ANNEX A

Third Party Submissions and Oral Statements

that the President exclude Canada from any relief action.[4] Imports of line pipe from Canada were excluded from the measure.[5]

III. ARGUMENT

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

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

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

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

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

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

[5] Imports of line pipe from Mexico were also excluded from the measure.

[6] First Submission of the Republic of Korea, para. 168.

[7] First Submission of the United States, para. 221, see also para. 214.

[8] *Id*., para. 216.

[9] *Id*, para. 217.

[10] WT/DS121/AB/R, December 14, 1999, para. 81.

IV. CONCLUSION

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

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

9.. Specifically, this right is not qualified by any limit to the admissibility of evidence in any

Specifically, the right to participate in domestic proceedings is not a prerequisite for to the right to resort to the dispute settlement system, nor does its non-exercise or partial exercise foreclose the right

(2) CONSTRUCTION.

27. Assessing the relevance of the evidence submitted by one of the parties to the dispute is therefore also not amounting to a *de novo*

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

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

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

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

-expectations of both importers and domestic producers that demand would continue to be strong

-misjudgement of the domestic market by domestic producers

-collapse of oil prices

-the East Asian financial crisis.

38. In the EC's view, the first three circumstances are certainly not "unforeseen developments" and are not "leading to" a surge in imports24 must

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

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

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

44.

ANNEX A-3

THIRD PARTY SUBMISSION OF JAPAN

(30 March 2001)

As Japan has not yet exhausted its examination of the issues contained in the submissions of

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

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

5. The remedy level imposed by the President was far more restrictive than that recommended by the ITC, which was based on detailed market and economic analysis. In stark contrast to the ITC's remedy recommendation, the President's remedy was unsupported by any analysis. Moreover, it was emTj 363ATw (he r TD 688 T1iled ma1875 6tyd) Tj -45 -12.75 President's rebuis.lsod

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

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

> 106. We question the Panel's implicit assumption that footnote 1 to Article 2.1 of the *Agreement on Safeguards* applies to the facts of this case. The ordinary meaning of the first sentence of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure "as a single unit or on behalf of a member State." On the facts of this case, Argentina applied the safeguard measures at issue after an investigation by Argentina authorities of the effects of imports from all sources on the Argentine domestic industry.
>
> 107. MERCOSUR did not apply these safeguard measures, either as a single unit or on behalf of Argentina. . . .
>
> 108.

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

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

V. THE US INCORRECTLY INTERPRETS THE TERM "UNFORESEEN DEVELOPMENTS" IN GATT ARTICLE XIX

21. The US asserts at paragraphimpl2(t20tt (that SUP7,lle) Tj w0airS-36.75 -38.22ELO2175 Tw9406jury

Safeguards Agreement, as interpreted by the Appellate Body,[21] the ITC finding, which ignored recent data, was improper.

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

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

VII. CONCLUSION

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

[21] *See* Korea's First Submission at paras. 197-200.

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

III. CONCLUSION

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

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

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

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

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

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

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

9. Korea argues that the US exemption from the safeguard measure violated MFN requirements

observed, is whether Argentina,

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

20. Furthermore, the specific justifications given by the ITC to exclude NAFTA imports could

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

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

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

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

(a) lack of "coincidence in trends" between imports and the domestic industry performance;

(b) lack of appropriate "non–attribution" to imports of the effects of "other factors";

(c) "mis-attribution" of injurious effects to imports of specialty products.

III.1. NO COINCIDENCE IN TRENDS

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

III.2. NO "NON-ATTRIBUTION"

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

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

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

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

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

[17] Korea's First Written Submission, paras. 266-272.
[18] *US – Wheat Gluten*, Appellate Body Report, para. 69.
[19] *US – Wheat Gluten*, Appellate Body Report, para. 69.

> simultaneously causing injury. If the competent authorities do not conduct this examination, *they cannot ensure that injury caused by other factors is not "attributed" to increased imports*." [20]

and, therefore, that such injury is

> "not treated as if it were injury caused by increased imports, when it is not". [21]

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

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

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

38. The Appellate Body noted that the US authorities had not "adequately evaluated the complexity of this issue" before them (in that case, the "the relationship between the increases in average capacity, the increases in imports and the overall situation of the domestic industry").[22] It therefore concluded that the ITC had not demonstrated adequately that non-import factors had not been attributed, and the attribu0 0 TD -0.0904 Tc 0.2779 Tw (5.1 of 128de in theon"D -0Safeguard2.75 Ts 0 -12.75 not".) Tj

1. Trends in oil and gas industry

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

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

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

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

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

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

3. Production shift from OCTG products to line pipe

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

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

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> "need only examine "other factors" which are *clearly* raised before them as relevant by interested parties" [34]

and found that

> "the competent authorities must undertake additional investigative steps, when circumstances so require, in order to fulfil their obligations to evaluate all relevant factors." [35]

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

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

4.

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

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

ANNEX A-6

ORAL STATEMENT OF JAPAN

(12 April 2001)

1. Mr. Chairman, Members of the Panel, Japan welcomes the opportunity to present its views orally in this proceeding.

2. Japan's exporters of line pipe, like those of Korea, are subject to the US safeguard measure at issue in this dispute. Moreover, Japan has systemic concerns about US safeguards practices in general. I will now summarize Japan's views, some of which are expressed in greater detail in Japan's Third Party Submission.

3. First, the measure was not limited to the extent necessary to remedy any serious injury. The measure imposed by the US President, which was unsupported by any analysis, was far more restrictive than that recommended by the USITC, which was based on detailed market and economic analysis. Thus, the measure cannot possibly be limited "to the extent necessary to prevent or remedy serious injury," as required by Article 5.1 of the Safeguards Agreement and Article XIX:1(a) of GATT 1994.

4. Second, the exclusion of Canada and Mexico from the remedy is discriminatory and violates Article 2.2 of the Safeguards Agreement, which requires application of a measure "to a product being imported irrespective of its source."

5. Footnote 1 of the Agreement, upon which the US relies, does not apply in this dispute. The footnote applies only to customs unions applying a safeguard measure as a single unit. NAFTA is not a customs union. Moreover, even if footnote 1 applied to free-trade areas (which it does not), the safeguard measure at issue was not applied by NAFTA on behalf of the United States; the US applied the measure on its own behalf.

6. Third, the USITC investigation failed to satisfy the requirements of Article 2 of the Safeguards Agreement and Article XIX:1 of GATT 1994. The USITC investigation failed to: (a) establish a sudden, sharp and recent increase in imports; (b) provide objective evidence that the US line pipe industry was seriously injured; and (c) demonstrate a causal link between increased imports and any injury to the US industry.

7. Fourth, the United States incorrectly interprets the term "unforeseen developments" in Article XIX:1 of GATT 1994. The term does not, as the US claims, refer to whether a domestic industry expected the market conditions prevailing prior to imposition of a safeguard measure. Rather, it refers to a Member's expectations with regard to the consequences of trade liberalization (or, more precisely, the trade effects flowing from incurring new GATT obligations and lowering tariffs).

8. Finally, the Panel should reject the US attempt to insulate the USITC injury determination from review. The proper standard for review of safeguard actions is set out in Article 11 of the DSU, which requires the Panel "to make an objective assessment of the matter before it." Thus, the Panel should indeed determine whether the USITC erred in failing to examine the most recent data available.