United States – Definitive Safeguard Measure on Imports of Circular Welded Carbon-Quality Line Pipe from Korea

ADDITIONAL STATEMENT OF THE UNITED STATES
AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

7 June 2001

1. We would like to return to the discussion we were having yesterday about whether the Safeguards Agreement requires a Member applying a safeguard measure to explain at the time of application how it had satisfied the requirements of Article 5.1. The short answer is that there is no such requirement.

2. We would like to be perfectly clear on this point. As we explained in our oral statement, nothing in Article 5.1 requires a Member to explain at the time of application of a safeguard how it complied with Article 5.1. The Appellate Body reached the same conclusion in *Argentina – Footwear*.

3. Korea has pointed to only two other provisions of the WTO Agreement that it reads as imposing such a requirement – the Article 3.1 and 4.2(c) obligations that the competent authorities publish a report. We have explained that the ordinary meaning of the text establishes that these obligations apply only to the investigation and determination of the competent authorities, a process and a decision that do not include compliance with the terms of Article 5.1.

4. Korea's argument that Articles 3.1 and 4.2(c) require an explanation of a Member's decision to take a safeguard measure is also inconsistent with the framework established under the Safeguards Agreement. That framework calls first for an investigation, then for a determination by the competent authorities based on that investigation. The competent authorities must publish a report containing "findings and conclusions on all pertinent issues of fact and law" and "a detailed analysis of the case under investigation." Article 2 allows a Member to apply a safeguard measure only *after* the determination of serious injury. Article 5 establishes that the benchmark for application of the measure is the condition of the domestic industry revealed in that investigation. Since the investigation, determination, and report of the competent authorities are a necessary precursor to the Member's decision whether to impose a measure under Article 5, they cannot themselves contain the explanation of how the decision to apply a safeguard measure complies with Article 5. Therefore, there is nothing *outside* of Article 5 that obliges a Member to explain its decision to apply a safeguard measure at the time of application.

5. The SPS Agreement contains a useful analogy. Article 5.1 of the SPS Agreement requires that Members base their sanitary and phytosanitary measures on a risk assessment. In addition, Article 5.6 of that Agreement requires Members to "ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection." In evaluating the EC measure on beef hormones, the Panel and Appellate Body did not require that the risk assessment establish compliance with SPS Article 5.6. Rather, it looked

to explanations presented by the EC in the panel process.

6. The approach we have outlined does not, as Korea charges, prevent review by a Panel. It merely reflects the general assumption under the WTO Agreement that Members have complied with their obligations. It does not prevent a Member, as with any other type of measure, from claiming in a dispute that the application of a safeguard measure is inconsistent with the requirements of Article 5.1. As with any other measure, the complaining Member bears the burden of making a *prima facie* case. Only if it succeeds does the Member applying a safeguard measure bear the burden of establishing that application of the measure is consistent with Article 5.

7. If a Member does claim that the application of a safeguard measure is inconsistent with Article 5.1, the serious injury determination of the competent authorities would obviously be relevant in the evaluation of its claim. That does not mean that the Member applying a safeguard measure must attempt to anticipate those claims, address, and rebut them at the time it applies the measure.

Korea's arguments regarding the U.S. explanation of its compliance with Article 5.1

8. The burden is on Korea to identify how the United States has acted inconsistently with the obligations of Article 5.1. It has not done so. Its so-called *prima facie* case is full of inaccuracies and internal inconsistencies.

9. Korea's arguments do not identify any flaw in the U.S. explanation of how the line pipe safeguard was consistent with Article 5.1.

a. The U.S. explanation started with assuming that the 19 percent duty would result in a 19 percent increase in import prices. Korea does not disagree with this conclusion.

b. The United States then explained that U.S. producers could respond to this increase in several ways. They could raise prices by the same amount as imports, which would result in $62-$64 increase. In that case, they would not capture sales volume from subject imports because the comparative status quo would continue.

c. U.S. producers could also maintain prices at preexisting levels, in which case customers would buy fewer imports, and domestic producers' sales volume would increase. However, prices would not change.

d. U.S. producers would also have the option of increasing prices, but less than the full amount of the increase in import prices. In that case, they would see less than the full potential price increase, but obtain less of an increase in volume than if

they had not increased prices at all.

e. However, Korea's calculations (para. 18 and footnote 31 of its oral statement) assume that the U.S. producers increase their prices by the full amount possible *and* obtain an increase in the sales volume. That is economically impossible. In addition, Korea ignored the fact that the 9000 ton exemption would reduce the average price increase of imports, which would further constrain the U.S. producers' ability to increase prices. Another Korean calculation, in footnote 33, assumes that imposition of a safeguard measure would return the U.S. industry to the conditions of 1997. The U.S. explanation of compliance with Article 5.1 makes no such assumption.

f. Korea also accuses the United States of disregarding "the fact that demand was improving rapidly." (Korea's oral statement, para. 17) The record does not support this claim. The ITC majority noted that 1997 and 1998 were years of unusually high demand, and that demand had by 1999 returned to earlier levels. (USITC Report, p. I-28) Other evidence indicated that demand in the largest segment of line pipe consumption was tied to general economic growth, which was forecast to grow at 3-4 percent annually.[1] U.S. producers projected 4-5 percent growth.[2] These facts indicate that any future increase in demand was likely to be quite moderate.

10. Korea also claims that because the United States views Article 5.1 as not confined to remedying the portion of injury caused by increased imports, it must have done so in this case. The reasoning is obviously fallacious. There is no basis under the WTO Agreement to presume that a Member has applied a measure to the maximum extent possible.

[1]OECD, Dec. 1999.

[2]Petitioners' Posthearing Brief on Remedy, p. 44 (17 November 17, 1999).