably ensured that it did not attribute to imports – which it found to be causing injury to the industry in 2000 – any of the effects of demand declines, which had caused injury to the industry in 1999. With this analysis, the ITC did, in fact, adequately distinguish the effects of these factors from one another. Nothing more is required under the Safeguards Agreement.

269. Indeed, the ITC's analysis is the sort of analysis the Panel asserted would satisfy the requirements of Article 4.2(b) elsewhere in its report. In its analysis of the ITC's causation findings for stainless steel bar, the Panel stated that the ITC could have provided a "reasoned and adequate" explanation of how it distinguished the effects of demand declines in the stainless bar market from the effects of imports by:

> demonstrat[ing] that there was no linkage between demand declines during the period of investigation and injury suffered in this particular case. More particularly, the USITC could have explained that operating margin, perhaps the most relevant injury factor in this regard, declined irrespective of demand trends. This analysis could have been bolstered by an explanation that declines in operating margins coincided with increases in imports rather than declines in demand.[357]

270. That is exactly what the ITC did. The ITC specifically examined whether the industry's operating margins "declined irrespective of demand trends" and whether the declines in the operating margins of the industry "coincided with increases in imports rather than declines in demand." More specifically, the ITC found that the declines in the industry's operating levels in 1999 were correlated with demand declines in 1999. However, it also found that the declines in demand in 2000 could not be correlated with demand declines in that year because demand increased in that year. Instead, because the industry's declines were correlated with significant import volume and market share increases in that year, the ITC properly concluded that they were caused by that import surge.[358] By conducting this analysis, the ITC was able to conclude,

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[357] Panel Reports, para. 10.558.
[358] ITC Report, p. 107.

consistent with the Panel's suggested approach, that operating income margins were not correlated with changes in demand but coincided most closely with import trends.

271. In sum, the Panel did not establish that the ITC failed to adequately distinguish the effects of demand declines from those of imports in its analysis. In its analysis, the Panel apparently failed to recognize that the ITC quite clearly separated the injurious effects of demand declines – which occurred only in 1999 – from those of imports, which had a substantial impact on the industry in 2000. By performing this analysis, the ITC ensured that it did not attribute to imports in 2000 the non-existent effects of demand declines in 1999. The Appellate Body should reverse the Panel's conclusions and affirm the ITC's findings on the matter.

f. The ITC's Causation Analysis for Rebar Was Consistent with Articles 2.1, 3.1, and 4.2 of the Safeguards Agreement

272. The Panel found that the ITC had properly established a causal link between increased imports of rebar and the serious injury being suffered by the industry[359] and that it had adequately distinguished the effects of capacity increases from those of imports in its analysis.[360]

273. However, the Panel found that the ITC failed to adequately distinguish the injurious effects of changes in the industry's costs of goods sold from the effects of imports in its analysis.[361] According to the Panel, the ITC failed to adequately explain why it had concluded that the increases in the industry's costs were not a cause of injury to the industry during the last years of the period. In particular, the Panel asserted, the ITC should have explained why an increase in the industry's costs of goods sold in 2000 and increases in its sales, general and administrative ("SG&A") expenses in 1999 and 2000 had not caused declines in the industry's profitability levels in those years.[362]

274. Again, the Panel's analysis does not fully take into account the ITC's entire analysis of this issue. As can be clearly seen from the face of the determination, the ITC did, in fact, provide findings and reasoned conclusions as to why the industry had not been injured by changes in its cost structure in 1999 or 2000.[363] In its analysis, the ITC specifically evaluated whether the changes in the industry's costs during the period between 1998 and 2000 had an impact on the industry's pricing and profitability levels.[364] The ITC found that the industry's unit COGS actually declined between 1998 and 1999 but noted that prices fell at a faster rate between the two years.[365] After noting demand had increased sharply between 1998 and 1999, the ITC

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[359] Panel Reports, paras. 10.470-10.477.
[360] Panel Reports, paras. 10.479-481.
[361] Panel Reports, paras. 10.482-10.484.
[362] Panel Reports, para. 10.484.
[363] Panel Reports, para. 10.484.
[364] ITC Report, p. 113-115.
[365] ITC Report, p. 113.

concluded that the industry should have been able to maintain or increase its prices in 1999 because producers normally do not need to "cut prices in a period of sharply increasing demand."[366] Accordingly, the ITC properly rejected the possibility that the declines in the industry's costs between 1998 and 1999 were the cause of the industry's profitability or pricing declines in 1999. Instead, the record data on the industry's costs suggested, as the ITC found, that some other factor was causing these declines in 1999.[367]

275. The ITC also evaluated whether the industry was adversely affected by changes in its cost structure from 1999 to 2000.[368] The ITC correctly noted that the record showed that the industry's per unit cost of goods sold increased and demand in the market grew between 1999 and 2000.[369] After noting that the industry's cost increases should have caused it to *increase* its prices in 2000, particularly in light of the increases in demand in that year, the ITC found that the industry's average unit sales values actually *declined* in 2000 from the previous year's level.[370] Since the increase in the industry's costs in 2000 could not conceivably have led to the declines in its prices in that year, the ITC correctly found that these cost increases were not the cause of the industry's price *or* profitability declines in that year.[371]

276. In other words, the ITC did provide a reasoned and adequate analysis of the reasons that it concluded that the industry's cost changes in 1999 and 2000 had not been a source of injury to the industry. By focusing on the difference between the industry's unit sales values and its unit costs, the ITC was able to assess precisely the extent to which the industry's pricing and profitability levels were adversely impacted by cost changes in 1999 and 2000.[372] Because the record clearly established that the industry's unit sales values were not able to keep pace with changes in its cost during this period, it also showed, as the ITC found, that it was not cost changes, but import price competition, that led to reductions in the industry's operating levels in these years.[373] The Panel's finding that the ITC did not perform such an analysis is simply mistaken.

277. In its analysis, the Panel also asserts that the ITC should have specifically indicated how increases in the industry's SG&A expenses affected the operating condition of the industry between 1998 and 2000.[374] The Panel fails to recognize that an analysis of these increases would not have changed the ITC's findings in any way. For example, the record showed that there was an *increase* in the industry's unit SG&A expenses between 1998 and 1999 of $1 per ton.

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[366] ITC Report, p. 113.
[367] ITC Report, p. 113.
[368] ITC Report, p. 114.
[369] ITC Report, p. 114.
[370] ITC Report, p. 114.
[371] ITC Report, p. 114.
[372] ITC Report, pp. 113-14.
[373] ITC Report, p. 113-14.
[374] Panel Reports, para. 10.484.

However, that increase was easily offset by a $16 per ton *decrease* in the industry's unit COGS in that year.[375] Given this, this single fact would not have changed the ITC's finding that the industry's unit costs declined overall in that year. Similarly, there was a $3 per ton increase in the industry's SG&A expenses between 1999 and 2000. However, that increase was significantly smaller than, and consistent with, the industry's $8 per ton increase in its unit COGS between 1999 and 2000. Again, the increase in the industry's SG&A expenses in that year would have not have changed the ITC's finding that the industry's costs were increasing at the same time that its prices were decreasing, thus indicating that some other factor was causing the declines in the industry's operating condition.[376] Given the foregoing, it was clear that the ITC was not mistaken in focusing on changes in the industry's unit COGS in 1999 and 2000 as a means of assessing the extent to which imports caused the declines in the industry's pricing and profitability levels in 1999 and 2000.

278. In other words, the ITC provide a detailed and reasoned assessment of the manner in which changes in the industry's costs impacted the industry's prices and profitability levels in 1999 and 2000. Moreover, the ITC's analysis showed clearly that, in this respect, rising input costs were not a cause of injury to the industry. The Panel's cursory analysis does not demonstrate any reason for finding the ITC's analysis not to be reasoned and adequate. The Appellate Body should, therefore, find that the ITC's analysis of this "other" factor was consistent with the requirements of Article 4.2(b).

g. The ITC's Causation Analysis for Welded Pipe Was Consistent with Articles 2.1, 3.1, and 4.2 of the Safeguards Agreement

279. The Panel concluded that the ITC properly established that there was a causal link between increased imports of welded pipe and the threat of serious injury to the industry.[377] However, the Panel also concluded that the ITC did not adequately distinguish the effects of industry capacity increases during the period or the "aberrational" performance of one domestic producer from the effects of imports in its analysis.[378] As we describe below, the Panel's conclusions on these issues are unfounded and should be reversed by the Appellate Body.

i. The ITC Provided Findings and Reasoned Conclusions That Capacity Increases Were Not a Source of Injury to the Domestic Welded Pipe Industry

280. The Panel concluded that the ITC failed to adequately distinguish the effects of the welded pipe industry's capacity increases from the effects of imports in its analysis.[379] According

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[375] *See, e.g.,* ITC Report, Table LONG-C-8.
[376] ITC report, p. 114.
[377] Panel Reports, para. 10.488.
[378] Panel Reports, para. 10.491-501.
[379] Panel Reports, para. 10.494-496.

to the Panel, the ITC "implicitly" acknowledged that these capacity increases were a source of injury to the industry, even though the ITC explicitly stated that the increases contributed in no "more than a minor way" to the industry's deterioration during the period.[380] Thus, the Panel concluded, Article 4.2(b) obliged the ITC to distinguish and separate the effects of this factor, even though the ITC found that the effects of these increases were minimal.

281. The Panel's conclusions are clearly in error. The Panel's approach was clearly rejected by the Appellate Body recently in *EC - Cast Iron Fittings*. In that report, the Appellate Body rejected the panel's finding that the EC was required by Article 3.5 of the Antidumping Agreement to perform a non-attribution analysis to assess the effects of cost differences between producers, even though the EC concluded that the differences were "minimal." In its report, the Appellate Body reasoned that:

> [O]nce the cost of production difference was found by the European Commission to be "minimal," *the factor claimed by Brazil to be "injuring the domestic industry" had effectively been found not to exist.* As such, there was no "factor" for the European Commission to "examine" further pursuant to Article 3.5 [, the non-attribution provision of the AD Agreement].[381]

The Appellate Body has previously stated that its findings concerning an investigating authority's obligation not to attribute the effects of other factors to imports under Article 3.5 of the Antidumping Agreement "provide guidance to it in the safeguards area."[382] Thus, in the safeguards context, a competent authority is not required to distinguish the effects of an "other" factor if that factor is found to contribute to injury in a "minimal," "minor" or "not significant" way.[383]

282. The ITC's conclusion with respect to the effects of capacity increases is substantively indistinguishable from the findings made by the EC in the *EC – Cast Iron Fittings* antidumping proceedings. After evaluating the possible effects of these capacity increases on the industry in its determination,[384] the ITC correctly noted that these increases kept pace with the growth in consumption during the period and did not, therefore, "contribut[e] in more than a *minor way* to the condition of the industry in 2000 or interim 2001." Obviously, by stating that the capacity increases did not contribute in more than a "minor way" to injury, the ITC had effectively found this factor not to be a source of injury for purposes of Article 4.2(b).

