BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2001-9)

APPELLANT SUBMISSION OF THE UNITED STATES

20 November 2001

TABLE OF CONTENTS

I. INTRODUCTION

1. The United States presents this appellant submission pursuant 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.

II. EXECUTIVE SUMMARY

2. The panel erred in finding that the United States violated Articles 3.1 and 4.2(c) of the Safeguards Agreement by failing to base its affirmative determination on serious injury or threat of serious injury alone.

3. The U.S. competent authority that conducts safeguards investigations is the U.S. International Trade Commission("ITC"), a body composed of six Commissioners. The affirmative or negative vote of a majority of the Commissioners constitutes the determination of the ITC. No provision of the U.S. safeguards law requires the Commissioners to reach consensus on the basis for either an affirmative or negative determination.

4. In the U.S. safeguards investigation underlying this appeal three of the ITC's six Commissioners found that the domestic industry was seriously injured and two found that the domestic industry was threatened with serious injury. On the basis of this vote, the ITC determined that the subject line pipe was being imported into the United States in such increased quantities as to be a substantial cause of *serious injury or the threat of serious injury.* This determination, with in-depth explanations of all of the Commissioners' findings and reasoned conclusions was published by the ITC in a report.

5. The ITC report complies fully with the express requirements of Article 3.1. Both groups of Commissioners making affirmative determinations fully explained their findings and conclusions.

6. Although the Panel framed its analysis in terms of the requirements of SGA Article 3.1, it was essentially interpreting one of the basic conditions for the application of a safeguard measure that are contained in Article 2.1. By requiring a discrete determination of serious injury or threat, the Panel essentially read into Article 2.1 a substantive requirement that does not exist in the Safeguards Agreement. The Panel's decision is not supported by an analysis of the language of the Safeguards Agreement. Had the Panel examined the ordinary meaning of Article 2.1, it would have found that a determination of either serious injury, or threat of serious injury, or both, satisfy Article 2.1.

7. The conditions of serious injury and threat of serious injury are closely interrelated, and neither GATT Article XIX nor the Safeguards Agreement distinguish in either procedural or substantive effect between the two conditions. The Safeguards Agreement certainly does not support the rigid division between the concepts of serious injury and threat of serious injury that

the Panel found. The definitions of "*serious injury*"and "*threat of serious injury*" describe two variations of the same basic condition. The *injury* component of the two definitions is the same, and competent authorities are required to evaluate the same enumerated factors set out in Article 4.2(a) in all injury investigations.

8. The definitions of "serious injury" and "threat of serious injury" do not require that a competent authority that is composed of multiple decision-makers (such as the ITC) make a discrete finding of either serious injury or threat thereof.

9. Nor does Article 5 require that Members make a discrete finding of serious injury or threat of serious injury. The first sentence of Article 5.1 makes clear that the condition of the industry and its need for adjustment, and not the characterization of that condition as serious injury or threat of serious injury, establish the benchmark by which a Member determines the nature of the safeguard measure required.

10. 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 a discrete finding of serious injury or threat by a competent authority as a whole, the Panel disregarded an accepted principle of treaty interpretation and infringed unnecessarily on the manner in which the United States has internally structured the decision-making process of its competent authority.

11. The Panel based its finding of an inconsistency with Article 4.2(b) of the *Agreement on Safeguards* ("Safeguards Agreement")[1] upon an incorrect legal interpretation. Because the Appellate Body in *Lamb Meat* and *Wheat Gluten* found that the ITC had failed in those cases to assure that it did not attribute injury caused by other factors to the imports, the *Line Pipe* Panel simply presumed without a factual analysis that the ITC also did not comply with Article 4.2(b) in this case. In this respect, the Panel misread the prior Appellate Body Reports. In those Reports, the Appellate Body emphasized that Article 4.2(b) does not prescribe a particular methodology that Members must apply. Rather, the relevant question for determining compliance with the causation requirements of the Agreement is whether, under whatever methodology the Member applies, it identifies, distinguishes, and assesses the injurious effects of factors other than the imports.

12. Despite thorough analysis in the ITC Report showing that the United States identified and distinguished the effects of other factors, and that it did not attribute injury caused by other factors to the imports, the Panel failed even to acknowledge or review these findings and analyses. Instead, the Panel rejected offhand the United States' references to the ITC's findings, based on the Panel's view that the ITC's relative injury causation analysis could not possibly

[1] Unless otherwise indicated, all references to "Articles" in this submission refer to the the Safeguards Agreement.

have entailed separation and assessment of the injurious effects of the factors other than imports. Hence, the Panel's conclusions are faulty.

13. The Appellate Body should reverse the Panel's finding of a violation of Article 4.2(b). If the Appellate Body decides to complete the analysis that the Panel failed to undertake, it should find, as the Panel would have had it conducted the proper analysis, that findings and reasoned conclusions in the ITC Report demonstrate that the United States did not mis-attribute injurious effects of other factors to the imports.

14. The Panel relied upon an incorrect legal interpretation in finding that the United States failed to comply with both Articles 12.3 and 8.1. The Panel concluded that Article 12.3 requires a Member proposing to apply a safeguard measure to "ensure" that exporting Members "obtained" the information that Members must review in consultations pursuant to that Article. The text imposes no such obligation. Article 12.3 requires a Member to provide "adequate opportunity" prior to application of a safeguard measure for consultations with Members having a substantial export interest in the product in question, with a view to reviewing certain information. As the Appellate Body has recognized, this standard is met when the Member with a substantial export interest obtains the relevant information.

15. The Panel did not perform the factual analysis necessary to evaluate U.S. compliance with this obligation. Instead, it assumed – without citing to any evidence – that the press release by which Korea obtained the relevant information did not ensure receipt of that information by exporting Members. Not only is this assumption without support, it does not address the relevant question – whether Korea obtained the information. Korea itself admitted that it did. Therefore, the Appellate Body should reverse the Panel's finding with regard to Article 12.3 as resting on a misinterpretation of the Safeguards Agreement and unsupported by the factual findings necessary to evaluate compliance with the obligation.

16. The Panel derived its finding of a breach of Article 8.1 exclusively from its invalid conclusion on Article 12.3. Accordingly, the Appellate Body should also reverse the finding with regard to Article 8.1.

17. The Panel also erred by interpreting Article 9.1 as requiring that any safeguard measure specifically list the developing country Members to which the measure is not applied. The text of the Article conditionally prohibits application of a measure "as long as" a developing country Member accounts for less than three percent of total imports. However, it is silent as to *how* a Member may comply with that obligation, and certainly does not require a list of the developing country Members covered by Article 9.1. The only support cited by the Panel for this proposition was the Suggested Formats of the Safeguards Committee, which by their terms carry no interpetative authority.

18. The United States met the Article 9.1 requirement by establishing a mechanism – a 9000 ton exemption for each country – under which the 19 percent safeguard duty on imports did not

apply to any developing country Member accounting for less than three percent of total imports. The Panel concluded that the fact that developing country Members were subject to the exemption meant that the safeguard measure did, in fact, "apply" to them. This conclusion does not represent a valid interpretation of the requirement that a safeguard measure "not be applied" to a developing country Member accounting for more than three percent of imports. Accordingly, the Appellate Body should reverse the Panel's conclusion that the United States safeguard measure was inconsistent with Article 9.1.

III. ARGUMENT

A. The Panel Erred in Finding That the United States Violated Articles 3.1 and 4.2(c) of the Safeguards Agreement by Failing to Base Its Affirmative Determination on Serious Injury or Threat of Serious Injury Alone.

1. Background

19. The U.S. competent authority that conducts safeguards investigations is the U.S. International Trade Commission ("ITC"). The ITC is composed of six Commissioners. Each 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. If making an affirmative determination, a Commissioner specifies whether that determination is based on a finding of serious injury or threat thereof. The affirmative or negative vote of a majority of the Commissioners constitutes the determination of the ITC.[2] No provision of the U.S. safeguards law requires the Commissioners to reach consensus on the basis for either an affirmative or negative determination.

20. In the U.S. safeguards investigation underlying this appeal three of the ITC's six Commissioners found that the domestic industry was seriously injured and two found that the domestic industry was threatened with serious injury.[3] The vote of these five Commissioners constituted the determination of the ITC. (The sixth commissioner found neither serious injury nor a threat thereof. Her views were not part of the determination of the ITC.) On the basis of this vote, the ITC determined that the subject line pipe was being imported into the United States in such increased quantities as to be a substantial cause of *serious injury or the threat of serious*

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[2] 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. Section 330(d)(1) of the Tariff Act of 1930, 19 U.S.C. §1330(d)(1) (Exhibit USA-1).

