ANNEX B

Parties' Answers to Written Questions

of the "recent period" can ensure that the increase in imports is "recent enough" to satisfy the requirements of Article 2.1 of the SA.[3]

The concept of "recent" is crucial to the gravamen of Article XIX of the GATT 1994 and the SA. The purpose of import measures under Article XIX and the SA is to remedy present or imminent serious injury – not past injury.

In this case, the legal implications of the texts of Article XIX of the GATT 1994 and of Articles 2.1 and 4.2(a) of the SA, read together with the interpretations of the Appellate Body in *Argentina – Footwear,* are as follows:

(a) "[I]s being imported ... in such increased quantities" refers to at the time the authority makes its decision. Here, the "recent" period is characterized by a sustained decline in absolute import levels which commenced in the second half of 1998 and continued through the end of the period of investigation, coupled with the decline in the level of imports relative to production in the six-month period immediately proceeding the ITC's decision. That was the present.

(b) It is not proper to analyze imports in 1999 by referring only to the same period one year earlier and ignoring the immediately preceding six months. Article 4.2(a) of the SA requires the consideration of all relevant factors concerning increased imports--including the "rate and amount." [4]

(c) Specifically, given the finding of the Appellate Body in *Argentina – Footwear* ("recent imports … not simply trends ... during any other period of several years"),[5] the determination of what is "recent" cannot be several years. "Recent imports" are those that occurred in the last year of the period with the most recent trends being the most significant trends.

(b) Minimum time

Korea does not know the minimum time an industry would need to file a petition; likely, this would vary from case to case. However, the petition not only must demonstrate that imports were increasing, it also must satisfy all of the other conditions of Article 2 of the SA. Thus, it must show that the industry is significantly impaired ("seriously injured") or that serious injury is imminent and that the increase in imports is causally related to the serious injury of the industry. In this case, the petition was filed in June of 1999. By that time, imports had been declining for a 12-month period, two new US producers had emerged, and domestic capacity had increased by 25 per cent.[6]

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[3] See e.g., *Argentina – Footwear (AB)* at para. 130 (" ... the use of the present tense of the verb phase 'is being imported' in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 indicates that it is necessary ... to examine recent imports. ... the phrase 'is being imported' implies that the increase in imports must have been sudden and recent."); see also para. 131.

[4] We do not have information on the amount of the relative decline in imports because it is confidential, but the United States permits the Panel (First Substantive Meeting) to do its own calculations of relative import trends. Given that US domestic production increased in the first half of 1999 (ITC Determination, Staff Report at II-20) and imports declined in the first half of 1999 (US 16 February Letter), imports declined relative to domestic production in the first half of 1999.

[5] *Argentina – Footwear (AB)* at para. 130 (emphasis added).

[6] See ITC Determination, Separate Views on Injury at I-46; ITC Determination, Dissenting Views on Injury at I-61, n.26; Exhibit 48A (Welded Line Pipe – Domestic Industry Capacity, Apparent Consumption and Export Shipments)(KOR-48A).

(c) When the petition could have been filed

With respect to whether the US line pipe industry could have filed a petition before it did, this question highlights the temporary nature of the decline in the line pipe industry factors. It also

(ii) Serious injury

5. At para. 214 of its first written submission, Korea refers to alleged violations of inter alia SA Article 4.2(c). In the title to section IV.B.3, however, Korea refers to SA Article 4 more generally. With regard to SA Article 4, do the claims set forth in section IV.B.3(b) – (e) only relate to paragraph 2(c) of that provision? If not, please explain which claim (in section IV.B.3) relates to which element of SA Article 4.

Answer

The claims made in Korea's First Written Submission with respect to Article 4 of the SA are not limited to Article 4.2(c). We apologize for any lack of clarity.

Korea's claims with respect to Article 4 of the SA encompass Articles 4.1(a), (b) and (c), and, 4.2(a), (b) and (c). Specifically:

(a) Korea's claims at paragraphs 214-224 are based on Articles 3.1 and 4.2(c) of the SA and Article 11 of the DSU.