283. Moreover, the ITC's finding was fully consistent with the record evidence. The record showed that the increase in the industry's capacity levels of 1.5 million tons was only modestly

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[380] Panel Reports, para. 10.491-501.
[381] *EC – Cast Iron Fittings*, AB Report, para. 178.
[382] *US - Line Pipe*, AB Report, para. 214.
[383] *EC – Cast Iron Fittings*, AB Report, paras. 178 and 193.
[384] ITC Report, p. 165.

higher than the 1.2 million ton increase in domestic consumption of welded pipe during the same period.[385] In percentage terms, the industry's capacity increased by 22 percent between 1996 and 2000 while apparent consumption increased by 20 percent during this same period. It was therefore eminently reasonable for the ITC to conclude that this increase in capacity was consistent with the growth in demand during the period and should have been absorbed by that growth.[386] The Panel offered no evidence or findings in its analysis that indicated this conclusion was unwarranted.

284. In sum, the ITC was more than justified in finding that the industry's capacity increases were not a source of injury to the industry. The ITC was, therefore, not required to perform an analysis to separate and distinguish the minimal effects of this factor from those of imports as part of its causation analysis. The Panel's conclusions to the contrary are unfounded and should be reversed.

ii. The ITC Adequately Established that the "Aberrant" Performance of One Domestic Producer Was Not A Cause of Injury to the Industry

285. The Panel also concluded that the ITC did not adequately explain why it found the allegedly "aberrant" performance of one member of the welded pipe industry not to be a source of injury for the industry during the period.[387] According to the Panel, the ITC's analysis was flawed because it relied heavily on "subjective judgment" in its analysis.[388] As examples of this subjectivity, the Panel cited the ITC's findings that the "main" reason for the producer's operating declines was declines in its unit sales values, which were "largely" the result of import competition. According to the Panel, the ITC should have provided further explanation of the reasons for these conclusions. In particular, the ITC should have identified and examined reasons other than the "main" one (*i.e.*, imports) for the producer's declines, and explained why they had not caused the declines in the producer's performance.[389]

286. The Panel's analysis is flawed on a number of grounds. First the Panel based its finding that the ITC found this producer's performance to be a source of injury to the industry on the ITC's statement that exclusion of the producer from the industry "does not substantially alter the downward trend in industry profitability" during the period. According to the Panel, this statement implicitly acknowledges that this producer's performance "had some effect, though insubstantial" on the industry's performance. Accordingly, the ITC was required to "separate and distinguish" the effects of this factor in its analysis.

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[385] ITC Report, p. 165.
[386] ITC Report, p. 165.
[387] Panel Reports, paras. 10.497-499.
[388] Panel Reports, para. 10.499.
[389] Panel Reports, para. 10.499.

287. Again, the Panel misconstrues the ITC's findings. The ITC's finding on this issue clearly indicated that the producer in question did not have a significant impact on the industry's performance during the period. Although the details of the producer's problems and its operating results are confidential, the ITC evaluated the record evidence relating to this producer's performance in detail.[390] After evaluating that record data, the ITC noted that certain of the producer's costs had increased during the period but found that the main reason for the decline in the industry's financial performance was the "substantial drop in the unit values of the company's sales beginning in 1999."[391] As a result, the ITC rejected the notion that the producer's performance had been adversely affected by factors other than import pricing competition.

288. As a check on this analysis, the ITC examined the financial data for the industry, after excluding this producer's financial results, and found that the exclusion of the producer did not substantially alter the downward trends in the industry's condition in those years.[392] Neither the Panel – nor the complaining parties – have pointed to any information in the ITC's report or in the publicly available record that suggests that these conclusions are wrong. Given this, the ITC reasonably concluded that the evidence established that the producer's performance had not been a source of injury to the industry during the period. The Panel has not demonstrated any inadequacy in the ITC's findings or reasoned conclusions, or in its assessment of the underlying data.

289. As previously discussed, the Appellate Body has rejected the notion that an authority must "separate and distinguish" the effects of a factor from imports if the factor is reasonably found to have only a minimal or insignificant impact on the industry.[393] Accordingly, the issue for the Panel was not whether the ITC "separated and distinguished" the effects of this producer's operations from those of imports in its analysis. Instead, the Panel should have assessed whether the ITC had provided findings and reasoned conclusions as to why this factor was not causing any of the industry's declines.

290. Second, the Panel's analysis is premised on a significant misconception of the requirements of Article 4.2(b). Article 4.2(b) states that a competent authority must base its causation analysis on "objective evidence" but does not preclude a competent authority from making "subjective" judgments about the meaning of that evidence or from describing its assessment of that evidence in a "subjective" way. Indeed, the language of the Agreement quite clearly contemplates that a competent authority will make a number of "subjective" judgments about the import of "objective evidence," including such "subjective" judgments as to whether several products constitute one or more like products or whether imports are causing the requisite level of serious injury to an industry.

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[390] ITC Report, p. 165.
[391] ITC Report, p. 165.
[392] ITC Report, p. 165.
[393] *EC – Cast Iron Fittings*, AB Report, para. 178.

291. As we discussed above, the ITC correctly performed its assessment of the impact of this producer on the results of the industry by examining hard, statistical data showing the operating results of this producer and comparing those results to hard, statistical data showing the financial results of the remainder of the industry. By doing so, the ITC complied with its responsibility under Article 4.2(b) to base its causation analysis on an evaluation of "objective evidence." Having done so, the ITC was, obviously, not precluded from reaching a "subjective" conclusion about this evidence or from using "subjective" terms to discuss its analysis. Indeed, that is the essence of the causation analysis required under the Agreement. Given this, the Panel's analysis is premised on a fundamental misunderstanding of the nature of the "analysis" that must be contained in a competent authority's report under Article 4.2(b).

292. In this regard, the Panel's complaints about the "subjectivity" of the ITC's analysis result from its failure to recognize that this "subjectivity" is inherent in the confidentiality of the financial data discussed by the ITC in its analysis. As the Panel acknowledged elsewhere in its report, competent authorities are not permitted to disclose confidential data submitted by a particular party in a safeguards investigation.[394] As the Panel also recognized, the competent authorities may nonetheless satisfy their obligation to provide findings and reasoned conclusions on an issue involving confidential data by providing a general analysis "in words, rather than numbers."[395] Here, the ITC properly avoided the disclosure of the producer's confidential data in its report by providing its assessments of the producer's data in narrative fashion, using general descriptive terms. Indeed, the ITC itself noted that its "discussion of this issue [was] framed in general terms to avoid referencing business proprietary information."[396] Thus, by couching its findings and reasoned conclusions in general terms, the ITC did exactly what the Panel believed was required – it reasonably balanced its obligations under Article 3.1 and Article 3.2 of the Safeguards Agreement.

293. Finally, the Panel mistakenly asserts that the ITC should have "identified and considered" "possible reasons other than the asserted 'main' one for the company's decline" in its causation analysis.[397] In other words, the Panel appears to believe that the ITC should have performed a full-blown causation analysis for one member of the industry. However, the ITC is not required by the Safeguards Agreement to assess whether imports are causing serious injury to individual producers; it is required to perform its causation analysis, including its analysis of the injury caused by other factors, for the industry *as a whole*. The Panel's finding has no basis in the language of Article 4.2(b), nor has the Appellate Body ever indicated that such an analysis is required under the Agreement.

294. In sum, the ITC established, in a reasoned and adequate manner, that the declines in this producer's operating results were not the cause of the declines in the industry's overall condition

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[394] Safeguards Agreement, Article 3.2; Panel Report, paras. 10.274-275.
[395] Panel Reports, para. 10.275.
[396] ITC Report, p. 165, n. 1019.
[397] Panel Reports, para. 10.499.

during the period. The Panel's findings are premised on mistakes of law and do not call into question the sufficiency of the ITC's analysis for this factor. The Panel's findings should be reversed and the ITC's affirmed.

h. The ITC's Causation Analysis for Fittings, Flanges, and Tool Joints Was Consistent with Articles 2.1, 3.1, and 4.2 of the Safeguards Agreement

295. The Panel also concluded that the ITC's causation analysis for fittings, flanges, and tool joints ("FFTJ") was inconsistent with the requirements of Articles 2.1, 3.1 and 4.2(b).[398] Although the Panel concluded that the ITC had established a causal link between import trends and the industry's declines,[399] the Panel concluded that the ITC did not adequately distinguish the effects of capacity increases and purchaser consolidation from the effects of imports.[400] The Panel's reasoning on these issues does not call into question the sufficiency of the ITC's analysis and should be reversed.

i. The ITC Provided Findings and Reasoned Conclusions Demonstrating that Capacity Increases Were Not a Cause of Injury to the Industry

296. The Panel concluded that the ITC failed to adequately distinguish the effects of the FFTJ industry's capacity increases from the effects of imports in its analysis.[401] According to the Panel, the ITC "acknowledged that domestic capacity played a role in causing the injury that was suffered by the domestic industry" because the ITC stated that "'the increase in capacity [by the industry during the period] would not be expected to place substantial pressure on domestic prices.'"[402] According to the Panel, such a finding implies that the ITC believed that the capacity increases would "place some pressure on domestic prices, even if not substantial." Thus, the Panel found, the ITC was required to distinguish the effects of this factor from the effects of imports, even though this factor had only a limited injurious effect on the domestic industry."[403]

297. The Panel's analysis is both legally and analytically flawed. As discussed above, the Appellate Body has found that an authority need not "separate and distinguish" the effects of an "other" known factor if the factor contributes only "minimally" to the injury being suffered by an industry.[404] That is essentially what the ITC meant when it stated that capacity increases by the

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[398] Panel Reports, para. 10.536.
[399] Panel Reports, para. 10.521.
[400] Panel Reports, paras. 10.523-534.
[401] Panel Reports, para. 10.523-529.
[402] Panel Reports, para. 10.524.
[403] Panel Reports, para. 10.527.
[404] *EC – Cast Iron Fittings*, AB Report, paras. 178, 193-94.

FFTJ industry would not "place substantial pressure on domestic prices." Accordingly, the ITC bore no obligation to assess the nature and extent of this factor's impact on the industry.