[3] *Circular Welded Carbon Quality Line Pipe*, Inv. No. TA-201-70, USITC Pub. 3261 (December 1999) ("ITC Report"), p. I-7.

injury.[4] This determination, with in-depth explanations of all of the Commissioners' findings and reasoned conclusions, was published in the ITC Report.

21. Both groups of Commissioners making affirmative determinations (*i.e.*, those finding serious injury and those finding a threat thereof) analyzed all of the factors described in Article 4.2(a).[5]

2. The Decision of the Panel

22. The Panel found that the United States breached Articles 3.1 and 4.2(c) of the Safeguards Agreement by failing to base its affirmative determination on serious injury or threat of serious injury alone.[6] According to the Panel, Article 3.1 requires a discrete finding of either serious injury or threat of serious injury.[7] Notwithstanding the reference in Article 4.2(a) to a determination of whether increased imports "have caused or are threatening to cause serious injury," the Panel ruled that the ITC's *Line Pipe* determination was fatally flawed because it tracked that language rather than finding either injury or threat to the exclusion of the other.

23. Although the Panel framed its analysis in terms of the requirements of Article 3.1, it was essentially interpreting one of the basic conditions for the application of a safeguard measure that are contained in Article 2.1. This is clear in paragraph 7.263 of the Panel Report where the Panel explained that: (i) the basic conditions for the application of a safeguard measure are to be found in Article 2.1; (ii) fulfillment of these basic conditions "is a pertinent issue of . . . law in respect of which findings or reasoned conclusions must be included in the published report" required by Article 3.1; and (iii) one of these basic conditions is a determination that increased imports have caused or are threatening to cause serious injury.

24. The Panel gave three reasons for its conclusion that a discrete finding of serious injury or threat of serious injury is required. First, it relied on the definitions of "serious injury" and "threat of serious injury" in Article 4.1. Finding these definitions to be mutually exclusive, the Panel concluded that Article 3.1 does not permit a finding of "serious injury or threat of serious injury."[8] Second, the Panel decided that Article 5.1 requires that Members make a discrete finding of injury or threat because of the requirement in that article that a Member "apply

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[4] ITC Report, p. I-3.

[5] ITC Report, pp. I-16-20 and I-38-44.

[6] *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, para. 7.271 (19 October 2001) ("Panel Report").

[7] Panel Report, para. 7.264.

[8] Panel Report, para. 7.264.

safeguard measures only to the extent necessary to prevent or remedy serious injury."[9] Third, the Panel found a discrete injury or threat determination to be necessary because of the provision in Article 5.2(b) precluding quota modulation in the case of threat of serious injury.[10] As explained below, none of these reasons supports the Panel's conclusion that Articles 3.1 and 4.2(c) require a discrete finding of injury or threat.

25. The Panel did not engage in a separate analysis of the consistency of the U.S. decision under Article 4.2(c). Instead, it found that "Article 4.2(c) should be read in light of the last sentence of Article 3.1," and that "the 'detailed analysis' to be published under Article 4.2(c) should include 'findings and conclusions reached on all pertinent issues of fact and law', including a finding and conclusion on whether there is either serious injury, or threat of serious injury."[11]

3. The ITC Report Complies Fully With the Express Requirements of Article 3.1.

26. The ITC's Report complied fully with the express requirements of the last sentence of Article 3.1,[12] which states:

> The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

Both groups of Commissioners making affirmative determinations fully explained their findings and conclusions. In its analyses of serious injury and threat of serious injury, the Panel did not find that the ITC Report was deficient in any substantive way, other than by not expressly stating a finding of either serious injury or of threat of serious injury.

4. By Requiring a Discrete Determination of Serious Injury or Threat, the Panel Read Into Article 2.1 a Substantive Requirement That Does Not Exist in the Safeguards Agreement.

27. Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("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

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[9] Panel Report, paras. 7.265-7.267.

[10] Panel Report, para. 7.268.

[11] Panel Report, para. 7.269.

[12] The remainder of Article 3.1 was not cited by the Panel in support of its conclusion and is not relevant to a consideration of this issue.

customary rules reflected in Article 31 of the Vienna Convention on the Law of Treaties,[13] which states:

> 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.

28. In reaching its erroneous determination that the Safeguards Agreement requires a discrete finding of either serious injury or threat thereof, the Panel failed properly to interpret the relevant provisions of the Safeguards Agreement in accordance with these principles.

29. The Panel effectively found that Article 2.1 requires a discrete determination of serious injury or the threat of serious injury. This decision is not supported by an analysis of the language of the Safeguards Agreement, considered in light of the Agreement's object and purpose.

30. Furthermore, as discussed below, the Panel's decision requiring a discrete determination of either serious injury or threat thereof also infringes on the manner in which the United States has structured the decision-making process of its competent authority. 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 Ordinary Meaning of Article 2.1 Does Not Support the Panel's Interpretation that a Discrete Finding of Either Serious Injury or Threat is Required.

31. Since the question of what the report required by Article 3.1 must contain depends on the requirements of Article 2.1, the analysis should begin with a close examination of the text of Article 2.1. The Panel failed to examine the ordinary meaning of Article 2.1. Had it done so, it would not have found support for its position that a discrete determination of serious injury or threat is required. 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.[14]

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[13] *See, e.g., Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 10 (4 October 1996).

[14] (footnote 1 omitted, emphasis added) .

32. The use of the word "or" to link the concepts of serious injury and threat of serious injury in Article 2.1 (and in Article 4.2(a), upon which the Panel also relies, in paragraph 7.263 of its Report) does not mean either that serious injury or threat of serious injury must be chosen over the other. The English word "or" is sometimes used *exclusively* to mean one or the other but not both, but it is also used *inclusively* to mean at least one or the other and possibly both.[15]

33. The word "or" is used in the inclusive sense earlier in Article 2.1, in the reference to "increased quantities, absolute or relative to domestic production." It is clear that an absolute increase in imports can, at the same time, be an increase relative to domestic production. It is equally clear that either an absolute or a relative increase in imports, or both, satisfies the "increased imports" requirement of Article 2.1.

34. The use of "or" in the inclusive sense in the same paragraph, indeed in the same sentence, suggests that the drafters of the Safeguards Agreement meant that the word be used in the same sense as a connector between the references to serious injury and threat of serious injury. In other words, a finding of either serious injury or threat of serious injury, or both, would satisfy this basic condition of Article 2.1. A finding of both serious injury and threat thereof can arise where, as here, some members of a multi-person competent authority find serious injury and others find threat.

b. The Object and Purpose of the Safeguards Agreement Do Not Support the Panel's Interpretation that a Discrete Finding of Either Serious Injury or Threat is Required.

35. Requiring multi-person competent authorities such as the ITC to characterize affirmative determinations as being based entirely on a finding of serious injury or of threat of serious injury serves no object or purpose of the Safeguards Agreement. Moreover, the introduction of that requirement would represent both an unexplained and unjustified departure from GATT Article XIX, which does not distinguish in either procedural or substantive effect between a determination of serious injury and one premised on a threat of serious injury. The absence of any distinction in Article XIX, and also in the Safeguards Agreement, regarding the legal consequences of those determinations reflects the Members' view that it is unnecessary to distinguish between the two situations since the existence of either present serious injury or threat of serious injury, or for that matter both, suffices to satisfy the injury requirement for the adoption of a safeguard measure. Indeed, as discussed below, a situation in which there is a threat of serious injury differs from one where serious injury already exists only in that in the

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[15] *The New Shorter Oxford English Dictionary*, vol. II, p. 2012 (1993). The French and Spanish texts of the Safeguards Agreement use the words "ou" and "o," respectively, to connect the references to serious injury or threat of serious injury. The United States believes that the same flexibility, between an exclusive and an inclusive use, is inherent in the French and Spanish texts.

former the serious injury has not been fully realized. Thus considered, a finding of serious injury presupposes that a threat of serious injury to the same industry had previously existed and, in fact, may exist again should the safeguard measure prove ineffective. Given the interrelatedness of the conditions of serious injury and threat of serious injury it comes as no surprise that neither the GATT Contracting Parties nor the WTO Safeguards Agreement assigns legal significance to whether a measure is predicated on serious injury or threat of serious injury.

36. The Safeguards Agreement differentiates between serious injury and threat in only two ways. One is the separate definitions for "*serious injury*"and "*threat of serious injury*" in Articles 4.1(a) and (b). (However, Article 4.2(a) brings both concepts together when discussing the competent authorities' determination.) The other distinction is in Article 5.2(b), which precludes quota modulation in the case of threat of serious injury. Neither of these distinctions supports reading into the Safeguards Agreement a requirement that Members make a discrete finding of serious injury or threat.