(b) Korea's claim at paragraph 225 is based on the preamble to the SA ("Emergency Action"), Article 11 of the SA and Article XIX of the GATT 1994.

(c) Korea's claims at paragraphs 226-244 are based on Articles 4.1(c) (definition of "domestic industry") and 4.2(a) of the SA (as indicated in paragraph 226), as well as Articles 4.2(a) and 4.2(b) of the SA with respect to the need to evaluate "all relevant factors" and to isolate the effects of "other factors" causing injury.

(d) Korea's claims at paragraphs 245-262 relate to the requirement to demonstrate serious injury, "significant overall impairment," in accordance with Articles 2.1, 4.1(a) and 4.2(a) of the SA.

(e) Korea's claims at paragraphs 312-317 related to the requirement to demonstrate "threat of serious injury" in accordance with Article 4.1(b), 4.1(c) and 4.2(a).

These constitute Korea's claims of the US violations.

(iii) The measure

6. Article 5.1 of the Safeguards Agreement refers to quantitative restrictions that "reduce the quantity of imports below the level of a recent period ... ." (a) Does a TRQ reduce the quantity of imports? Please explain. (b) If the second sentence of Article 5.1 is applicable to TRQs, why would a Member impose a TRQ instead of a simple quota?

Answer

(a) Yes, a TRQ does restrict the quantity of imports.[19] The distinction between a TRQ and an absolute quota is a difference of degree not kind. This question may best be addressed be referring to the ITC Majority's recommendation of a TRQ. A TRQ was recommended to reduce imports to a certain level unless purchasers sought specialty products not produced in the United States.[20] Following the requirement of

[19] See also Response to Question 9.
[20] See ITC Determination, Majority Views on Remedy at I-81 (KOR-6).

Article 5.1 of the SA, the ITC Majority recomtme

The ITC Majority also concluded that market participation of imports at only 105,849 tons "would be excessive."[26] These conclusions were based on the findings in the ITC's Economic Memoranda which the United States had previously implied were the basis for the President's measure as well.

Neither Korea nor the Panel has the entire Economic Memoranda, so neither Korea nor the Panel knows the projected level of imports with a 9,000-ton quota and a 19 per cent tariff. Further, neither Korea nor the Panel knows: (i) whether the United States analyzed the projected level of imports under the TRQ measure actually imposed; or (ii) if it did, the results of the analysis. Further, it appears from the US Letter of 23 April that we will never know.[27]

What Korea does know is that any reasonable calculation of the quota portion of the measure imposed results in far less than 151,124 tons. We also know that the measure as a whole actually restricted imports to 78,671 tons during the first quota year March 2000-February 2001.[28] The Panel also can consider the following facts from the ITC's opinion which would indicate that very limited imports would enter at 19 per cent under the measure as constructed:[29]

(a) Total "in-quota" imports were projected to be approximately 63,000 tons, based on the fact that the ITC listed only seven significant suppliers other than Canada and Mexico. (Current US import data for March 2000-February 2001, show total "in-quota" imports of 64,067 tons.)[30]

(b) Very limited "out-of-quota" imports could be expected at the 19 per cent tariff level:

(i) The duty imposed was 6 to 10 times the level of the bound rate.

(ii) Each supplying country could supply 9,000 tons at bound rates. It could be presumed that the market would absorb these imports first (and those of Canada and Mexico) before the imports at the 19 per cent additional duty.

(iii) Two very significant suppliers were not controlled. (The actual data shows that Canada and Mexico now supply approximately 50 per cent of total imports.) The NAFTA exemption had a much more negative impact on other suppliers under the Presidential measure than it did under the measure recommended by the ITC. Under the ITC recommendation, it would have been only after imports of 151,124 tons entered that the preference for Canada and Mexico would have created a price advantage. Under the Presidential measure, the preference affects exporters after they reach 9,000 tons.

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(iv) Imported and domestic line pipe were highly substitutable.[31] Moreover, according to testimony before the ITC, consumers preferred domestic products.[32]

(v) The US industry had substantial unused capacity and US capacity exceeded consumption.