298. Indeed, the evidence supports the ITC's finding that the industry's capacity increases had only a minimal effect on the industry during the period of investigation. As the ITC noted, the industry's aggregate capacity level grew by 7.4 percent between 1996 to 2000. However, this capacity growth was clearly outstripped by the 9.7 percent growth in apparent consumption in the market during this same period.[405] Moreover, the record also established that domestic capacity reached its highest level of the period examined in 1999 and then declined significantly in 2000 and in interim 2001.[406] After reviewing these trends, the ITC rejected the argument that the industry's capacity increases had an impact on domestic prices. As the ITC noted, capacity increases "would not be expected to place substantial pressure on domestic prices" during a period in which the increases are outstripped by a coincident growth in demand.[407] Even the Panel did not question the ITC's finding that, in this context, the contribution of these capacity increases to injury could only be of a "limited" and "not substantial" nature.[408]

299. Clearly, the ITC reasonably rejected the idea that these capacity increases could have more than a minimal effect on domestic prices during the period, given that the increases were outstripped by demand increases during that same period.[409] The ITC's analysis of this issue was direct, unambiguous, reasoned and complete. Nothing more was necessary under the Safeguards Agreement. The Panel's reasoning on this issue did not demonstrate that the ITC's analysis was insufficient under Article 4.2(b).

ii. The ITC Established that Purchaser Consolidation Was Not a Cause of Injury to the Industry

300. The Panel also incorrectly found that the ITC failed to provide an adequate and reasoned explanation of the nature and extent of the injury caused by purchaser consolidation in the FFTJ market. In particular, the Panel found that the ITC's analysis failed to "provide any explanation of [its finding that] 'consolidation would not explain the reduction in domestic production, shipments, employment, and other non-price indicators that occurred during the period examined.'" Moreover, it asserted, the ITC failed to satisfy its obligation to establish explicitly

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[405] ITC Report, p. 175.

[406] ITC Report, p. 175.

[407] ITC Report, p. 178. The industry's capacity declined by 5.2 percent in 2000 and 4.6 percent in interim 2001 as compared to interim 2000. ITC Report, p. 175

[408] Panel Reports, paras. 10.524 & 10.527.

[409] In fact, it should be noted that, from 1999 to 2000, when imports had their largest annual increase in volume and market share during the period of investigation and the domestic industry ceased to operate profitably, U.S. capacity actually declined to its lowest level since 1996. ITC Report, Table TUBULAR-C-6.

that the injury caused by purchaser consolidation was properly separated and distinguished from other factors.[410]

301. The ITC did, in fact, adequately separate and distinguish the injury caused by purchaser consolidation from that of imports. The ITC specifically recognized that purchaser consolidation "would be expected to place some pressure on domestic prices." It noted, however, that there was only "one domestic producer who indicated that purchaser consolidation had negatively impacted price levels."[411] While recognizing the theoretical possibility that purchaser consolidation might have some impact on domestic prices, the ITC correctly noted that the serious injury being suffered by the domestic FFTJ industry was associated with declines in its market share, production, shipment, and employment levels, all of which were factors not directly affected by declines in price.[412]

302. Because the ITC correctly recognized that purchaser consolidation could not explain the declines in these indicators of the industry's condition, it reasonably concluded that the serious injury being suffered by the industry was more attributable to imports than purchaser consolidation.[413] By explaining that the serious injury it observed for the FFTJ industry was different in nature and broader in scope than the relatively limited price effects attributable to purchaser consolidation, the ITC satisfied its obligation not to attribute to imports any injury caused by purchaser consolidation.

303. In sum, the ITC properly assessed the nature and extent of any injury caused by this factor. The ITC correctly noted that purchaser consolidation could theoretically cause price declines but had not impacted the indicia of serious injury to the industry, such as production and shipments, that were not directly impacted by price declines in the market. The Panel's finding that the ITC's conclusions were not reasoned and adequate is unfounded.

i. The ITC's Causation Analysis for Stainless Steel Bar Was Consistent with Articles 2.1, 3.1, and 4.2 of the Safeguards Agreement

304. Finally, the Panel concluded that the ITC's causation analysis for stainless steel bar was not consistent with the requirements of Articles 2.1, 3.1 and 4.2 of the Safeguards Agreement.[414] In its analysis, the Panel correctly concluded that the ITC had provided a compelling explanation of the existence of a causal link between import trends and the stainless steel bar industry's declines.[415] However, it erred by concluding that the ITC failed to ensure, through a reasoned

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[410] Panel Reports, para. 10.533.
[411] ITC Report, p. 178.
[412] ITC Report, p. 178.
[413] ITC Report, pp. 176-178.
[414] Panel Reports, para. 10.569.
[415] Panel Reports, para. 10.553.

and adequate explanation, that it did not attribute to imports the effects of late period demand declines and energy cost increases.[416]

i. The ITC Adequately Distinguished the Injurious Effects of Late Period Demand Declines from Those of Imports In its Analysis

305. In its analysis, the Panel concluded that the ITC acknowledged that demand declines had caused injury to the industry during late 2000 and early 2001. The Panel concluded that the ITC improperly dismissed demand declines as a cause of injury to the industry merely on the grounds that the "'industry's inability to maintain its operating profits in the face of these demand declines . . . is a direct result of the increasing share of the market obtained by imports and their consistent underselling of domestic merchandise during the period.'"[417]

306. The Panel's conclusion does not fully reflect the complexity of the ITC's analysis of the effects of demand declines on the industry during the period. In its analysis of this issue, the ITC examined the changes in demand that occurred in the stainless steel bar market during the entire period of investigation. As the ITC stated in its determination, demand for stainless steel bar fluctuated somewhat but grew overall between 1996 and 2000.[418] On a year to year basis, the ITC noted, demand increased from 1996 to 1997 but then declined in 1998 and 1999. Demand then increased considerably in 2000 but subsequently declined in interim 2001.[419]

307. After examining these trends, the ITC then evaluated whether declines in the industry's operating condition were correlated with demand declines during the period. The ITC acknowledged that declines in the industry's operating margins did appear to correlate with demand declines in late 2000 and interim 2001.[420] Nonetheless, the ITC correctly found that the stainless steel bar industry had been experiencing serious declines in its market share, production volumes, sales levels, employment levels, and profitability levels during the years prior to 2000 and 2001,[421] when demand was fluctuating and imports increasing. Given the lack of correlation between changes in the industry's condition and changes in demand during this period, the ITC reasonably rejected the respondents' arguments that demand declines were causes of injury to the industry. Instead, the ITC found, the industry's inability to maintain its operating profits in the face of demand declines in late 2000 and 2001 was the "direct result of the increasing share of the market obtained by imports and their consistent underselling of domestic merchandise during the period."[422]

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[416] Panel Reports, paras. 10.555-567.
[417] Panel Reports, para. 10.558.
[418] ITC Report, p. 208.
[419] ITC Report, p. 208.
[420] ITC Report, p. 212.
[421] ITC Report, p. 212.
[422] ITC Report, p. 212.

308. As can be seen, the ITC closely evaluated the effects that were attributable to demand declines. In particular, the ITC properly noted that significant demand declines became evident only during the final three quarters of the period of investigation.[423] However, it also correctly noted that these late-period demand declines could not possibly have contributed to the serious declines in the condition of the industry during the years prior to this period, when demand was fluctuating.[424] By performing an analysis that assessed whether imports were causing injury to the industry during a period of increasing demand, the ITC was able to distinguish the effects of these two factors in the final quarters of the period of investigation from those attributable to imports during prior periods.

309. Indeed, the Panel's finding is inconsistent with its own statements about the sort of analysis that would satisfy the requirements of Article 4.2(b), second sentence. When addressing this issue for stainless steel bar, the Panel asserted that the ITC could have satisfied this obligation by explaining "that there was no linkage between demand declines during the period of investigation and injury suffered," and "that operating margin, perhaps the most relevant injury factor in this regard, declined irrespective of demand decline trends."[425] The Panel also asserted that this analysis could have been bolstered by an explanation that declines in operating margins coincided with increases in imports rather than increases in energy costs."[426]

310. That is exactly what the ITC did. After reviewing the data described above, the ITC explicitly found that:

> [T]here were substantial declines in the industry's production, sales, and *profitability levels* during the years prior to 2000 and 2001. In particular, . . . the industry's market share, production volumes, employment levels, and *profitability levels* all declined considerably during the period from 1996 to 1999 *in the face of increasing import volumes*.[427]

Clearly, the ITC's analysis was fully consistent with the standard enunciated by the Panel in its report. The ITC did, in fact, evaluate whether the industry's operating income (i.e., profitability levels) declined, irrespective of changes in demand. Moreover, the ITC did find that profitability declines correlated more closely with import trends than demand declines in late 2000 and interim 2001. Given this, the Panel should have applied its own standard and affirmed the ITC's findings on this issue.

311. In sum, by evaluating whether declines in the industry's condition correlated more closely with imports than demand declines during the period, the ITC adequately distinguished the

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[423] ITC Report, p. 212.
[424] ITC Report, p. 212.
[425] Panel Reports, para. 10.558.
[426] Panel Reports, para. 10.563.
[427] ITC Report, p. 212 (emphasis added).

effects of energy cost increases in the stainless bar market from those of imports in its causation analysis. The Appellate Body should reverse the Panel's findings.

ii. The ITC Adequately Distinguished the Effects of Late Period Energy Cost Increases from Those of Imports in its Causation Analysis

312. The Panel also found that the ITC failed to separate and distinguish, in a reasoned and adequate manner, the effects of increased energy costs in its causation analysis.[428] As in its analysis for demand declines, the Panel asserted that the ITC should have, but failed to, provide a reasoned and adequate explanation "that there was no linkage between energy cost increases during the period of investigation and injury suffered," and could have done so by "explain[ing] that operating margin declined irrespective of energy cost trends."[429] The Panel also stated that this analysis could have been bolstered by an explanation that declines in operating margins coincided with increases in imports rather than increases in energy costs."[430]

313. Again, that is exactly what the ITC did. As in its conclusions regarding demand declines, the ITC found that "there was . . . an increase in energy costs in late 2000 and interim 2001."[431] Accordingly, the ITC also examined the record data concerning the industry's profitability, market share, production, and employment levels during the previous years as a means of evaluating whether declines in these factors correlated more closely with these cost increases or with changes in import volumes.[432] As a result of its evaluation of this data, the ITC explicitly found that:

> [T]here were substantial declines in the industry's production, sales, and *profitability* levels during the years prior to 2000 and 2001. In particular, . . . the industry's market share, production volumes, employment levels, and *profitability* levels all declined considerably during the period from 1996 to 1999 *in the face of increasing import volumes*.[433]

Clearly, the ITC's analysis was fully consistent with the standard enunciated by the Panel in its report. The ITC did, in fact, evaluate whether the industry's operating income (i.e., profitability levels) declined irrespective of changes in energy costs. Moreover, the ITC did find that profitability declines did correlate more closely with import trends than energy cost changes in late 2000 and interim 2001. Given this, the Panel should have applied its own standard and affirmed the ITC's findings on this issue.

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[428] Panel Reports, paras. 10.562-65.
[429] Panel Reports, para. 10.563.
[430] Panel Reports, para. 10.563.
[431] ITC Report, p. 212.
[432] ITC Report, p. 212.
[433] ITC Report, p. 212 (emphasis added).

314. In sum, by evaluating whether declines in the industry's condition correlated more closely with imports than energy cost increases, the ITC did undertake an analysis designed to separate and distinguish the effects of energy cost increases in the stainless bar market from those of imports in its causation analysis. The Panel's finding to the contrary was not consistent with the Safeguards Agreement and should be reversed.