37. The Panel relied on the definitions of "serious injury" and "threat of serious injury" for its conclusion that Members are required to make a discrete finding of one or the other. These definitions are:

> (a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;
>
> (b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2 . . . .

According to the Panel, "[s]ince 'threat of serious injury' is defined as 'serious injury that is clearly imminent', necessarily 'threat of serious injury' can only arise if serious injury is not present." Finding the definitions to be mutually exclusive, the Panel concluded that Article 3.1 does not permit a finding of "serious injury or threat of serious injury."[16]

38. The Safeguards Agreement does not support such a rigid division between the two concepts. The definitions of "*serious injury*"and "*threat of serious injury*" describe two variations of the same basic condition, separated only by a modest temporal variation. (The requirement in Article 4.1(b) that the threat of serious injury be "imminent" shows that serious injury cannot be far off when a threat thereof is present.) The *injury* component of the two definitions is the same (*i.e.*, a significant overall impairment) and competent authorities are required to evaluate the same enumerated factors set out in Article 4.2(a) in all injury

[16] Panel Report, para. 7.264.

investigations.[17] In fact, in this case, all five Commissioners voting in the affirmative relied largely on the same or similar conditions in the U.S. industry.[18]

39. The similarity of the conditions of "*serious injury*"and "*threat of serious injury*" is further underscored by the fact that the Safeguards Agreement does not distinguish between the two conditions in Article 4.2(b), where it provides: "When factors other than increased imports are *causing injury* to the domestic industry at the same time, *such injury* shall not be attributed to increased imports."[19] This "non-attribution" provision has been applied equally to an analysis of threat of material injury, even though the language of the treaty refers only to "injury."[20]

40. The definitions of "serious injury" and "threat of serious injury" do not require that a competent authority that is composed of multiple decision-makers (such as the ITC) make a discrete finding of either serious injury or threat thereof. There is no requirement under the Safeguards Agreement that competent authorities characterize their determination as primarily present serious injury or primarily threat of serious injury, as long as, in reaching an affirmative determination, they properly evaluate the relevant Article 4.2 factors and explain their findings and reasoned conclusions in accordance with Articles 3.1 and Articles 4.2(c).

c. Article 5 Does Not Require that Members Make a Discrete Finding of Serious Injury or Threat of Serious Injury.

41. Article 5.1 also reflects the overlap between serious injury and threat of serious injury. As in Article 4.2, it addresses only serious injury, without regard to whether the injury is current or imminent. The Panel chose to read a differentiation into the obligation to apply a safeguard measure "only to the extent necessary to prevent or remedy serious injury," viewing "prevent" as

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[17] Unlike the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Antidumping Agreement") and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), the Safeguards Agreement does not specifically list additional factors that competent authorities must consider in addressing threat. Antidumping Agreement Article 3.7, SCM Agreement Article 15.7. *See Mexico - Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, para. 7.131 (28 January 2000).

[18] Compare ITC Report pp. I-16-20 (views of Commissioners finding serious injury) with ITC Report pp. I-38-44 (views of Commissioners finding threat of serious injury).

[19] (emphasis added).

[20] *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, para. 175 (1 May 2001) ("*US – Lamb Meat (AB)").*

referring to threatened injury and "remedy" as referring to current injury.[21] The text does not support this view. "Preventing" serious injury in the future is just as relevant to an industry that is experiencing injury as it is to one that is threatened with injury. Indeed, the goal of Article 5 – adjustment – would hardly be met by solving an industry's current injury while not preventing a future recurrence of that injury.

42. The requirement in Article 5.1 is for Members to apply measures "only to the extent necessary to prevent or remedy serious injury." Once it is determined that increased imports are injurious to the industry, whether presently or in the imminent future, the Member must consider the condition of the industry in deciding what measures are appropriate and necessary to improve or prevent further deterioration of the industry's condition. Article 5.1 thus provides the general rule for applying any safeguard measure, whereas Article 5.2 addresses the limited circumstance of a safeguard measure involving allocation of quotas. Article 5.2(b) further delineates more specific circumstances under which a Member may depart from the quota allocation provisions of Article 5.2(a). This subparagraph applies only in cases where the Member determines that the industry is presently injured; it is the only provision concerning remedy that does not apply in the case of threat of serious injury.

43. The fact that the specific language of subparagraph (b) of Article 5.2 addresses only present injury circumstances does not mean, as the Panel inferred, that other provisions of the Agreement are likewise specific only to present injury or to threat of injury. Rather, the absence of such distinction in other substantive provisions of the Agreement, including the other provisions of Article 5.1, indicates that no such broad distinction is intended.[22] By permitting Members to take a safeguard measure when either serious injury or the threat of serious injury exists, the Safeguards Agreement recognizes that industries that are not yet suffering serious injury may be given relief and that a distinction between these two conditions is unnecessary.[23]

44. The first sentence of Article 5.1 -- which states that "[a] Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment" – makes clear that the condition of the industry and its need for adjustment establish the benchmark by which a Member determines the nature of the safeguard measure required. A

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[21] Panel Report, para. 7.267.

[22] *See United States–Tax Treatment for Foreign Sales Corporations*, WT/DS108/R, para. 7.118 (adopted 20 March 2000) modified in other respects, WT/DS108/AB/R (existence of explicit "qualifying" language in footnote 59 of SCM Agreement Annex 1 regarding deferral and double taxation serves to underline the absence of any explicit statement regarding other exemptions from direct tax export subsidy prohibitions);

[23] Under the Safeguards Agreement, the minimum threshold in terms of serious injury is the existence of threat of such injury. Since a finding of present serious injury reflects the conclusion that the threat has been realized, the minimum threshold is clearly satisfied.

Member ascertains the condition of the industry through an analysis of the factors enumerated in Article 4.2(a), namely: the absolute and relative increase in imports, import market share, changes in the level of sales, production, productivity, capacity utilization, profits and losses, employment, and any other objective and quantifiable factor having a bearing on the situation of the industry.

45. The Panel misunderstood the United States' position on the significance of the terms "serious injury" and "threat of serious injury." The United States did not assert – as the Panel states – that these terms are "merely labels that do not themselves indicate the condition of the industry."[24] Instead, the United States explained that the terms "serious injury" and "threat of serious injury" are broad characterizations of the condition of the industry, which do not provide the precise information necessary for ascertaining the nature of the safeguard measure.[25] That information is provided by the factors measuring the industry's performance, the causes of the injury or threat thereof, and the need for adjustment.

46. Put another way, the broad characterization of the condition of the domestic industry as suffering "serious injury" or a "threat of serious injury" does not add anything to what a Member needs to know to formulate its safeguard measure to comply with the requirements of Article 5.1. Accordingly, the Panel erred in concluding that a discrete finding of serious injury or threat of serious injury is necessary to comply with the first sentence of Article 5.1.

5. The Panel's Decision Improperly Infringes on the Manner in Which the United States Has Structured the Decision-Making Process of its Competent Authority.

47. The Safeguards Agreement leaves entirely to Members' discretion how they structure their competent authorities and the decision-making process in safeguards investigations.[26] By construing the Safeguards Agreement to require a discrete finding of serious injury or threat by a competent authority as a whole, the Panel is infringing unnecessarily on the manner in which the United States has internally structured the decision-making process of its competent authority.

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[24] Panel Report, para. 7.266.

[25] United States Response to Questions from the Panel and Korea, paras. 1-6, 11 (7 May 2001).

[26] 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 – Tax Treatment For "Foreign Sales Corporations*," WT/DS108/AB/R, para. 179 (24 February 2000) (members may choose any kind of tax system they wish, as long as the system is applied in a way consistent with WTO obligations).

48. The principle of *in dubio mitius* supports an interpretation of treaty language that assumes that sovereign states intend to impose upon themselves less burdensome, as opposed to more onerous, obligations absent any agreement language to the contrary. The Appellate Body has recognized the relevance of this principle of treaty interpretation, and has described it as follows:

> The principle of in dubio mitius applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.[27]

49. In this case, the Safeguards Agreement is, at the most, ambiguous on the question of whether a discrete determination of serious injury or threat is required. As discussed above, an analysis of the text of Article 2.1, considered in light of the object and purpose of the Safeguards Agreement, shows that no such discrete determination is required. Under these circumstances, the principle of *in dubio mitius* suggests that the Panel should not have inferred such an additional obligation from the terms of the Safeguards Agreement.

50. This conclusion is reinforced by the general provision in 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." By reading into the Safeguards Agreement an obligation to reach a discrete determination of serious injury or threat, the Panel was acting inconsistently with DSU Article 3.2.

6. Conclusion

51. In sum, the Panel's finding that the United States violated Articles 3.1 and 4.2(c) by failing to make a discrete determination of either serious injury or threat of serious injury is based on an incorrect legal interpretation of the Safeguards Agreement and should be reversed.