(c) Total imports, excluding Canada and Mexico, equalled 78,671 tons from March 2000-February 2001. Of that total, only 14,604 tons entered at the 19 per cent duty rate. In-quota imports totaled 64,067 tons.[33]

(d) The only economic analysis done for the purpose of meeting obligations under Article 5.1 of the SA were the Economic Memoranda. From these analyses, the ITC Majority concluded that 151,124 tons at bound rates would reduce imports to a "sufficient" level. These appear to be the only economic basis for the level of restriction recommended by the ITC. The ITC recommendation--which appeared to be more in line with WTO rules--was rejected in favor of a remedy that did not comply with WTO rules.[34]

Thus, the pattern of imports resulting from the import restriction could have been and should have been anticipated. Total imports, excluding Mexico and Canada, equalled 78,671 tons during the first quota year – far below the 151,124 tons analyzed by the ITC as "necessary" and sufficient to remedy the injury.[35] In the absence of contrary analysis that: (i) the President concluded that a higher level of relief was "necessary" and not "excessive"; or (ii) the level of imports subject to the restrictions had been projected to equal or exceed 151,124 tons, the Panel can only conclude from the facts available that the measure imposed was greater than necessary to remedy the injury.

8. Are there circumstances in which the nature of a safeguard measure may change, depending on whether the competent authority makes a finding of present serious injury, or a finding of threat of serious injury? If the competent authority finds that increased imports have caused "serious injury or a threat thereof," how does that authority ensure that the resultant safeguard measure is "necessary to prevent or remedy serious injury" within the meaning of Article 5.1 of the Safeguards Agreement? Is it necessary to choose between a finding of present serious injury and a finding of threat of serious injury in order to comply with the necessity requirement contained in the first sentence of Article 5.1? Please explain.

Answer

The texts of Articles 4.1, 5.1 and 5.2(b) of the SA show that the nature and effect of a "serious injury" finding are not the same as those of a "threat of serious injury" finding. The different nature of these findings has specific implications for the measure that is imposed.

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[31] See US First Written Submission at para. 170.

[32] See Transcript of Hearing on Injury, Circular Welded Carbon-Quality Line Pipe, Inv. No. TA-201-70 (30 September 1999) at 145-147 (KOR-50).

[33] See Exhibit 49 (KOR-49).

[34] It is now unclear, based on the US Letter of 23 April, whether the measure imposed by the President was based on the economic assessment of the ITC. To the extent that the United States now claims that the Presidential Proclamation and Memorandum "form the entirety of the explanation of the decision to impose the line pipe safeguard measure," there is no economic support for the measure. See US 23 April Letter, Response to Question 6, p.(i).

[35] See Exhibit 49 (KOR-49).

First, in the case of serious injury, the industry must be in a state of significant overall

should be a function of the objective of the measure.[43] First, the Member should determine the level of imports (or the "amount" of the restriction) that is necessary to prevent or remedy the injury ("the objective"). This determination should be based on an analysis of the price and volume effects of certain levels of import restriction. The "amount" is likely to vary depending on the industry's condition (

Article XI of the GATT 1994 defines quantitative restrictions (by excluding "other than duties, taxes, or other charges"). In addition, Article XIII.2 of the GATT 1994 provides for the manner in which all quantitative restrictions are to be imposed (normal distribution of trade). Specifically, in the case of quotas, Article XIII.2 of the GATT 1994 provides for the means by which quota amounts are to be fixed both on an overall basis (Article XIII.2(a)) and by supplier (Article XII.2(d)). There is no dispute that the term "quota" in Article XIII.2 includes both tariff-rate quotas and absolute quotas. There is no basis in the text of Article 5.2 of the SA to create a distinction between absolute quotas and tariff rate quotas.

(b) Tariff-rate quotas restrict quantities

TRQs, as a general matter, restrict the quantities imported even if they do not expressly ban

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discrimination applies equally to absolute quotas and tariff-rate quotas and hence both are subject to the disciplines of Article XIII.2.