E. The Panel's Conclusions on Parallelism Are Without Basis in Either Article 2.1 or Article 4.2 of the Safeguards Agreement

1. Two General Conclusions the Panel Articulated Served As Its Grounds for Rejecting the ITC's Parallelism Analysis

315. The Panel concluded that the application of safeguards measures with respect to each product at issue was inconsistent with Articles 2.1 and 4.2 because the United States failed to comply with the obligation of "parallelism."[434] The United States excluded from the safeguard measures imports from Canada, Mexico, Israel, and Jordan pursuant to free-trade agreements it has entered with these countries. The Panel concluded that the United States had not established that imports from sources other than these four countries satisfied the conditions for application of a safeguards measure for any of the pertinent products.

316. Although the Panel purported to conduct a product-by-product examination of the parallelism claims, its basis for rejecting the ITC's parallelism analysis varied little from product to product. The Panel asserted two general conclusions in its introductory analytical section that served as the basis for its product-specific analyses.[435]

317. First, the Panel found that under Article 2.1 of the Safeguards Agreement:

> [i]ncreased imports from sources ultimately excluded from the application of the measure must hence be *excluded* from the analysis. The increase of these imports and their effect on the domestic industry cannot be used to support a conclusion that the product in question "is being imported in such increased quantities so as to cause serious injury." This makes it necessary – whether imports excluded from the measure are an "other

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[434] Panel Report, WT/DS248/R, para. 11.2 (all products); WT/DS249/R, para. 11.2 (all products); WT/DS251/R, para. 11.2 (all products), WT/DS252/R, para. 11.2 (all products); WT/DS253/R, para. 11.2 (all products); WT/DS254/R, para. 11.2 (all products); WT/DS258/R, para. 11.2 (all products); WT/DS259/R, para. 11.2 (all products).

[435] The Panel additionally declined to review the parallelism analyses of Commissioner Bragg with respect to the measures imposed on tin mill and stainless steel wire on the grounds that Commissioner Bragg's analyses concerned broader product groups. Panel Reports, paras. 10.614-10.615, 10.684-10.685. This is another variant of the Panel's conclusion, which it also stated with respect to increased imports and causation, that determinations of individual ITC Commissioners must all address the same like product. We discuss this issue in section F below.

> factor" or not – to account for the fact that excluded imports may have some injurious impact on the domestic industry. As said, this impact must not be used as a basis supporting the establishment of the Article 2.1 criteria.[436]

318. The Panel rejected nine of the ten safeguards measures (all except the one pertaining to stainless steel rod) because the ITC had failed to satisfy the obligation, which the Panel had articulated, to account for the effects of imports from excluded sources. In each of the pertinent product-by-product analyses, the Panel used very similar, and sometimes identical, language, to conclude that the ITC had not satisfied this obligation.[437] For ease of reference, this requirement will be called the "excluded sources accounting requirement." As discussed further below, this is a new requirement that lacks any textual basis whatsoever in the Safeguards Agreement, and the Panel had no authority to create it. The Panel consequently could not find the U.S. safeguards measures defective because they did not satisfy a non-existent obligation.

319. Second, the Panel concluded that, under Articles 2.1 and 4.2, the competent authorities must satisfy the requirements of parallelism by establishing "explicitly" that imports covered by the safeguard measure satisfy the conditions for application of the measure. The Panel indicated that such an "explicit" finding must be clear and unambiguous, and must leave nothing implied or suggested.[438]

320. The Panel used this conclusion as the basis for finding that the United States had not adequately justified the exclusion of Israel and Jordan from the safeguards measures for any product subject to the measures. In each product-specific analysis, the Panel used nearly identical language to state that the United States had not established explicitly that, when imports from Israel and Jordan were excluded, the imports from sources covered by the measure satisfy the conditions for application of a safeguards measure.[439] As discussed further below, the ITC in fact provided explicit findings. The Panel, however, incorrectly construed the Safeguards

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[436] Panel Reports, para. 10.598 (emphasis in original) (footnotes deleted).

[437] Panel Reports, paras. 10.605-10.606 (CCFRS), 10.621 (tin mill), 10.629-10.630 (hot-rolled bar), 10.639-.640 (cold-finished bar), 10.650 (rebar), 10.657 (welded pipe), 10.666-10.667 (FFTJ), 10.676-10.677 (stainless steel bar), 10.688 (stainless steel wire). The Panel did not make a similar finding concerning stainless steel rod. The apparent reason for this is that because imports of stainless steel rod from excluded sources constituted only 0.08 percent of all imports, there were virtually no imports from such sources and consequently no "effects" of such imports to exclude. *See id.*, para. 10.697.

[438] Panel Reports, para. 10.595. As noted in section III.A.3.b of this submission, the term "explicit" cannot impose an autonomous requirement on a Member, as that term does not appear in the Safeguards Agreement.

[439] *See* Panel Reports, paras. 10.607-10.608 (CCFRS), 10.622 (tin mill), 10.631-10.632 (hot-rolled bar), 10.641-10.642 (cold-finished bar), 10.651-10.652 (rebar), 10.658-10.659 (welded pipe). 10.668-10.669 (FFTJ), 10.678-10.679 (stainless steel bar), 10.689-10.690 (stainless steel wire), 10.698 (stainless steel rod).

Agreement to require that findings be in a specific format. This result not only lacks support in the text of the Safeguards Agreement, but also is inconsistent with how the Panel interpreted the Safeguards Agreement elsewhere in its discussion of parallelism.

2. The Panel's "Excluded Sources Accounting Requirement" Imposes Obligations on Authorities Not Found in the Safeguards Agreement

321. As stated, the Panel proceeded from the premise that Article 2.1 requires the authorities to account for the effects of imports from sources not covered by a safeguards remedy. Article 2.1 states as follows:

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

(Footnote omitted.)

322. The language of Article 2.1 does not specifically address "parallelism." Nevertheless, in *US – Wheat Gluten*, the Appellate Body construed Article 2.1 by reference to Article 2.2, which states that "[s]afeguard measures shall be applied to a product being imported irrespective of its source." The Appellate Body reasoned that, since Articles 2.1 and 2.2 both use the phrase "product . . . being imported," the phrase should have the same meaning for purposes of both articles. According to the Appellate Body, this meant that "the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2."[440]

323. Although the Appellate Body found that Article 2.1 contained a parallelism requirement, it did no more than state the nature of the requirement (*i.e.*, that the imports included in the injury determination be from the same sources as the imports subject to the measure) and that the authorities must provide an explicit statement that imports from sources subject to the measure satisfied the conditions for application of a safeguard measure.[441] The Appellate Body did not purport to set conditions on *how* an authority must conduct its parallelism analysis. When the Appellate Body subsequently considered the parallelism requirement in *US – Line Pipe*, its explanation of the requirement was the same as its explanation in *Wheat Gluten.* Again, the

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[440] *US – Wheat Gluten*, AB Report, para. 96.
[441] *See US – Wheat Gluten*, AB Report, paras. 96, 98.

Appellate Body did not purport to impose requirements concerning the nature of the authorities' parallelism analysis.[442]

324. The Panel, however, decided to take a divergent – and unwarranted – approach. Careful examination of paragraph 10.598 of the Panel Reports – the source of the Panel's "excluded sources accounting requirement" – demonstrates this. The first sentence of the paragraph, citing *US – Line Pipe*, states that "if the scope of the measure does not match the scope of the determination, competent authorities must 'establish *explicitly* that increased imports from non-[FTA] sources alone' cause serious injury or threat of serious injury."[443] This sentence, to the extent that it indicates that parallelism requires authorities to focus separately on imports from sources that are not excluded from the measure, accurately reflects what the Appellate Body said in *Line Pipe*. As stated above, *Line Pipe* relied on *Wheat Gluten*.

325. The Panel did not stop there, however. It then proceeded to conclude that:

> [i]ncreased imports from sources ultimately excluded from the measure must hence be *excluded* from the analysis. The increase of these imports and their effect on the domestic industry cannot be used to support a conclusion that the product in question "is being imported in such increased quantities so as to cause serious injury." This makes it necessary – whether imports excluded from the measure are an "other factor" or not – to account for the fact that excluded imports may have some injurious impact on the domestic industry.[444]

The Panel cited *no* authority – not the language of the Safeguards Agreement, not prior Appellate Body or Panel reports – in support of any of these statements. Indeed, paragraph 10.598 of the Panel Reports contains no citations at all except with respect to its first sentence.

326. The Panel's disinclination to cite any authority for its "excluded sources accounting requirement" is understandable. The phrase "such product is being imported" in Article 2.1, which the Appellate Body has read to impose a "parallelism" requirement, does not in any way specify the nature of a "parallelism" analysis. It certainly does not state that a parallelism analysis entails steps not found in an analysis of imports from all sources. The only analysis Article 2.1 requires pertains to imports "in increased quantities" and "under such conditions as to cause or threaten to cause serious injury." Thus, the language of the provision indicates that the analytical steps involved in finding that the conditions for imposition of a safeguard measure are satisfied are the same whether or not imports from specific sources are excluded from the safeguards measure pursuant to a free-trade agreement. Thus, the language of Article 2.1 cannot

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[442] *US – Line Pipe*, AB Report, para. 198.
[443] Emphasis and bracketing in original.
[444] Panel Reports, para. 10.598 (emphasis in original).

support the Panel's insertion of an extra analytical step – the "excluded sources accounting requirement" – with respect to parallelism.

327. Moreover, the analysis required by Article 2.1 pertains to "such product" that "is being imported." While the most natural reading of this language would be to interpret it to encompass *all* imports, the United States acknowledges that the Appellate Body has read this language to refer to only imports from sources which are subject to a safeguards measure. Nevertheless, it simply is not possible to read Article 2.1 to require a separate analysis of imports from those sources *not* subject to the safeguards measure. Yet this is precisely what the Panel did by requiring not only that an authority exclude from its database imports from excluded sources – which is what the ITC did – but also that it affirmatively account for the effect of such imports.

328. Nor does Article 4.2 provide textual support for the Panel's imposition of the "excluded sources accounting requirement." Article 4.2(b) states that "[w]hen factors other than increased imports are causing injury at the same time [as increased imports], such injury shall not be attributed to increased imports." The Panel, although noting at several places that the parties disputed the applicability of this provision to a parallelism analysis,[445] never squarely resolved this dispute, and never referred to either the text or Appellate Body constructions of Article 4.2(b) as the source of its new requirement concerning imports from excluded sources.[446] It had good reason not to do so. There is nothing in the language of Article 4.2(b) that could be read to require that an authority conduct the same type of examination with respect to *imports* from sources not included in the remedy that the Appellate Body has stated an authority must conduct for factors *other than* imports.[447] It also cannot serve as the source for the Panel's "excluded sources accounting requirement."

329. Consequently, the Panel's "excluded sources accounting requirement" has no basis or support in the language of the Safeguards Agreement. It also has no basis in prior Appellate Body reports. As previously stated, these reports indicate that an authority should make explicit findings that imports from sources subject to the safeguards measure meet the conditions for imposition of a safeguards measure. They do not otherwise specify how an authority must conduct a "parallelism analysis." They certainly do not require a distinct or explicit analysis of imports from sources *not* subject to the measure.