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[27] Appellate Body Report on *EC – Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26/AB/R, para. 165, n. 154 (adopted on 13 February 1998) ("*EC – Hormones")*, quoting from R. Jennings and A Watts (eds.), Oppenheim's International Law, 9th Ed., vol. I (Longman, 1992), p. 1278.

B. The Panel Erred in Finding That The ITC's Causation Determination Violated Article 4.2(b) of the Safeguards Agreement.

1. The Panel's Finding is Based on an Erroneous Legal Interpretation of Article 4.2(b) and on Incorrect Readings of Prior Appellate Body Reports.

52. The basis for the Panel's finding that the ITC failed to comply with Article 4.2(b) is that the U.S. causation methodology did not ensure that injury caused by other factors was not attributed to the increased imports.[28] Although the Panel made passing reference to the ITC's consideration and analysis of "other" factors raised in *Line Pipe,* the Panel essentially found that the U.S. causation methodology was inherently inconsistent with Article 4.2(b).[29]

53. It is apparent from paragraphs 7.284-7.290 that the Panel simply presumed that because the ITC started with the same standard it applied in *Lamb Meat*, the ITC's *Line Pipe* causation analysis could not have been consistent with Article 4.2(b). The Panel focused on the ITC's determination that the decline in oil and natural gas activities was a lesser contributing factor to the industry's serious injury than the imports.[30] Unconvinced that this determination alone is enough to satisfy the requirements of Article 4.2(b), the Panel likened this case to *Lamb Meat*, stating that, in both, the United States "effectively assumed that the [other identified factors] did not cause the injury attributed to increased imports."[31]

54. The Panel's cursory treatment of Korea's causation claim as a strictly legal matter, without actual examination of the particular factual underpinnings addressed in the competent authority's determination, ignores the teachings of the very reports upon which the Panel relied. The Panel presumed that the ITC's *relative* injury causation analysis could not separate the injurious effects of other factors, such as the oil and gas crisis, from the injurious effects of the increased imports. In *Lamb Meat*, the Appellate Body actually found just the opposite, stating that, "[b]y examining the *relative* causal importance of the different causal factors, the ITC clearly engaged in some kind of process to separate out, and identify, the effects of the different factors, including increased imports."[32] The Appellate Body went on to state that, "to be certain

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[28] Panel Report, paras. 7.282-7.292.

[29] As reflected in the terms of reference, Korea did not challenge the U.S. statute, but rather challenged the actual causation analysis applied by the United States in the *Line Pipe* determination. WT/DS202/4 (15 Sept. 2000).

[30] Panel Report, paras. 7.287-7.288. The Panel did not suggest that any other factor was as significant a causal factor as increased imports.

[31] Panel Report, para. 7.288.

[32] *US – Lamb Meat (AB)*, para. 184.

that the injury caused by these other factors, whatever [their] magnitude, was not attributed to increased imports, the ITC should also have assessed, to some extent, the injurious effects of these other factors."[33]

55. Thus, contrary to the Panel's understanding of *Lamb Meat*, the Appellate Body in that case recognized that the ITC's consideration of the relative importance of different causal factors clearly could incorporate an explanation of what injurious effects the other factors had on the domestic industry.[34] Although the Appellate Body stated that the ITC's examination of the *relative* causal importance of the different causal factors does not necessarily satisfy the Safeguards Agreement simply because it satisfies U.S. law,[35] the Appellate Body did *not* find that the ITC's examination of the *relative* causal importance of the factors *precludes* the ITC from explaining and separating the injury caused by each of the other factors from that caused by the increased imports.

56. That is precisely the course of action followed by the ITC in its *Line Pipe* investigation. Indeed, in this particular case, in addition to finding that the injury caused by the increased imports was greater than injury caused by any other factor, the ITC also explained how it ensured that it did not attribute injury caused by other factors to the imports.[36] Yet, the Panel made no mention of this finding or of the aspects of the ITC's analysis pertinent to showing that injury was not mis-attributed.

57. The only reference by the Panel to the actual facts underlying the ITC's extensive discussion of causation in *Line Pipe* is the Panel's dismissive statement that "it is not apparent from [the ITC's analysis] how, if at all, the ITC separated the injurious effects of the decline in the oil and gas industry from the injurious effects of the increased imports. The ITC's analysis provided no insight into the nature and extent of the injury caused by the decline in the oil and gas industry."[37] The Panel's comment is not based upon an examination of the ITC's factual analysis in this case, but rather on the Panel's assumption that the ITC's factual findings on causation in *Line Pipe* went no further than the analysis that the Appellate Body found to be inadequate under the Safeguards Agreement in *Lamb Meat*. The Panel apparently believed, erroneously, that deference to the Appellate Body's views on causation generally in *Wheat*

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[33] *US – Lamb Meat (AB)*, para. 185. *See also United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, paras. 81-91 (22 December 2000) ("*US – Wheat Gluten (AB)*").

[34] *US – Lamb Meat (AB)*, para.185.

[35] *US – Lamb Meat (AB)*, para.184.

[36] ITC Report, p. I-30.

[37] Panel Report, para. 7.288.

Gluten and *Lamb Meat* made it unnecessary to examine the ITC's analysis of the underlying facts.

58. competent authority to determine whether there is a "genuine and substantial relationship of cause and effect" between the serious injury and the increased imports.[38] According to the Panel, the ITC analysis is flawed from the start because the ITC first "determines whether there is a link between the increased imports and the serious injury, without first attempting to separate out the injury that is being caused by other factors." That the ITC then compares causation with respect to each of the identified other factors is irrelevant to the Panel, because in its view, "the serious injury determination under examination remains 'polluted' by the injurious effects . . . of the remaining other factors."[39] Therefore, according to the Panel, "the United States is not assessing the relative causal importance of the injurious effects of the other factor at issue against the injurious effects of the increased imports."

59. The Panel's reasoning suggests that competent authorities are required to assure that non-import related causes of injury in the aggregate do not negate a conclusion that any injury or threat of injury caused by increased imports is serious. By faulting the ITC for determining serious injury "without first attempting to separate out injury that is being caused by other factors,"[40] the Panel appears to echo the incorrect view of the *Wheat Gluten* panel that competent authorities must *exclude* totally the effects of factors other than increased imports from the determination of serious injury.[41] That analysis was rejected by the Appellate Body in its reports in both *Wheat Gluten* and *Lamb Meat*.

60. Thus, the Panel here, like the panels in *Wheat Gluten* and *Lamb Meat*, erroneously assumed that the Safeguards Agreement precludes imposition of a safeguard measure unless there is a demonstration that serious injury is caused by increased imports taken *alone*.[42] However, the Appellate Body in *Wheat Gluten* and *Lamb Meat* found otherwise. As stated by the Appellate Body in *Wheat Gluten* and reiterated in *Lamb Meat*, "under Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards*, the competent authorities should determine whether the

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[38] Panel Report, para. 7.289. The term "genuine and substantial relationship of cause and effect" derives from the Appellate Body Reports in *Wheat Gluten* and *Lamb Meat*.

[39] Panel Report, para. 7.289.

[40] Panel Report at para. 7.289.

[41] *See US – Wheat Gluten (AB)*, para. 66 (panel's third step as identified by the Appellate Body).

[42] *See, e.g.*, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, *WT/DS177/R,* para. 7.249 (6 December 2000); *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, para. 8.140 (31 July 2000).

increase in imports, not alone, but in conjunction with the other relevant factors, cause serious injury."[43]

61. The Panel also based its causation finding on the erroneous proposition that the Safeguards Agreement requires competent authorities to address causation issues in a specific sequence, and that the sequence of the ITC's causation analysis was inconsistent with the Agreement.[44] Specifically, the Panel faults the ITC for immediately assessing whether there is a link between the increased imports and the serious injury without first attempting to separate out injury that is being caused by other factors. The Panel did not explore the ITC's explanation of how it separated the effects of the other factors in the process of its analysis or how it assured that the causal link between increased imports and serious injury was not broken. Rather, the Panel found that the ITC approach *per se* could not be consistent with Article 4.2(b).