The same concept, prohibiting a discriminatory effect on suppliers, is contained in Article 5.2 of the SA. The conditions that must be present to depart from this requirement are specifically delineated in Article 5.2(b) and are quite strict. Finally, again, an analysis of the ITC Majority's TRQ recommendation demonstrates that the ITC understood that the requirements of Article XIII:2 of the GATT 1994 and Article 5.2(a) apply to TRQ's. The US representative at the First Substantive Meeting denied that the ITC's practice constituted the US practice. Of course, the United States also denied that the measure imposed is a TRQ. In fact, the US representative is wrong on both counts.

The United States cannot avoid the requirements of Article 5.2(b) of the SA in order to depart from Article 5.1(a) and, yet, discriminate among suppliers by calling its measure a "tariff."[49] The President's measure is discriminatory precisely because it does contain a quota element that fails to respect historic market shares.

10. In Korea – Dairy, the Appellate Body stated that it does "not see anything in Article 5.1 that establishes such an obligation [to justify the necessity of a safeguard measure] for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years." Could the Appellate Body have inferred that there is no obligation on a Member to explain that its safeguard measure is "necessary" (within the meaning of Article 5.1) unless that safeguard measure is a quantitative restriction which reduces the level of imports below the average level of the last three representative years? Please explain.

Answer

The decision of the Appellate Body in *Korea – Dairy* must be placed in its proper legal context. The issue before the Appellate Body in *Korea – Dairy* was whether Article 5.1 of the SA by its terms required a specific finding that the measure, in that case (as here) a quantitative restriction, was "necessary." The Appellate Body held that a quantitative restriction which reduced imports below the three-year representative period specified in Article 5.1 clearly had to be justified at the time of the decision and in the authority's recommendations on the application of the measure.[50] The Appellate Body then examined whether a quantitative restriction that set the level at or above the last three representative years also had to be justified. The Appellate Body concluded, "[i]n particular, a Member is not obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with 'the average of imports in the last three representative years ... .'"[51]

This is a logical conclusion given that Article 5.1 of the SA sets out a benchmark (the last three representative years) for what level of quantitative restriction is presumed "necessary." No specific reaffirmation of that fact was therefore needed. Only a departure from the benchmark required the explanation that the measure was "necessary."

While it is true that the Appellate Body rejected the broad language of the Panel with respect to the obligations of Article 5.1 of the SA, the holding did not extend past the question presented to the Appellate Body regarding the extent of the obligation to justify a quantitative restriction. The

[49] The departure provided for in Article 5.2(b) is not permitted in the case of a threat determination.

[50] See Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, Report of the Appellate Body, WT/DS98/AB/R (14 December 1999) at para. 98.

[51] See *id*. at para. 99.

Appellate Body independently observed that the first sentence of Article 5.1 imposes a very specific obligation and that this obligation applies regardless of the particular form of the safeguard measure.[52] The legal issue concerning the obligation of the United States to provide a separate economic justification arises specifically because the President imposed a measure harsher than that justified by the ITC decision or underlying economic analysis. If the President takes action which is either the

Answer

Imports did not increase at the same time as domestic shipments in 1999, for the same reason

apparent from Figure 3.[57] Finally, the correlation to subject merchandise was to the drilling rig count, which in turn was dependent on the prices of oil and natural gas.[58] During this period, the rig count reached its lowest point ever in April 1999.[59] Demand and, with it, the performance of the line pipe industry closely followed the rapid decline in the rig count in 1998.

(vi) Exclusion of Canada and Mexico

15. If footnote 1 to the Safeguards Agreement was relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Answer

We agree that the placement of Footnote 1 as a footnote to Article 2.1 of the SA rather than Article 2.2 is significant and confirms the reading of Footnote 1 as relating to the definition of a Member and to the proper modalities for safeguard investigations conducted by a Customs Union. It does not relate either to FTAs or to the MFN requirement.

16. Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions? Please explain.

Answer

No. Article XI of the GahI0e998.4easures arenfuc9c0

ANNEX B-2

UNITED STATES' ANSWERS TO QUESTIONS FROM THE PANEL AND KOREA

(7 May 2001)

I. RESPONSES TO QUESTIONS FROM THE PANEL

Note: The United States previously provided early written responses to questions 6, 7, and 8 at the request of the Panel. This document contains a further elaboration on those earlier answers.