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[445] *See* Panel Reports, paras. 10.347-10.349, 10.597.

[446] The Panel's use of the phrase "whether imports excluded from the measure are an 'other factor' or not" in paragraph 10.598 of its Report suggests that the Panel did not find it necessary to resolve whether imports from excluded sources needed to be addressed pursuant to the non-attribution language in Article 4.2(b). Moreover, the portion of the Panel's parallelism analysis referring to imports from excluded sources does not use the phrase "separate and distinguish," which Panels and the Appellate Body now commonly use to describe the Article 4.2(b) non-attribution obligation.

[447] The Panel itself acknowledged the logical inconsistency of treating imports from specific sources as a factor other than imports. Panel Reports, para. 10.348.

330. The structure of the Panel's report – as well as an examination of the pertinent language of the Safeguards Agreement and prior Appellate Body reports – confirms that the "excluded sources accounting requirement" was one that was never previously recognized prior to its articulation by the Panel. The requirement has no basis in the Safeguards Agreement. Thus, it is a new requirement the Panel first created, and then stated that a Member must satisfy before imposition of a safeguards measure.

331. Such Panel action, however, is clearly contrary to the DSU. Article 3.2 of the DSU emphasizes that the purpose of the WTO dispute settlement process is:

> to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided by the covered agreements.

332. The Panel's introduction of an "excluded sources accounting requirement" for parallelism was not based on, and has no support in, the actual language of the Safeguards Agreement. Instead, the Panel created a new requirement that adds to a Member's obligations under the Safeguards Agreement. Consequently, the Panel's ruling that a Member must account for the effects of imports from sources not subject to a safeguards measure must be reversed as inconsistent with Article 2.1 of the Safeguards Agreement.

333. Because the Panel's "excluded sources accounting requirement" must fail, its unsurprising conclusions in the product-by-product analysis that the United States failed to satisfy a requirement never previously identified or articulated must fail as well.

3. The Panel Misconstrued the Appellate Body's Requirement that Findings Must Be "Explicit" as a Requirement that an Authority Make Redundant Findings

334. As previously stated, the Panel rejected the ITC's findings concerning the exclusion of imports from Israel and Jordan on the grounds that they were insufficiently explicit.

335. The actual findings that the ITC made concerning Israel and Jordan appear in two sources. In its views concerning remedy, the ITC characterized imports from these sources using such terms as non-existent, virtually non-existent, small, and sporadic.[448]

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[448] *See* ITC Report, pp. 366 & n.69 (for CCFRS, imports from Israel were "small and sporadic" and there were "virtually no" imports from Jordan), 376 & n.117 (no imports of hot-rolled bar from Jordan or of cold-finished bar or rebar from either Israel or Jordan; imports of hot-rolled bar from Israel were "at very low levels"); 385 & n.155 (imports of welded pipe from Israel were less than 1 percent of total imports from 1996 to 1999 and nonexistent thereafter; there were no imports of welded pipe from

336. The underlying data confirm that, even for products for which there were reported imports from Israel or Jordan, the volume of such imports was infinitesimal. Imports from Jordan were essentially non-existent. There were no imports of any pertinent product in 1996 and 1998, and only tiny quantities of a single product were imported in each of the other years of the ITC's period of investigation:

Product	Year	Jordanian percentage of total imports
FFTJ	1997	0.006
Stainless steel wire	1999	0.004
Stainless steel wire	2000	0.010

Source: ITC Dataweb (US-40)

Jordan); 390 & n.180 (imports of FFTJ from Israel accounted for less than 1 percent of total imports during each year of the period of investigation and there were virtually no imports of FFTJ from Jordan); 399 & n.225 (imports of stainless steel bar from Israel accounted for a "small or non-existent percentage" of total imports, and there were no imports of stainless steel bar from Jordan); 405 & n.268 (imports of stainless steel rod from Israel accounted for a "small or non-existent percentage" of total imports, and there were no imports of stainless steel rod from Jordan); 414 & n.39 (opinion of Commissioner Koplan) (imports of stainless steel wire from Israel accounted for a "small or non-existent percentage" of total imports, and there were virtually no imports of stainless steel wire from Jordan); 529 & n.5 (opinion of Commissioner Miller) (combined imports of tin mill from Israel and several other countries potentially subject to exclusion were "small and sporadic" and there were no imports of tin mill from Jordan).

Imports from Israel present a similar situation. The table below provides the percentage of each year or part year's total imports represented by imports from Israel:

Israeli percentage of total imports, by year

						January-June	
	1996	1997	1998	1999	2000	2000	2001
CCFRS	0.00	--	--	0.00	0.00	0.00	0.00
Hot-rolled bar	0.00	0.01	0.00	0.00	0.00	0.00	0.01
Welded pipe	0.33	0.36	0.04	0.00	--	--	--
FFTJ	0.63	0.62	0.18	0.24	0.24	0.19	0.27
Stainless steel bar	0.01	--	--	0.01	0.12	0.21	0.05
Stainless steel wire	0.08	--	0.02	0.09	--	--	0.01

Source: ITC Report, Tables LONG-C-3, TUBULAR-C-4, TUBULAR-C-6, STAINLESS-C-4, STAINLESS-C-7, E-3; ITC Memorandum INV-Y-209, Table FLAT-ALT7 (US-33). Percentages that are greater than zero but less than 0.005% are expressed as "0.00." Periods with no imports are expressed as "--".

337. Consequently, there were four products (tin mill, cold-finished bar, rebar, and stainless steel rod), where there were no imports from Israel and Jordan during any portion of the period of investigation. For two additional products (CCFRS and hot-rolled bar) imports from Israel and Jordan, combined, never exceeded 0.01 percent of all imports during any year in the period of investigation. For the remaining four products, imports from Israel and Jordan, combined, never exceeded 0.3 percent of all imports during any time in the last three and one-half years of the period of investigation.

338. Additional ITC findings concerning Israel and Jordan appear in the Second Supplemental Report. The ITC referenced its views concerning remedy and stated, in accordance with those findings, "that exclusion of imports from Israel and Jordan would not change the conclusion of the Commission or of individual Commissioners."[449]

339. This statement immediately preceded the ITC's parallelism analysis for imports from sources other than Canada and Mexico. In the context in which it appeared, the meaning of the statement was clear: imports from Israel and Jordan were either non-existent or so small that the Commission's conclusions for imports from sources other than Canada and Mexico (*i.e.* non-NAFTA imports) were also applicable to imports from sources other than Canada, Mexico,

[449] ITC Second Supplemental Report, p. 4.

Israel, and Jordan (*i.e.* non-FTA imports). The reasons for this are self-evident: the domestic industry data were identical whether non-NAFTA imports were considered or whether non-FTA imports were considered. The import data were precisely identical for a significant number of products. For the remaining products, the import data were virtually identical.

340. Consequently, the ITC's statements specifically address the Panel's concern that "[t]he other Members who are facing the safeguard measure should be able to assess its legality on the basis of the determination and explanations provided by the competent authorities."[450] The ITC's reasoning is complete, clear, and unambiguous: imports from Israel and Jordan were too small to affect the data on which the ITC relied for its conclusions. Because the data were not affected, neither were the ITC's analyses.

341. Indeed, the Panel recognized this principle in the discussion of stainless steel rod, the only product for which the Panel did not reject the ITC's parallelism analysis on the grounds it failed to exclude the effect of imports from Canada and Mexico. The Panel states that it "agrees with the United States that in a case where excluded imports account for less than 0.08% of total imports, it would normally be possible to reach the conclusion that imports from other sources satisfy the same requirements as all imports do."[451] Thus, under the Panel's own logic, it is adequate for an authority to state that, because the volume of imports is extremely small, the authority's conclusions with respect to all imports are also applicable to imports from all sources other than excluded sources.

342. This is precisely what the ITC did with respect to Israel and Jordan. The Panel nevertheless concludes that the ITC's findings are inadequate. There is no principled basis for these conclusions. For example, for stainless steel rod, where the Panel criticizes the ITC for not expressing findings for imports from sources other than Canada, Mexico, Israel, and Jordan, it is by no means clear why the ITC's analysis of the exclusion of Canada and Mexico is apparently sufficient, when these imports accounted for less than 0.08% of total imports of the product, but the analysis of the exclusion of Israel and Jordan is not sufficient when there were no imports from these countries. Indeed, for the four products where there were no imports from Israel or Jordan, there were no additional findings the ITC conceivably could have made in addition to those it made in its discussion of non-NAFTA imports. The Panel's logic makes no more sense

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[450] Panel Reports, para. 10.596

[451] Panel Reports, para. 10.697. In this respect, the Panel's logic is consistent with the conclusion that the Appellate Body recently reached in *EC – Cast Iron Fittings*, AB Report, para. 178, that a "minimal" cost of production difference was essentially non-existent and thus did not warrant further examination pursuant to Article 3.5 of the Antidumping Agreement. It is also consistent with the conclusion of the Panel (which was not appealed) in *Korea – Dairy* upholding Korea's calculation of increased imports notwithstanding that the import data Korea used included certain products outside the scope of the measure. The Panel observed that these products accounted for no more than 1.5 percent of total imports in any year and were thus "a very minor portion of the SMPP imports." *Korea – Dairy*, Panel Report, para. 7.60.

for the other products at issue, where the percentages of total imports represented by imports from Israel and Jordan were also very small.

343. The Panel appears to believe that it was not enough for the ITC to state that the findings that it made with respect to non-NAFTA imports were equally applicable to non-FTA imports. Instead, the ITC apparently had to repeat the findings word for word in a section specifically addressing non-FTA imports.[452] There is no basis in the Safeguards Agreement for requiring an authority to make redundant or unnecessary findings. This does not serve the interest of transparency: once an authority has made an "explicit" finding, there is no need to require that the authority repeat the finding with respect to every issue to which it is applicable.[453] Article 3.1 requires that competent authorities publish a report setting forth findings and conclusions on pertinent issues of fact and law. It does not require the use of a particular structure or format for the report. The Panel itself realized this when it concluded that parallelism findings need not be recited in a discrete section of the report, and that the United States could rely on both findings made in the initial ITC Report and the Second Supplementary Report to support its conclusions on parallelism.[454]

344. Consequently, the Panel's conclusions that the ITC did not make sufficiently "explicit" findings concerning the exclusion of imports from Israel and Jordan are illogical and contradict principles that the Panel itself articulated. Thus the Panel has failed to demonstrate that the ITC's conclusions violate either the parallelism requirement or the requirement of Article 3.1 of the Safeguards Agreement that there be a report setting forth findings and reasoned conclusions on pertinent issues of fact and law. Furthermore, the Panel's inconsistent and unprincipled decision making cannot be reconciled with its obligation under Article 12.7 of the DSU to provide reasoning sufficient to disclose the justification for its actions.[455] Consequently, the Panel's conclusions that the ITC did not make explicit findings with respect to the exclusion of imports from Israel and Jordan should be reversed.