62. In this regard too, the Panel's findings are not in accord with the Appellate Body's interpretation of Article 4.2(b) in *Lamb Meat* and *Wheat Gluten*. In *Wheat Gluten*, the Appellate Body agreed only with the first and second steps it identified from the *Wheat Gluten* panel's analysis: first, that there must be a "causal link" between increased imports and serious injury, and second, that in order to satisfy the "non-attribution" language of the last sentence of Article 4.2(b), the effects caused by increased imports must be distinguished from the effects caused by other factors.[45] With regard to the second of these steps, *i.e*. non-attribution, the Appellate Body mentioned a "two stage process" which fulfills that second step: distinguishing the injurious effects caused by increased imports from the injurious effects caused by other factors, and then attributing to increased imports, on one hand, and by implication to other relevant factors, on the other hand 'injury' caused by all these different factors, including increased imports."[46] In this same discussion, the Appellate Body then referred to a "final step," which described the "first" step identified in *Wheat Gluten* Panels' analysis, wherein the competent authority ensures that the causal link between imports and serious injury or threat is "genuine and substantial."[47]

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[43] *US – Wheat Gluten (AB)*, para. 78.

[44] Panel Report, para. 7.289.

[45] *US – Wheat Gluten (AB)*, paras. 66 and 79. As discussed above, the Appellate Body disagreed with the third and fourth steps applied by the *Wheat Gluten* panel: that the effects caused by other factors must be *excluded* totally from the determination of injury and that the effects caused by increased imports *alone*, excluding the effects caused by other factors, must be capable of causing injury. *Ibid*.

[46] *US – Wheat Gluten (AB)*, para. 69.

[47] *US – Wheat Gluten (AB)*, paras. 69 and 66.

63. In *Lamb Meat*, the Appellate Body provided further edification on the appropriate analytical process, emphasizing that the approach it described in *Wheat Gluten* did not establish a mandated test:

> We emphasize that these steps simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b). Those steps are not legal "tests" mandated by the text of the Agreement on Safeguards, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities.[48]

The Appellate Body emphasized that "the method and approach Members choose to carry out the process of separating the effects of other causal factor is not specified by the *Agreement on Safeguards*."[49]

64. Notwithstanding the Appellate Body's pronouncement that Article 4.2 does not prescribe a particular methodology or order of addressing causation, the *Line Pipe* Panel in part based its conclusion on its view that causation must be addressed in a strict order to meet the requirements of that Article. The Panel's legal interpretation of the Agreement in this respect is erroneous and provides further reason why the Panel's views on causation should be reversed.

2. The Panel's Review Did Not Provide Sufficient Basis for a Conclusion that the United States Failed to Comply with Article 4.2(b).

65. Having erroneously determined that the ITC's methodology was incapable of producing a finding consistent with the requirements of Article 4.2(b), the Panel disregarded the findings that the ITC actually made. The only finding by the Panel referring to the ITC's extensive discussion of causation in the ITC Report is the Panel's dismissive statement that "it is not apparent from [the ITC's analysis] how, if at all, the ITC separated the injurious effects of the decline in the oil and gas industry from the injurious effects of the increased imports."[50] The Panel then restates its thesis, concluding that it is "not apparent" how, if at all, this analysis distinguished the effects of imports from the effects of declining demand for line pipe or identified the nature and extent of the injurious effects of declining demand for line pipe in the oil and gas industry. The Panel does not address the ITC's specific factual findings regarding oil and gas demand in any way. In fact, the Panel stops short its quote from the ITC Report at the point immediately before the ITC's factual findings begin.

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[48] *US – Lamb Meat (AB)*, para. 178 (emphasis added).

[49] *US – Lamb Meat (AB)*, para. 181.

[50] Panel Report, para. 7.287.

66. Just as a panel cannot simply accept summary conclusions by a competent authority *in lieu* of "findings and reasoned conclusions reached on all pertinent issues of fact and law,"[51] it cannot ignore or summarily reject such findings and reasoned conclusions.[52] In the panel proceedings, the ITC pointed to specific findings and extensive examination in its *Line Pipe* determination of the nature of the effects, if any, of the various real and alleged other factors causing injury to the domestic line pipe industry. The Panel did not undertake any evaluation of these arguments or of the ITC's analysis of the other causation factors. As such, the Panel failed to conduct a review of the Commission's findings as set forth in the ITC determination and report.[53] Given this failure on the part of the Panel, the Appellate Body is, in effect, in a position where it is not possible to evaluate what would have been the Panel's analysis.

67. In distinct, but not entirely different circumstances, the Appellate Body has recognized that, after reversing a finding of the panel, it can complete the analysis only if the factual findings of the panel, or the undisputed facts in the panel record, provide sufficient basis to do so.[54] As the Appellate Body stated in *Korea – Dairy*, where 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 . . . ."[55] Similarly, in this dispute, there is insufficient analysis by the Panel regarding the ITC's determination and findings to enable the Appellate Body to conduct the analysis of Korea's Article 4.2(b) claim in this dispute.

68. Had the Panel undertaken the required analysis of the ITC's determination, it should have found that the ITC specifically took the effects of the decline in domestic consumption and decline in exports into account in its analysis, distinguished those effects from those of the

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[51] Safeguards Agreement, Article 3.1. *See US – Wheat Gluten (AB)*, para. 160.

[52] *See EC–Hormones*, para. 133.

[53] We note that, in this respect, this case is in a different posture from *Wheat Gluten* and *Lamb Meat*. In those cases, the panels had delved into and reviewed the ITC's factual findings concerning the other injury factors. The Appellate Body therefore was able to reach conclusions regarding the Panel's review of the ITC's causation analyses. *See US – Wheat Gluten (AB)*, paras. 80 and 81; *US – Lamb Meat (AB)*, para. 172.

[54] *See, e.g.*, *United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, paras 235 and 236 (24 July 2001); *European Communities–Measures Affecting Asbestos-Containing Products*, WT/DS135/AB/R, para. 78 & nn. 48 & 49 (12 March 2001).

[55] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy* Products, WT/DS98/AB/R, para. 92 (14 December 1999). The Appellate Body reached a similar conclusion in paragraph 103.

increased imports of line pipe, and reached a reasonable conclusion that was thoroughly explained in its report that increased imports were a substantial cause of the serious injury to the domestic industry.

69. Instead, the Panel applied an erroneous interpretation of the Safeguard Agreement's causation requirements. By virtue of that faulty interpretation, the Panel failed to examine the pertinent findings and conclusions in the ITC Report and failed to make factual findings addressing whether the ITC had not attributed injurious effects of other factors to the imports. The Appellate Body should therefore reverse the Panel's finding of a violation of Article 4.2(b) as it is bereft of legal basis.

70. We have described why the Appellate Body does not have a sufficient foundation to conduct the analysis that the Panel should have performed. However, if the Appellate Body decides to undertake this task, it should conclude that the United States complied with Article 4.2(b).

71. As we have noted, Korea contested the validity of several of the factual findings of the ITC. However, it has never contested that the ITC did, in fact, make those findings. Nor has the Panel found that those factual findings were inconsistent with the requirements of the Safeguards Agreement. Therefore, if the Appellate Body decides to complete the analysis of the Panel, it should do so based on the findings of the ITC. These findings show that the ITC's causation analysis comports with the requirements that the Appellate Body found in *Wheat Gluten* and *Lamb Meat*. The ITC demonstrated and adequately explained a genuine and substantial causal link between increased line pipe imports and serious injury or threat of serious injury to the domestic line pipe industry.

72. The United States explained in detail in its submissions to the Panel how the ITC determination comported with the requirements of Article 4.2(b), particularly as those requirements have been articulated in the *Wheat Gluten* and *Lamb Meat* Appellate Body decisions.[56] A summary of the ITC's pertinent findings and the associated analysis is contained in Appendix A to this submission. Had the Panel followed the correct legal analysis, its proper consideration of the ITC's findings and reasoned conclusions would have led the Panel to reject Korea's claim under Article 4.2(b). If the Appellate Body decides to complete the analysis, it therefore should reject Korea's claim, just as the Panel should have done had it correctly examined the ITC's findings.

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[56] First Written Submission of the United States, paras. 112-159, Oral Statement of the United States at First Panel Meeting, paras. 20-31; Second Written Submission of the United States, paras. 55-79; U.S. Response to Questions from the Panel and Korea (7 May 2001), paras. 53-59, 92-106; Oral Statement of the United States at the Second Panel Meeting, paras. 47-56.

C. The Panel Erred in Upholding Korea's Claim That the United States Failed to Provide an Adequate Opportunity for Prior Consultations and to Endeavor to Maintain a Substantially Equivalent Level of Concessions and Other Obligations.

73. Before applying the line pipe safeguard measure, the United States made available the information needed for consultations, and thereby met its Article 12.3 obligation to provide substantial exporters of line pipe with an adequate opportunity for prior consultations. Korea argued that it did not receive the information sufficiently in advance of application of the measure. The Panel based its decision on an argument that Korea never raised – that the United States failed to "ensure" that Members with a substantial export interest received the necessary information. The Panel committed two errors in reaching this decision. First, it erroneously interpreted the requirement of an *adequate* opportunity for consultations with some Members (those having a substantial export interest) as a requirement to *ensure* that exporting Members had such an opportunity. Second, it did not make the findings of fact necessary to support a finding that the United States breached Article 12.3. Accordingly, the Appellate Body should reverse the Panel's finding that the United States breached Article 12.3, and also the derivative finding that this inconsistency by itself created a further breach of Article 8.1.