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[452] *See*, *e.g.*, Panel Reports, para. 10.608 ("It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be necessary for the competent authorities to actually express the findings required under parallelism. . . .").

[453] The Panel itself recognized this point. It initially presented its analysis of determinations based on different like products in its discussion of increased imports of tin mill. Panel Reports, paras. 10.191-10.200. In subsequent discussions of determinations based on different like products, the Panel explains its findings as being taken "for the reasons set out in relation to the ITC's determination(s) on tin mill," or "refers to its discussion in the context of its review of the ITC's increased import determination in paragraphs 10.191-10.200 above." *E.g.*, Panel Reports, paras. 10.262, 10.422, and 10.572. If the Panel considered that simply cross-referencing previous analyses that did not change was sufficient to provide a "basic rationale" for its findings, as required under Article 12.7 of the DSU, then it certainly should have found that the ITC's similar approach on imports from Israel and Jordan was sufficient to provide the findings and reasoned conclusions required under Article 3.1.

[454] Panel Reports, para. 10.592.

[455] *See Mexico – HFCS*, Recourse to Article 21.5, AB Report, para. 106.

4. Had the Panel Applied the Proper Standards, It Would Have Concluded that the ITC's Parallelism Analysis Was Consistent with the Safeguards Agreement

345. As previously stated, the Panel's conclusion that the ITC's parallelism analysis was not consistent with the Safeguards Agreement was based on two general legal principles. We have demonstrated above that because neither principle is consistent with the Safeguards Agreement, the Panel's conclusions based on these principles must be reversed. Consequently, the Panel Reports provide no basis for a conclusion that the ITC's parallelism analysis does not satisfy the requirements of the Safeguards Agreement.

346. In the Panel proceedings, the United States pointed to numerous specific findings the ITC made with respect to each product for which safeguards measures were imposed to establish that imports from sources other than Canada, Mexico, Israel, and Jordan satisfied the conditions for application of a safeguards measure. Because the Panel's analysis proceeded from its articulation and application of non-existent and/or incorrect legal requirements, it did not review these ITC findings.

347. In other contexts, the Appellate Body has recognized that, after reversing a panel finding, it can complete the analysis only if the factual findings of the panel, or the undisputed facts in the panel record, provide sufficient basis for it to do so.[456] As the Appellate Body stated in *Korea – Dairy*, when a Panel has failed to make necessary findings of fact and undisputed facts in the Panel record are insufficient, the Appellate Body is "not in a position, within the scope of [its] mandate set forth in Article 17 of the DSU, to complete the analysis and make a determination as to whether a [defending party] acted inconsistently with its obligations. . . ."[457] Similarly, there is insufficient analysis by the Panel regarding the ITC's determinations and findings to enable the Appellate Body to complete the analysis of the the complaining parties' claims on parallelism.

348. We consequently believe that the Appellate Body does not have a sufficient foundation to conduct the analysis the Panel should have performed. However, if the Appellate Body decides to undertake this task, it should conclude that the ITC's parallelism analysis complied with the obligations actually set forth in Article 2.1 of the Safeguards Agreement. As previously stated, the most those obligations entail, pursuant to prior Appellate Body reports, is an explicit analysis indicating that imports from those sources subject to safeguard measures satisfy the conditions for a safeguard measure.

349. As the United States argued to the Panel, such an analysis encompasses five separate elements.[458] Each element was included in the ITC Report for each product subject to safeguard

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[456] *See*, *e.g.*, *US – Hot-Rolled Steel*, AB Report, paras. 235-36; *EC – Asbestos*, AB Report, para. 78 & nn. 48-49.

[457] *Korea – Dairy*, AB Report, para. 92.

[458] *See* Panel Reports, para. 7.1775.

measures. Rather than repeat our product-specific arguments to the Panel, we cite to those portions of the Panel Reports containing the citations to those portions of the ITC Report that satisfy each element.[459]

350. Our arguments here concern the reasoned conclusions provided in the ITC Report regarding imports from all countries other than Canada and Mexico, which are parties with the United States in the North American Free Trade Agreement (NAFTA). As we previously explained, because imports from Israel and Jordan were either non-existent or at infinitesimal levels, the discussion of non-NAFTA imports also provides the requisite explicit findings with respect to imports from all sources other than Canada, Mexico, Israel, and Jordan.

351. The first element is a specific finding that imports from sources other than excluded sources have increased. The United States demonstrated that the ITC Report contained such findings in its discussion of non-NAFTA imports.[460] The Panel did not find to the contrary.

352. The second element is a specific finding that the pertinent domestic industry was seriously injured or threatened with serious injury. The United States demonstrated that the ITC made this finding in the context of its examination of all imports.[461] Again, the Panel did not find to the contrary.

353. The third element encompasses findings concerning the conditions of competition pertinent to each domestic industry. The United States demonstrated that the ITC made these findings in the context of its examination of all imports,[462] and the Panel did not find to the contrary.

354. The fourth element encompasses findings that there was a causal link between the imports from sources other than excluded sources and the serious injury and the threat of serious injury. The United States demonstrated before the Panel that the ITC did this by several means. For some products, the ITC demonstrated that imports from sources other than excluded sources were responsible for underselling that put price pressure on domestically produced products,

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[459] We also direct the Appellate Body to the sections of the First Written Submission of the United States to the Panel concerning parallelism for our detailed arguments. Arguments identifying generally the findings of the ITC relevant to parallelism appear at paras. 778-787 of the First Written Submission. Product-specific arguments relevant to parallelism appear at paras. 788-924 of that submission.

[460] Panel Reports, paras. 7.1807 (CCFRS), 7.1814-7.1815 (tin mill), 7.1818 (hot-rolled bar), 7.1826 (cold-finished bar), 7.1829 (rebar), 7.1833 (welded pipe), 7.1836 (FFTJ), 7.1839 (stainless steel bar), 7.1843-7.1844 (stainless steel wire), 7.1846 (stainless steel rod).

[461] *See* Panel Reports, para. 7.1775.

[462] *See* Panel Reports, para. 7.1775.

depressed domestic industry revenues, and led to poor performance by the domestic industry.[463] For other products, the ITC demonstrated that imports from sources other than excluded sources were exclusively or predominantly responsible for gains in overall import market share.[464]

355. The Panel did evaluate the ITC analysis in this regard and found it to be insufficient. The premise of the Panel's conclusions in this respect, however, is that the ITC could not have found a causal link between imports from sources other than excluded sources and serious injury or threat unless it accounted for the effect of imports from excluded sources.[465] As explained above, the Panel's "excluded sources accounting requirement" was self-created and is not based on or consistent with the language of the Safeguards Agreement. Consequently, the Panel's rationale cannot serve as a basis for conclusions that the ITC's product-specific causation analyses were inconsistent with that Agreement.

356. To the contrary, the ITC analyses were entirely consistent with the language of Article 2.1, and provided all of the findings and information that the Appellate Body found to be necessary in *US – Wheat Gluten* and *US – Line Pipe*. The analyses focused on the imports from the sources that were not excluded.[466] As stated previously, the Agreement cannot be read to require any further analysis, such as a separate analysis concerning imports from excluded sources.

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[463] *See* Panel Reports, paras. 7.1808 (CCFRS), 7.1814-7.1815 (tin mill), 7.1819 (hot-rolled bar), 7.1826 (cold-finished bar), 7.1829 (rebar), 7.1833 (welded pipe), 7.1836 (FFTJ), 7.1839 (stainless steel bar), 7.1844 (stainless steel wire), 7.1846 (stainless steel rod).

[464] *See* Panel Reports, paras. 7.1819 (hot-rolled bar), 7.1833 (welded pipe), 7.1836 (FFTJ), 7.1839 (stainless steel bar), 7.1843 (stainless steel wire), 7.1846 (stainless steel rod).

[465] In its product-specific analysis, the Panel used several different verbal formulations to express this single conclusion. *See*, *e.g.*, Panel Reports, paras. 10.603, 10.630, 10.650.

Additionally, in its discussion of stainless steel wire, the Panel criticizes Chairman Koplan's parallelism analysis on the grounds that it "examine[s] an increase in imports merely in a rudimentary fashion and otherwise focus[es] on market share developments." Panel Reports, para. 10.688. Assuming for the sake of argument that this finding is a distinct ground for the Panel's rejection of the parallelism findings on stainless steel wire, the Appellate Body should reverse it. As Commissioner Koplan explained in his analysis of all imports, his basic reason for finding a causal nexus between the increased imports and the threat of serious injury was that imports increased their presence in the U.S. market during interim 2001; the increased import presence at a time of falling demand caused prices to decline, leading to reduced profitability in the domestic industry. ITC Report, p. 259. Commissioner Koplan, in his parallelism findings, emphasized that the increased import presence during 2001 was due exclusively to imports from sources that were not excluded. *Id*., p. 260, n.36. Thus, Commissioner Koplan provided a full and explicit explanation of the causal linkage between imports from sources other than excluded sources and the threat of serious injury.

[466] *Compare US – Wheat Gluten*, AB Report, para. 98 (finding that when the United States excluded imports from Canada from a safeguards measure, it needed to make an "explicit determination relating to increased imports, excluding imports from Canada").

357. The fifth element of the ITC's parallelism analyses consisted of non-attribution findings concerning factors other than imports that were alleged to cause injury. As the United States demonstrated before the Panel, the ITC included such findings in its analysis of all imports.[467] For its part, the Panel did not dispute that the exercise of separating and distinguishing factors other than imports provided in a causation analysis pertinent to all imports need not be repeated in a parallelism analysis.[468]

358. The United States does not dispute that the ITC's parallelism analysis did not satisfy the standards articulated by the Panel. But that is irrelevant. Contrary to the DSU, the Panel imposed standards for a parallelism analysis that can be found nowhere in the Safeguards Agreement. Because the United States fully satisfies the requirements actually contained in the Safeguards Agreement, the Appellate Body should reverse the Panel's rulings that the ITC's parallelism analysis was not consistent with that Agreement.

F. The Panel Erred in Concluding That the Increased Imports, Causation and Parallelism Findings Relevant to the Tin Mill and Stainless Steel Wire Determinations Were "Impossible to Reconcile" and, Therefore, Did Not Provide a "Reasoned and Adequate Explanation."

1. Background

359. The U.S. competent authority that conducts safeguards investigations is the ITC, a body usually composed of six Commissioners. Each ITC Commissioner independently makes an affirmative or negative determination as to whether the product involved is being imported in such increased quantities as to be a substantial cause of serious injury or the threat of serious injury to the domestic industry. As part of the process of making an overall determination, each Commissioner independently defines the like or directly competitive product. The affirmative or negative vote of a majority of the Commissioners (on the overall question of whether the product involved is being imported in such increased quantities as to be a substantial cause of serious injury or the threat of serious injury to the domestic industry) constitutes the determination of the ITC.[469]

360. For two of the steel products involved in this appeal, tin mill and stainless steel wire, the Commissioners making affirmative determinations did not all define the like or directly competitive product in the same way.

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[467] Panel Reports, para. 7.1775.