74. The relevant facts are not in dispute. The United States announced its readiness to consult with Members having a substantial interest as exporters of line pipe on 24 January 2000.[57] The United States conducted consultations with Korea on that very day.[58] The United States issued a press release on 11 February 2000, which described in detail the safeguard measure that it proposed to take. Korea admits that it received the press release on 11 February 2000.[59] The United States remained available for consultations, and held them with the EC in the second half of February, before the line pipe measure took effect on 1 March 2000.[60]

75. There is also no question that the United States filed the necessary notifications at each stage of the proceedings. It provided an Article 12.1(b) notification of the ITC injury vote on 8 November 1999, a supplemental Article 12.1(b) notification of the issuance of the ITC Report on 24 January 2000, and an Article 12.1(c) notification of the final proposed measure on 22 February.[61] As the Panel noted, Korea did not contest the adequacy of these notifications, either

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[57] G/SG/N/8/USA/7/Suppl.1 (25 January 2001).

[58] Korea's first written submission, para. 324.

[59] Korea's first written submission, para. 324.

[60] Proclamation 7274, 65 Fed. Reg. 9194 (Feb. 23, 2000) (Exhibit KOR-19).

[61] G/SG/N/8/USA/7 (11 November 1999); G/SG/N/8/USA/7Suppl.1 (25 January 2000); G/SG/N/10/USA/5/Rev.1 (28 March 2000).

in terms of timeliness or content, and they must be presumed to be adequate for purposes of this dispute.[62]

76. The Panel did not address whether in this dispute the United States provided Korea with an adequate opportunity for prior consultations. Rather, the Panel invented a *per se* rule and made a finding in the abstract under Article 12.3. The Panel did not examine whether Korea received the information necessary to conduct prior consultations. It found instead that the press release issued by the United States was inherently incapable of satisfying the requirements of Article 12.3 because

> [A] press release does not ensure that exporting Members obtained the necessary detailed information on the proposed measure. A simple press release does not guarantee that exporting Members obtained the information contained therein, because, *inter alia*, a press release may not be accessible to all Members having a substantial interest. Indeed, Members may not even know of the existence of such a press release, or may be unable to obtain a copy of it. Therefore, we find that the 11 February 2000 press release, regardless of its content, cannot itself be considered to have provided Korea with an adequate opportunity for prior consultations.[63]

77. As an initial matter, the Panel based its conclusion on an argument that Korea never raised. Korea originally argued that the United States acted inconsistently with Article 12.3 because it "did not disclose to Korea the measure proposed prior to or during the consultations."[64] It subsequently argued in addition that it had no adequate opportunity for consultations because the press release preceded the actual imposition of the measure "only by a few days" and the Article 12.1(c) notification was made subsequent to issuance of the Presidential proclamation of the measure.[65] But Korea never contended that a press release would be incapable of conveying the information necessary for consultations.[66] Nor did it argue that the United States failed to provide the information in the press release to Members other than Korea. Yet this reasoning formed the basis for the Panel's conclusion.

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[62] Panel Report, para. 7.311.

[63] Panel Report, para. 7.314.

[64] Korea's first written submission, para. 323.

[65] Korea's written rebuttal, paras. 151-152.

[66] Korea stated in its written rebuttal that "the United States cannot seriously maintain that the Press Release provided Korea with 'adequate opportunity' for prior consultation." Korea's written rebuttal, para. 151. However, Korea never provided a reasoned explanation for this conclusory dismissal.

78. The Panel misinterprets Article 12.3 in finding that it requires a Member to "ensure" or "guarantee" receipt of information by exporting Members of the WTO. Article 12.3 states:

> A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

79. The Panel's interpretation neglected that the obligation is to "provide *adequate opportunity* for prior consultations with Members having a substantial export interest"[67] – not to "guarantee" receipt of particular information. The ordinary meaning of opportunity is "time or condition favourable for a particular action or aim; occasion, chance;" and its modifier "adequate" means "[c]ommensurate in fitness; sufficient, satisfactory . . . [b]arely sufficient."[68] Thus, Article 12.3 requires only that the Member proposing to impose a safeguard measure provide a satisfactory time or condition favorable for Members with a substantial export interest to participate in prior consultations. This standard will be met whenever those Members have the information necessary for consultations and enough time to hold them. The possibility of the Member not receiving the information does not detract from the adequacy of the opportunity for consultations if the information was, in fact, received. Thus, the Panel's concern that a Member with a substantial exporting interest *may* not have obtained the information needed for consultations does not establish an inconsistency with Article 12.3.

80. The Appellate Body has also indicated that the focus in determining adequacy of consultations is on the actual ability of a Member to participate in consultations, explaining in *Wheat Gluten* that

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[67] The Panel is also imprecise on exactly which "exporting Members" are entitled to obtain information. Article 12.3 addresses potential consultations with a limited group of Members – those having a substantial interest as exporters of the product concerned. In this regard, it differs from many other provisions of Article 12, which require action with regard to the Committee on Safeguards, a body open to all WTO Members. A necessary corollary of the Article 12.3 rule is that a Member is not acting inconsistently with the obligation if it fails to provide an opportunity for consultations with Members who do not have a substantial export interest. Accordingly, the possibility that an exporting Member may not have had an adequate opportunity for prior consultations does not establish an inconsistency with Article 12.3 unless the Member had a substantial exporting interest. Neither the Panel nor Korea identified any Member with a substantial export interest that did not receive the information in the press release.

[68] *The New Shorter Oxford English Dictionary*, vol. 2 (1993), pp. 26 & 2009.

> in our view, an exporting Member will not have an "adequate opportunity" under Article 12.3 to negotiate overall equivalent concessions through consultations unless, prior to those consultations, it has obtained, *inter alia*, sufficiently detailed information on the form of the proposed measure, including the nature of the remedy.[69]

Thus, the requirement to "guarantee" that exporting Members receive particular information does not appear in the text of Article 12.3. The Appellate Body should, therefore, reverse the Panel's legal interpretation as an impermissible addition to the obligations in the covered agreements, in direct contravention of DSU Article 3.

81. The Panel compounded its error by failing to make the factual findings necessary to determine whether the United States failed to provide adequate opportunity for prior consultations.[70] The Panel did not find that Korea failed to "obtain" the information in the press release. Indeed, Korea admitted that it received the information, so any contrary finding would not have been an objective assessment of the facts. Nor did the Panel find that the contents of the press release provided an inadequate basis for prior consultations – it made the ruling on the press release "regardless of its content."[71] Korea itself never claimed that the contents of the press release were inadequate. It is also clear that, together with the earlier Article 12.1(b) notifications, the press release provided all of the information that the Appellate Body has found to be necessary for purposes of Article 12.3 – evidence of serious injury or threat thereof caused by increased imports, a precise description of the product involved and the proposed measure, the proposed date of introduction, the expected duration and the timetable for progressive liberalization.[72]

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[69] *US – Wheat Gluten (AB)*, para. 137.

[70] We note that, under Article 12, provision of the appropriate notifications would presumptively indicate that a Member with a substantial export interest had obtained the information needed for an adequate opportunity for prior consultations. The availability of this presumptive avenue for notification does not prevent a Member providing information through other means. Indeed, a Member will best be able to afford an adequate opportunity for prior consultations if it has a speedy avenue to convey modifications to the proposed measure to Members with a substantial export interest. Article 12.1(c) notifications – which the Safeguards Committee may not communicate to Members for several days – do not provide such an opportunity.

[71] Panel Report, para. 7.314.

[72] *US – Wheat Gluten (AB)*, paras. 136-137. The Press Release specifies the progressively more liberal level of the safeguard duty, the 9000 ton exemption, the date of application, and duration in the terms comparable to the notification under Article 12.3(c), which Korea did not challenge. Statement by the Press Secretary, 11 February 2000 (Exhibit KOR-16); G/SG/N/10/USA /5/Rev.1 (28 March 2000), paras. 4-6, 8. The remaining information appears in

82. The Panel did not find that any other Member with a substantial interest failed to obtain the information in the press release. Korea never alleged that such Members existed, and the Panel never identified any. Had Korea provided evidence concerning another Member, the United States would have had the chance to demonstrate that the relevant Member received the information necessary for prior consultations. Indeed, the United States informed the Panel that it *did* conduct consultations with the EC, which supplied the second largest quantity of line pipe after Korea, following issuance of the press release but before the line pipe safeguard took effect.

83. The Panel also provided no support for its conclusion that a press release might not be accessible to a Member with a substantial export interest. It did not assess how the United States distributed the press release or whether the United States had reason to believe that Members with a substantial export interest would obtain the press release. Korea did not present evidence on these points. Instead the Panel assumed that press releases might not be accessible.

84. We also note that, had the question of other Members' access to the press release been raised by or before the Panel, the United States would have demonstrated that the hypothetical inconsistency with Article 12.3 did not nullify or impair any benefit accruing to Korea. Article 3.8 DSU permits a Member found to have infringed an obligation to rebut the presumption that there has been a nullification or impairment. For the reasons discussed above, the fact that Korea received the information necessary for consultations via press release did not impair in any way its opportunity to conduct prior consultations with the United States.

85. The Panel's conclusions with regard to Article 12.3 led to a further finding that the United States also acted inconsistently with Article 8.1. The Panel explained

> if a Member has not provided adequate opportunity for consultations under Article 12.3, it cannot have complied with its obligation to endeavour to maintain a substantially equivalent level of concessions and other obligations. Therefore, we find that the United States, by failing to comply with its obligations under Article 12.3, has also acted inconsistently with its obligations under Article 8.1 to endeavour to maintain a substantially equivalent level of concessions and other obligations.[73]

This is the sole basis for the finding of an inconsistency with Article 8.1. Since, as we have shown above, the Article 12.3 finding is erroneous, the Appellate Body should conclude that the Article 8.1 finding is equally erroneous.

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the U.S. notification under Article 12.1(b). G/SG/N/8/USA/7/Suppl.1 (25 January2000), paras. 1-3, and 7.

[73] Panel Report, para. 7.319.

D. The Panel Erred in Finding That Article 9.1 Required the United States to List the Developing Country Members "Excluded" from the Line Pipe Safeguard.

86. Presidential Proclamation 7274 imposed a 19 percent safeguard duty on all imports of line pipe. The Proclamation did not require any developing country Member accounting for less than three percent of total imports to pay the 19 percent supplemental duty. Even so, the Panel found that the United States "applied" the safeguard measure to developing country Members because it did not exclude them by name. The Panel has misinterpreted the text of the Safeguards Agreement. Article 9.1 conditionally prohibits application of a measure "as long as" a developing country Member accounts for less than three percent of total imports.[74] It is silent as to *how* a Member may meet this obligation, and certainly does not require a list of the developing countries. Thus, the United States complied with Article 9.1 when it structured the safeguard duty so that it automatically would not apply to developing countries accounting for less than three percent of imports. Accordingly, the Appellate Body should reverse the Panel's finding that the line pipe safeguard was inconsistent with Article 9.1.

87. The line pipe safeguard took the form of a 19 percent tariff, with the first 9000 tons from each source exempt. At the peak of the import surge, 9000 tons would have represented 2.7 percent of total imports. After application of the safeguard measure, imports would decline below the point at which any developing country that passed the 9000 ton threshold would account for more than three percent of imports.[75] Korea also argued before the Panel that the line pipe safeguard would result in a decrease in imports, and the Panel recognized that any other outcome was "unlikely to materialize."[76] Thus, the terms of the safeguard measure would not apply the safeguard tariff to any developing country Member that accounted for less than three percent of imports.

88. The Panel began its analysis with Article 9.1, which states:

> Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent . . . .

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[74] Additionally, Article 9.1 allows application of a safeguard measure to developing country Members if such Members that account for less than three percent of imports together account for more than nine percent of imports. This aspect of Article 9.1 is not at issue in this dispute, and we will not discuss it further.

[75] We note that this expectation was borne out. To date, imports have not reached a level at which the 9000 ton threshold has represented less than three percent of total imports.

[76] Panel Report, para. 7.181.

The Panel concluded from this text that "if a measure is not to apply to certain countries, it is reasonable to expect an express exclusion of those countries from the measure."[77] The Panel provides no support for this assertion other than to note that the Safeguards Committee's Suggested Formats for Notifications requests Members to "[s]pecify the developing countries to which the measure is not applied under Article 9.1."[78]

89. The most basic flaw in the Panel's reasoning is that Article 9.1 does not obligate Members to provide specifically for "non-application" of a safeguard measure. The text requires only that the safeguard measure "not be applied" against a developing country Member having less than three percent of imports. Thus, if the measure by its terms applied only to developed country Members and developing country Members above the three percent threshold, it would satisfy the Article 9.1 requirement without any need for exclusions. For example, a Member could specify that the measure applied *only* to certain countries and, as long as the relevant developing countries did not appear on the list, the measure would satisfy Article 9.1. In that case, a list of excluded countries would be redundant. The line pipe safeguard took a similar approach, although it specified the *included* countries in functional terms (as those accounting for more than 9000 tons of imports) rather than listing them. The important point is that under this functional definition, the measure would not be applied to developing country Members and, therefore, was consistent with Article 9.1.

90. The sole support cited by the Panel, the Suggested Formats, does not change this conclusion. As the Panel noted, the Suggested Formats were "suggested without prejudice to the interpretation of the Agreement by relevant bodies."[79] Nonetheless, the Panel found that the Suggested Formats "provide[] guidance as to what is expected from Members,"[80] and discerned from the suggestion to list developing country Members in the notification an obligation to list those Members in the underlying safeguard measure.

91. This conclusion simply does not withstand scrutiny. As their title indicates, the Suggested Formats provide *suggestions* on how to comply with notification requirements. They do not even purport to provide guidance on how Members comply with the substantive obligations of the Safeguards Agreement. Moreover, a Member does not have to list developing countries to meet the suggestion in question – to "specify the developing countries to which the measure is not applied" – as long as the measure allows a determination of whether particular developing countries qualify.

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[77] Panel Report, para. 7.175.

[78] *Suggested Formats for Notifications under the Agreement on Safeguards*, G/SG/W/1 (23 February 1995), section V, para. 3 ("Suggested Formats").

[79] Suggested Formats, Note from the Chairman, para. 2.

[80] Panel Report, para. 7.175, note 150.

92. But the Panel's reasoning fails on an even more important procedural basis. In ostensibly taking "guidance" from the Suggested Formats, the Panel adopted a requirement that appears nowhere in the text of the Safeguards Agreement itself. This is entirely inconsistent with the express statement of the Safeguards Committee that it adopted the Suggested Formats "without prejudice to the interpretation of the Agreement by the relevant bodies."[81] And even if the Safeguards Committee's statement could be construed to allow the conclusion reached by the Panel, it would be inconsistent with Article IX:2 of the Marrakesh Agreement, under which the General Council or Ministerial Conference have the "exclusive authority to adopt interpretations of . . . the Multilateral Trade Agreements." Accordingly, the authorities cited by the Panel do not support its reasoning, which should accordingly be reversed by the Appellate Body.

93. The Panel also suggests that the U.S. Customs Service's statement that Proclamation 7274 "will apply" to some developing country Members reveals that the safeguard measure did, in fact "apply" to those Members. However, that statement merely reflects that both the safeguard duty and the 9000 ton exemption from that duty apply to developing country Members under the specified circumstances. Application of the exemption certainly cannot breach Article 9.1, as that was the administrative device preventing the application of the safeguard duties to developing country Members. Nor could it breach Article 9.1 to apply the supplemental duty to developing country Members with more than 9000 tons in imports, as they would exceed the three percent threshold. Article 9.1 provides that a measure shall not be applied to a developing country Member "as long as its share of imports . . . does not exceed 3 per cent." Proclamation 7274 follows this prescription – as long as imports from any developing country Member remain below the 9000 ton threshold, no duty is applied to that Member. But once a developing country Member ceases to meet the criteria, the duty is applied.

94. Finally, the Panel states that there is a scenario – which it admits is "unlikely to materialize" – in which total imports increase in spite of the safeguard measure. In that case, a developing country Member that shipped more than 9000 tons per year to the United States would be subject to the safeguard duty even though the 9001st ton was still beneath the three percent threshold.[82] It is unclear what significance the Panel attaches to this possibility.

95. If the point is that the United States did not at the outset craft the line pipe safeguard so as to conform to Article 9.1 in every conceivable circumstance, the Panel has misconstrued that provision. In the framework of the Safeguards Agreement, Article 9.1 creates an exception to the Article 2.2 obligation that "[s]afeguard measures shall be applied to a product being imported irrespective of its source." And, as noted above, it provides only a [contingent] exception, effective with regard to a particular developing country "as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent." Since both the overall level of imports and the level of imports from particular developing countries may change over

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[81] Suggested Formats, para. 2.