[468] *See*, *e.g.*, Panel Reports, para. 10.629.

[469] If the Commission is evenly split, with an equal number of Commissioners making affirmative and negative findings, the U.S. President decides which voting group constitutes the determination of the Commission. 19 U.S.C. §1330(d)(1).

361. For tin mill, three Commissioners made affirmative determinations, and three Commissioners made negative determinations. Of the Commissioners making affirmative determinations, one (Commissioner Miller) concluded that tin mill was a distinct like product, and two (Commissioners Bragg and Devaney) concluded that tin mill fell within a larger like product along with other flat-rolled steel, and reached affirmative determinations for that product. These determinations, with in-depth explanations of the Commissioners' findings and reasoned conclusions, were published in the ITC Report.

362. There is no dispute that there were three affirmative votes with regard to a like product that included tin mill steel.[470]

363. For stainless steel wire, three Commissioners made affirmative determinations. Of these, one Commissioner (Chairman Koplan) defined the domestic like product as consisting of stainless steel wire, while the other two Commissioners (Commissioners Bragg and Devaney) defined a broader like product consisting of stainless steel wire products (in the case of Commissioner Bragg) or stainless steel wire and rope (in the case of Commissioner Devaney). These determinations, with in-depth explanations of the Commissioners' findings and reasoned conclusions, were published in the ITC Report.

364. Again, there is no dispute that there were three affirmative votes with regard to a domestic like product that included stainless steel wire.[471]

2. The Findings of the Panel

365. The Panel noted that Articles 2.1 and 3.1 of the Safeguards Agreement, and Article 11 of the DSU require that the Panel determine whether the competent authorities provided a "reasoned and adequate explanation" of their determinations.[472] The Panel characterized the increased imports findings of the Commissioners who relied on different like product definitions as "divergent," impossible to reconcile," "inconsistent," "alternative explanations departing from each other," and as "alternative explanations partly departing from each other."[473]

366. Although these assertions are the foundation for the rest of the Panel's analysis, the Panel Reports neither provided examples of "divergent" findings nor explained why the Commissioners' tin mill and stainless steel wire findings are "impossible to reconcile." The only reason the Panel offered for this conclusion is that it is a "given" of the findings being "based on differently defined like products."[474] Thus, the Panel clearly viewed its statement as a general rule, rather than a conclusion drawn from the specific facts of the dispute.

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[470] ITC Report, pp. 17-18; Panel Reports, para. 10.191.
[471] ITC Report, p. 17-18; Panel Reports, para. 10.261.
[472] Panel Reports, para. 10.194.
[473] Panel Reports, paras. 10.194, 10.200 and 10.262.
[474] Panel Reports, para. 10.194.

367. The Panel stated its belief that "a Member is not permitted under Articles 2.1 and 3.1 of the Agreement on Safeguards to base a safeguard measure on a determination supported by a set of explanations each of which is different and impossible to reconcile with the other."[475] Because of this supposed "divergence" or "inconsistency," the Panel found that the United States breached Articles 2.1 and 3.1 by failing to provide a reasoned and adequate explanation of how the increased imports requirement was satisfied for tin mill or for stainless steel wire.[476]

368. The Panel cross-referenced its conclusions with respect to the increased imports requirement for tin mill in its analysis of increased imports of stainless steel wire, as well as its analyses of causation for both tin mill and stainless steel wire.[477] The Panel also concluded that lack of uniformity in the like product definition precluded satisfying the parallelism requirement for tin mill and stainless steel wire.[478]

369. The Panel did not find fault with the U.S. statement that each Commissioner's opinion, taken alone, provided findings and reasoned conclusions, consistent with Article 3.1, with regard to the determination reached by that Commissioner.[479] Since each Commissioner found that increased imports consisting in whole or in part of tin mill and stainless steel wire were causing serious injury or threat of serious injury, that should have been sufficient under the Safeguards Agreement to justify a safeguard measure on tin mill and stainless steel wire respectively.

3. The "Inconsistency" Identified By the Panel Is of No Legal Consequence.

370. The Panel erred in asserting that there is an inconsistency in the increased imports findings of Commissioners who defined the like product in different ways. Contrary to the Panel's assumption, it is not necessary to "reconcile" the increased imports findings of each Commissioner or group of Commissioners.

371. The Panel provided an example of why it believed that findings based on different like products cannot provide compatible explanations:

> For the purposes of the Agreement on Safeguards, with regard to, for instance, the question whether imports have increased, it makes a difference whether the product at issue is tin mill or a much broader category called CCFRS and

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[475] Panel Reports, para. 10.195.

[476] Panel Reports, paras. 10.200 and 10.262.

[477] Panel Reports, paras. 10.263 (stainless steel wire – increased imports), 10.422 (tin mill – causation), and 10.572 (stainless steel wire – causation).

[478] Panel Reports, paras. 10.615 and 10.685.

[479] United States, First Written Submission, para. 541, note 722.

> containing tin mill products. [sic] The difference is that the import numbers for different product definitions will not be the same.[480]

The example provides no insight into the Panel's reasoning. It is correct that the import volumes for tin mill and the broader category of carbon and alloy flat products (which includes tin mill) were different and that the analyses of these quantities would be, in part, different. However, the Panel identifies no reason why an analysis based on two distinct volume levels for different product groups creates an inconsistency with Articles 2.1 and 3.1.

372. There is nothing intrinsically irreconcilable about findings based on different product groupings. A hypothetical illustrates this point. Suppose there were four imported items, with one Commissioner making four affirmative determinations based on treating each item as a separate like product, while another Commissioner made one affirmative determination treating the four items as a single like product. The two Commissioners' findings would be "reconcilable" because they reached the same conclusion for the same set of products, albeit at the end of different analytical paths.

373. This is essentially what happened with the affirmative tin mill determination. Commissioners Bragg and Devaney reached affirmative determinations with regard to "carbon and alloy flat products," a category encompassing imports of CCFRS, tin mill, and GOES.[481] Commissioner Miller reached an affirmative determination with regard to imports of CCFRS and a separate affirmative determination with regard to imports of tin mill. Thus, the findings of the three commissioners are easily reconciled, in that all reached affirmative determinations covering imports of CCFRS and tin mill. (GOES, the only product on which they reached divergent determinations, never accounted for more than 0.8 percent of total flat steel imports during the investigation period.[482])

374. The Panel assumed that the "increased imports" findings of Commissioners who defined the like product differently are mutually exclusive. This is not so. The question of whether the ITC satisfied the "increased imports" requirement should be addressed by examining separately the increased imports findings of the Commissioners making affirmative determinations. For example, for tin mill the Panel should have examined the increased imports determination of Commissioner Miller (which was on the basis of a like product definition limited to tin mill) and

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[480] Panel Reports, para. 10.195. The Panel erred in its description. CCFRS did not include tin mill. ITC Report, p. 36. Commissioner Bragg used the term "carbon and alloy flat products" to describe the like product consisting of slab, hot-rolled sheet and strip, cut-to-length plate, cold-rolled sheet and strip, corrosion resistant, GOES, and tin mill. ITC Report, p. 269 (views of Commissioner Bragg). GOES is the acronym for "grain-oriented electrical steel."

[481] ITC Report, p. 269 (views of Commissioner Bragg). Commissioner Devaney adopted the same like product definition as Commissioner Bragg, although he did not adopt the term "carbon and alloy flat products" to refer to that like product. ITC Report, p. 36, note 65.

[482] ITC Report, Tables FLAT-3 and FLAT-8, pp. FLAT-7 and FLAT-12.

Commissioners Bragg and Devaney (which were on the basis of a broader like product definition) separately. Had it done so, it would have found that each Commissioner separately satisfied each of the conditions in Article 2.1 for imposing a safeguard measure and provided findings and reasoned conclusions in support of his or her determination. This is all that is required.

375. In addition, the affirmative determinations of the Commissioners who applied different like product definitions are much like alternative analyses by a single fact-finder. If a Member's competent authority relied on a single decision maker, and that decision maker made alternative analyses with respect to the requirements of Article 2.1,[483] this clearly would not violate the Safeguards Agreement, so long as at least one of the decision maker's alternative analyses satisfied the requirements of the Agreement. In that case, the consistency of the analyses with each other would not matter. It follows then that, if alternative analyses by a single decision maker are permitted under the Safeguards Agreement, alternative findings by more than one decision maker will also satisfy the requirements of the Agreement, so long as the analysis of at least one of the decision makers satisfies the requirements of the Agreement. That is effectively what the ITC report provides for tin mill and stainless steel wire – alternative findings based on different views as to the like product definition. The fact that one set of views – that of Commissioners Bragg and Devaney – has not been found to be inconsistent with the Safeguards Agreement should suffice to justify the determination regarding tin mill and stainless steel wire.

4. By Requiring Uniformity of Like Product Definition Among the Commissioners Making Affirmative Determinations, the Panel Read Into Articles 2.1 and 3.1 a Substantive Requirement That Does Not Exist in the Safeguards Agreement.

376. Article 3.2 of the DSU recognizes that WTO dispute settlement authorities should interpret covered agreements "in accordance with customary rules of interpretation of public international law." The Appellate Body has repeatedly noted the importance of referring for this purpose to those customary rules reflected in Article 31 of the Vienna Convention on the Law of Treaties. Article 31(1) of the Vienna Convention states that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

377. In reaching its erroneous determination that Articles 2.1 and 3.1 require uniformity in the like product definition of ITC Commissioners making affirmative determinations, the Panel

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[483] For example, the decision maker might decide that the like or directly competitive product could be defined two ways, and then show how the requirements of Article 2.1 are satisfied based on either definition.

failed to interpret properly the relevant provisions of the Safeguards Agreement in accordance with these principles.

378. The Panel's finding concerning the requirements of Article 3.1 was, in effect, an interpretation of the substantive requirements for the application of a safeguard measure that are found in Article 2.1. The Panel effectively found that Article 2.1 requires that all ITC Commissioners making affirmative determinations do so on the basis of the same like product definition. This finding is not supported by the language of the Safeguards Agreement, considered in light of the Agreement's object and purpose.

379. Furthermore, as discussed below, the Panel's finding requiring uniformity of like product definition also infringes on the manner in which Members structure the decision-making process of their competent authorities. Such infringement is contrary to relevant principles of treaty interpretation and to general provisions governing dispute settlement among Members of the World Trade Organization.

a. The Text of Articles 2.1 and 3.1 Does Not Support the Panel's Interpretation That Uniformity of Like Product Is Required.

380. The Panel cited only generally to Articles 2.1 and 3.1 to support its conclusion that uniformity of like product definition is required – it did not identify any specific portions of the text of these Articles.[484]

381. Article 2.1 provides:

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.[485]

382. Article 3.1 provides in relevant part:

> The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

383. The ITC complied with Article 2.1. The three Commissioners who made affirmative determinations for tin mill and stainless steel wire literally determined that "such product is being

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[484] Panel Reports, paras. 10.195, 10.196, 10.200, 10.262, and 10.263.
[485] Safeguards Agreement, Article 2.1 (footnote 1 omitted).

imported . . . in such increased quantities . . . ." For each product, for two of the Commissioners this determination was subsumed in their determination for a broader product grouping.