[82] Panel Report, para. 7.181.

time, compliance with Article 9.1 requires monitoring and, if necessary, adjustments to a safeguard measure.[83] Thus, the fact that the line pipe safeguard might subsequently require adjustment to conform to Article 9.1 cannot constitute an inconsistency with that provision.

96. The Panel also suggests that the fact that the 9000 ton threshold would result in developing countries accounting for less than three percent of imports not paying the safeguard duty was an irrelevant "trade effect" that did not change that the measure "applied" to developing countries. The Panel misses the point. What it dismisses as an "effect" is the application of the mechanism the United States chose to comply with Article 9.1. And it is no more a trade "effect" than the non-payment of duties that would have resulted if the United States had excluded developing countries by name.

IV. CONCLUSION

97. For the foregoing reasons, the United States requests that the Appellate Body reverse the following findings by the Panel:

(A) That the United States acted inconsistently with Articles 3.1 and 4.2(c) of the *Agreement on Safeguards* 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;

(B) That the United States acted inconsistently with Article 4.2(b) of the *Agreement on Safeguards* by failing to establish a causal link between increased imports and the serious injury, or threat thereof;

(C) That the United States acted inconsistently with its obligations under Article 12.3 of the *Agreement on Safeguards* by failing to provide an adequate opportunity for prior consultations with Members having a substantial interest as exporters of line pipe;

(D) That the United States acted inconsistently with its obligations under Article 8.1 of the *Agreement on Safeguards* to endeavor to maintain a substantially equivalent level of concessions and other obligations; and

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[83] The United States excluded developing countries by name from the safeguard measure it applied on wheat gluten. Subsequent to application, imports from Poland increased to represent almost seven percent of total imports. Accordingly, the United States removed Poland from the list of countries excluded from the wheat gluten safeguard. G/SG/N/10/USA/2/Suppl.2, G/SG/N/11/USA/2/Suppl.2 (13 September 2000); Proclamation 7314 of May 26, 2000, 65 Fed. Reg. 34899 (31 May 2000).

(E) That the United States applied the line pipe safeguard to developing countries whose imports do not exceed the individual and collective thresholds in Article 9.1 of the *Agreement on Safeguards*.

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Dated: 20 November 2001

APPENDIX A

SUMMARY OF ITC FINDINGS SHOWING NON-ATTRIBUTION

1. The ITC in its determination identified five "other factors" which assertedly caused injury to the domestic line pipe industry at the same time as increased imports.[1] These "other factors" were: declines in line pipe demand caused by reduced oil and natural gas drilling and production activities; competition from other domestic producers; an alleged production shift from oil country tubular goods ("OCTG") to line pipe; a decline in export markets in 1998 and interim 1999; and a decline in raw material costs in interim 1999. The ITC addressed in detail how the effects of these "other factors" – insofar as they produced any injurious effects at all – were not attributed to imports.

2. The ITC's conclusion that there was a genuine and substantial causal link between the increased imports and the serious injury began with its analysis of the adverse effects of the imports on the industry's condition. In particular, based upon the actual and relative size and timing of the increase in imports and on the pricing of imports and domestic line pipe,[2] the ITC found that the increased imports caused significant price depression, which in turn resulted in lost sales, market share and revenues for domestic producers and lost jobs for their workers. Thus, the ITC established that there was a causal link between the increased imports and the industry's poor performance. The ITC then examined other actual or alleged causes of injury to the industry. The ITC explained that it did not attribute injury caused by other factors to the imports.[3]

3. As the Panel found, the main "other factor" examined by the ITC was the reduction in oil and natural gas drilling.[4] The ITC recognized increased imports and declining demand for line pipe due to decreased oil and gas drilling and production as the only principal causes of injury.[5] It distinguished the injurious effects caused by increased imports from the effects of declining demand from the oil and gas sectors. It did so in several ways. First, the ITC observed that, although there was a substantial decline in consumption in the oil and gas sector from 1998 to

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[1] *See* Panel Report, para. 7.283. Korea alleged a sixth injury-causing factor: increases in the domestic producers' per-unit overhead and selling, general and administrative ("SG&A") expenses allegedly due to the misallocation of such expenses as a result of declines in production of other pipe products. However, the ITC found, and the Panel agreed, that the evidence did not bear out the allegations that the domestic producers had mistakenly or disproportionately attributed their overall per-unit allocated overhead and SG&A expenses to line pipe operations. *See* ITC Report, p. I-31; Panel Report, paras. 7.228 and 7.283.

[2] ITC Report, pp. I-23-26.

[3] ITC Report, p. I-30.

[4] *See* Panel Report, para. 7.287.

[5] ITC Report, p. I-22.

1999, this decline was from unusually high levels. The ITC noted that the domestic industry had operated at lower levels of demand in the past without experiencing the severe financial losses the industry experienced in 1998/1999. The ITC found that the most significant difference between previous periods of lower demand and the 1998/1999 period was the much greater presence of imports in the latter period.[6]

4. The second way in which the ITC distinguished the injurious effects caused by increased imports from the effects of declining demand from the oil and gas sectors was by recognizing the dramatic shift in market share from domestic suppliers to imports. The ITC explained that a decline in demand for a standardized product such as line pipe would be expected to impact all sources of supply in roughly proportional amounts. In this case, however, the market share of imports rose sharply.[7]

5. The ITC further distinguished the effects of increased imports from those of the demand declines in the oil and gas sector by noting the across-the-board price declines in 1998 and interim 1999, even in line pipe grades not sensitive to demand related to the oil and gas industries.[8] Finally, the ITC pointed to a consensus among producers, importers and purchasers that imports played a major role in the decline in U.S. line pipe prices in 1998 and interim 1999.[9] By separately identifying injurious effects of increased imports that were wholly unrelated to the oil and gas market, the ITC ensured that it was not attributing to imports injury caused by the decline in oil and gas demand.

6. In addition to the reduction in oil and gas drilling, the ITC examined the effects of each of the other four possible alternative causes, and did not attribute injury caused by any of them to the imports.[10] Addressing competition among domestic producers, the ITC found that such competition had always been a factor in the market, and that it did not explain the severe decline in domestic prices and shipments that occurred toward the end of the period investigated. The ITC further found that although the addition of two new facilities in 1998 added to capacity, the 8 percent increase in capacity was reasonable and moderate in comparison to the 23 percent growth in consumption from 1994 through 1998.

7. The ITC also examined the effects of changes in the OCTG market that caused domestic producers to shift production out of OCTG to line pipe. The ITC found that this factor was actually another form of increased intra-industry competition because its effect would be to

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[6] ITC Report, p. I-28-29.

[7] ITC Report, p. I-29.

[8] ITC Report, p. I-29.

[9] ITC Report, p. I-30.

[10] *See* ITC Report, p. I-30.

increase production, and therefore supply, of line pipe.[11] As noted, the ITC found that domestic competition had always been a factor but had not caused price depression and shipment declines such as those caused by the imports. Furthermore, the ITC found that any switch from OCTG to line pipe would have involved relatively small quantities.

8. The ITC next examined the decline in export markets in 1998 and interim 1999. It found that although this decline worsened the serious injury caused by the increased imports, the increase in imports was far larger than the decline in exports. Thus, although the modest declines in exports may have also affected the producers' bottom line, those effects were not attributed to imports because, as the ITC found, the impact of the increased imports dwarfed the decline in exports.[12]

9. Finally, the ITC examined whether a decline in interim 1999 prices for the main raw material – hot-rolled carbon steel – caused the line pipe price declines which had triggered the domestic industry's financial downturn. It determined that declining costs did not cause the price declines,[13] and that with respect to costs, it was not misattributing the price effects caused by the imports. In its Report, the ITC explained that the questionnaire data showed that overall raw material costs remained stable through 1998, and therefore declines in raw material costs could not have been an alternative cause of the 1998 price declines. Although the data showed declines in raw material costs in interim 1999, other costs, and therefore the total cost of goods sold remained roughly steady. In addition, the ITC noted that there were indications of increases in raw material costs, particularly for hot-rolled steel, in the latter half of 1999. Based on this reasoned examination of the evidence, the ITC found that the decline in raw material costs in interim 1999 was not causing injury to the domestic industry, and certainly was not causing the price declines found to be attributable to the increased imports.

10. Thus, the ITC distinguished the effects of each of the alternative causes and found that none of the other factors severed the causal link it had found to exist between the increased imports and the serious injury. The ITC's thorough explanation of this analysis in its Report demonstrates that the ITC based its serious injury determination upon the existence of a genuine and substantial relationship of cause and effect between the increased imports and the serious injury.

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[11] ITC Report, pp. I-30-31 & n.190.

[12] ITC Report, p. I-31.

[13] ITC Report, pp. I-31-32.