384. The ITC also complied with Article 3.1. Each Commissioner supplied his or her findings and reasoned conclusions in support of his or her determination that the increased imports requirement had been met. Articles 2.1 and 3.1 do not require any findings or conclusions as to the affirmative divided vote regarding tin mill and stainless steel wire beyond the views of the Commissioners making those determinations.

385. The Panel appears to have based its conclusion on the notion that separate conclusions could not meet the standard of being "reasoned." The ordinary meaning of the verb "reason" is "[t]hink in a connected or logical manner; use one's reason in forming conclusions . . . . Arrange the thought of in a logical manner, embody reason in; express in a logical form."[486] In the case of tin mill and stainless steel wire, there are three sets of findings and conclusions in which the issuing Commissioner "expresses in a logical form" the reasons behind the determination. Each of them provides a different set of reasons leading to the same legal conclusion – that imports of tin mill or stainless steel wire were causing serious injury to the corresponding domestic industry. That the determinations rely on different reasoning does not make them collectively less "logical." Rather, they represent three different ways of organizing the data to perform the inquiry required under the Safeguards Agreement. The fact that they yield the same result should be seen as confirming that result.

386. In sum, there is nothing in the text of these Articles to support the Panel's conclusion that all ITC Commissioners making affirmative determinations must define the like product in the same way.

b. The Object and Purpose of the Safeguards Agreement Do Not Support the Panel's Interpretation That Uniformity of Like Product Is Required.

387. The Appellate Body has described the object and purpose of the Safeguards Agreement as "that of giving a WTO Member the possibility, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation that, in the judgement of that Member, makes it necessary to protect a domestic industry temporarily."[487]

388. A determination by a multi-member competent authority such as the ITC, that rests on differently defined like products, does not detract from the object and purpose of the Agreement. Specifically, for purposes of determining whether there is a right to apply a safeguard measure, it

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[486] The New Shorter Oxford English Dictionary, 1993 Edition, pp. 2495-2496. Other definitions of "reason" equate it with "discussion" or "argument," a sense similar to the definition quoted in the text. *Ibid.*

[487] *US – Line Pipe*, AB Report, para. 82.

simply does not matter whether all Commissioners making affirmative determinations have defined the like product in the same way, as long as the ITC has shown that the three conditions of Article 2.1 for imposing a measure have been satisfied.[488]

c. The Appellate Body's *US – Line Pipe* Report Supports the ITC's Practice of Aggregating Mixed Votes of Individual Commissioners.

389. The Appellate Body's reasoning in *US – Line Pipe* shows the fallacy of the Panel's analysis. In that dispute, the Appellate Body overruled a panel's finding that the Safeguards Agreement did not permit a Member to apply a safeguard measure based on two different determinations (one of serious injury and the other of threat of serious injury) that were supported by two different sets of findings and conclusions. In reversing the Panel's finding, the Appellate Body "emphasized" that:

> The question at issue is whether the right [to apply a safeguard measure] exists in this particular case. And, as the right exists if there is a finding by the competent authorities of a "threat of serious injury" or – something *beyond* – "serious injury", then it seems to us that it is irrelevant *in determining whether the right exists*, if there is "serious injury" or only "threat of serious injury" – so long as there is a determination that there is *at least* a "threat".[489]

Similarly, in this dispute, the question is whether the United States had the right to apply a safeguard measure with respect to tin mill or stainless steel wire. That right exists whether there is a finding of serious injury to tin mill or stainless steel wire alone or – "something *beyond*" – a finding of serious injury to all flat steel, or all stainless steel wire products. Thus, under the Appellate Body's reasoning in *US – Line Pipe*, an affirmative finding on tin mill alone, carbon and alloy flat products alone, or both may support the conclusion that imports of tin mill are causing serious injury.

390. The Panel attempts to distinguish the situation in *US – Line Pipe* from this dispute on the grounds that:

> [t]he question in *US – Line Pipe* was whether a *determination* could leave open the question whether there was serious injury or threat of serious injury. From the perspective of the Agreement on Safeguards, the conditions of Article 2.1 are satisfied equally by serious injury and by threat of serious injury. The challenge was not that the *underlying report* was split and contained different reasonings

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[488] *See, US – Line Pipe*, AB Report, para. 171 (finding that for purposes of determining whether there is a right to apply a safeguard measure, it does not matter whether a domestic authority finds there to be "serious injury," "threat of serious injury," or "serious injury or threat of serious injury").

[489] *US – Line Pipe*, AB Report, para. 170 (emphasis in original).

> that could not be reconciled one with another and that, therefore, there was a violation of Articles 2.1 and 3.1 . . . .[490]

However, the Panel misapprehended the situation in *US – Line Pipe*. The Appellate Body stated clearly that the issue arose from the panel's finding that determinations of "injury" and "threat of serious injury" were "mutually exclusive."[491] Moreover, the Panel found that 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."[492] Thus, the *US – Line Pipe* panel's erroneous conclusion that the two sets of findings and underlying explanations were "mutually exclusive" (which is essentially the same as "impossible to reconcile") was a central issue in the dispute. There is no meaningful difference between that situation and the ITC's handling of tin mill and stainless steel wire in this dispute.

391. For these reasons, the Panel's conclusion that, as a general rule, findings based on different like products are always "impossible to reconcile" is plainly incorrect. The ITC Report demonstrates that such findings were reconcilable for tin mill and stainless steel wire. In the case of increased imports, data for tin mill were added to data for six other categories to produce total figures for flat steel. Data for stainless steel wire were added to data for stainless steel rope to produce total figures for the stainless steel wire products. The data and analysis for tin mill and stainless steel wire can therefore be related to the data and analysis for the larger categories of flat steel and stainless steel wire products, respectively. Similarly, the Commissioners' individual analyses of causal link and other factors causing injury can be related to one another based on the data and the different conclusions they impel. Thus, the different findings can be reconciled.

d. The Panel's Report Improperly Infringes on the Manner in Which a Member Structures the Decision-Making Process of Its Competent Authority.

392. The Safeguards Agreement leaves entirely to Members' discretion how they structure their competent authorities and the decision-making process in safeguards investigations.[493] By construing the Safeguards Agreement to require uniformity in the like product definition by a

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[490] Panel Reports, para. 10.196 (footnote omitted, emphasis in original).

[491] *US – Line Pipe*, AB Report, para. 139.

[492] *US – Line Pipe*, AB Report, para. 143.

[493] The Appellate Body has recognized in other contexts that Members are free to structure their administrative and legal regimes in whatever way they see fit, tempered only by express obligations in WTO Agreements. *United States – Foreign Sales Corporations*, AB Report, para. 179 (Members may choose any kind of tax system they wish, as long as the system is applied in a way consistent with WTO obligations).

multi-member competent authority, the Panel is infringing unnecessarily on the manner in which a Member may internally structure the decision-making process of its competent authority.

393. The Appellate Body in *US – Line Pipe* made it clear that the internal decision-making process of a Member is entirely within the discretion of that Member and an exercise of its sovereignty:

> We note also that we are not concerned with how the competent authorities of WTO Members reach their determination in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or – as here – six individual decision-makers under the municipal law of that WTO Member. What matters to us is whether the determination, however it is decided domestically, meets the requirements of the *Agreement on Safeguards*.[494]

Thus, the Agreement leaves the decision-making process to the Members, including the identification of what constitutes a decision under its municipal law, provided that the determination, "however it is decided domestically," meets the requirements of the Agreement.

394. That is the case for tin mill and stainless steel wire. The competent authorities (*i.e.*, the ITC) made an affirmative determination with regard to tin mill and stainless steel wire under U.S. law and fully complied with Article 3.1 by publishing "a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." The report addressed all of the factors necessary for an affirmative determination consistent with Articles 2.1 and 4. Since the views of the Commissioners and data in the ITC Report provided findings and reasoned conclusions in support of the affirmative determinations, Article 3.1 did not require further explanation.

395. Finally, the possibility that individual decision makers may reach the same result based on different reasoning is not unique to the ITC. In trade remedy proceedings[495] and in judicial proceedings, there are other collegial adjudicatory bodies outside the United States that allow

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[494] *US – Line Pipe*, AB Report, para. 158. Emphasis in original.

[495] *E.g.*, *Photo Albums with Self-Adhesive Leaves, Imported Together or Separately, and Self-Adhesive Leaves Originating in or Exported from Indonesia, Thailand and the Philippines*, Canadian International Trade Tribunal Inquiry No. NQ-90-003, p. 16 (2 January 1991) (Member of Commission agrees with outcome, disagrees with like product definition). *See also*, *Argentina – Peaches*, Panel Report, para. 7.3 (competent authorities' report contains separate opinions by each of two directors who found that increased imports did not cause serious injury.)

their members to set out divergent reasons for reaching a single conclusion.[496] We see nothing in the Safeguards Agreement that condemns the results of this well-established adjudicatory practice as unreasoned.

e. Conclusion

396. For the reasons given above, the Appellate Body should reverse the Panel's findings that the ITC's affirmative findings on increased imports, causation, and parallelism for tin mill and stainless steel wire are inconsistent with Articles 3.1, 2.1, 4.2, and 4.2(b).

IV. CONCLUSION

397. For the foregoing reasons, the United States requests that the Appellate Body reverse the following findings by the Panel:

(A) that the application of safeguard measures on imports of CCFRS, tin mill, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire is inconsistent with Article XIX:1 and Article 3.1 on the grounds that the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports of each of these products causing serious injury to the relevant domestic industry;

(B) that the application of safeguard measures on imports of CCFRS, hot-rolled bar, and stainless steel rod is inconsistent with Articles 2.1 and 3.1, on the grounds that the United States failed to provide a reasoned and adequate explanation of how the facts supported its determinations with respect to increased imports of these products;

(C) that the determinations regarding both increased imports of tin mill and stainless steel wire and also the causal link between these increased imports and serious injury to the corresponding domestic industry are inconsistent with Articles 2.1, 3.1, and 4.2(b) on the grounds that the explanations given for these determinations consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

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[496] The practice of issuing concurring views also exists outside the trade remedies field. *E.g.*, International Court of Justice, Rules of Court (1978), Article 95.2 (as amended 5 December 2000) ("Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration."). In some jurisdictions, including the United Kingdom and Australia, each member of a multi-member court may issue a separate opinion.

(D) that the application of safeguard measures on imports of CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar is inconsistent with Articles 2.1, 3.1, and 4.2(b) of the Safeguards Agreement, on the grounds that the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury or threat of serious injury to the relevant domestic producers with respect to increased imports of these products; and

(E) that the application of safeguard measures on imports of CCFRS, tin mill, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire is inconsistent with Articles 2.1 and 4.2, on the grounds that the United States failed to comply with the requirement of "parallelism" because it had not established that imports from sources subject to the safeguard measure satisfied the conditions for application of a safeguard measure.