1a. Are there circumstances in which the nature of a safeguard measure may change, depending on whether the competent authority makes a finding of present serious injury, or a finding of threat of serious injury?[1]

Response

1. Since a Member may apply a safeguard measure only to the extent necessary to prevent or remedy serious injury and facilitate adjustment, the nature of a safeguard measure depends primarily on the condition of the industry and its need for adjustment. The competent authorities' finding of serious injury or threat of serious injury is a legal characterization of the condition of the industry. Thus, there is likely to be a relationship between the finding of the competent authorities and the safeguard measure applied by a Member. However, it is the underlying facts describing the condition of the industry, and not the choice to label that condition as serious injury or threat of serious injury, that provide the benchmark for the application of the measure.

2. Article 4.1 of the Safeguards Agreement[2] defines serious injury as "a significant overall impairment in the position of a domestic industry," and threat of serious injury as "serious injury that is clearly imminent." Article 4.2(a) requires that the competent authorities base their findings in this regard on a consideration of 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. Since the evaluation occurs on an overall basis, an industry may be in a state of serious injury or threat of serious injury even if some factors viewed in isolation would suggest a healthy condition.[3] With so many factors, each of which may reveal varying degrees of negative or positive

[1] Question 1 consists of three related, but distinct questions. For clarity, we have divided the question and our response into three subsections.

[2] Unless otherwise specified all citations to an article using Arabic numerals reference provisions of the WTO Agreement on Safeguards ("Safeguards Agreement" or "SGA"), and all citations to an article using Roman numerals reference provisions of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

[3] The Appellate Body concluded in *Argentina – Footwear* that "An evaluation of each listed factor will not necessarily have to show that each such factor is "declining". In one case, for example, there may be significant declines in sales, employment and productivity that will show "significant overall impairment" in the position of the industry, and therefore will justify a finding of serious injury. In another case, a certain factor may not be declining, but the overall picture may nevertheless demonstrate "significant overall impairment" of the industry." *Argentina – Footwear*, WT/DS121/AB/R, para. 139.

performance, there are a myriad of potential combinations that could demonstrate the existence of serious injury or threat of serious injury.

3. Similarly, safeguard measures imposed by a Member may take a variety of forms, including tariff increases, quotas, and TRQs at varying levels and for varying lengths of time. Thus, for any industry, a number of combinations of these elements could satisfy the Article 5.1 requirement not to apply a safeguard measure beyond the extent necessary.

4. In contrast to the diversity of potential industry situations and safeguard measures, the competent authorities have only three options in rendering their determination – no serious injury, current serious injury, or threat of serious injury. Fitting an industry into one of these broad categories addresses primarily the timing of the onset of serious injury – not at all, now, or imminent – and does not indicate much about the precise state of the industry. Thus, the mere fact that the competent authorities found serious injury instead of threat of serious injury, or vice versa, in their

compliance with Article 5. The first sentence of Article 3 reflects this dichotomy, stating that "[a] *Member* may *apply* a safeguard measure only following an *investigation*

injury, ensures that the application of the safeguard measure does not exceed the extent necessary to prevent or remedy serious injury and facilitate adjustment.

c. Is it necessary to choose between a finding of present serious injury and a finding of threat of serious injury in order to comply with the necessity requirement contained in the first sentence of Article 5.1? Please explain.

Response

11. No. As we explained in segment a of this question and in paragraphs 37-42 of the US first oral statement, the benchmark for application of a safeguard measure is the condition of the domestic industry and its need for adjustment. A finding of present serious injury or threat of serious injury is merely a broad legal conclusion about that condition. By itself, that finding simply does not provide enough information about the industry to identify whether a particular measure would satisfy the requirements of Article 5.1. A Member must look instead to the underlying facts about the industry's condition and need for adjustment to delineate the extent to which it may apply a safeguard measure. Therefore, although competent authorities may choose to specify the condition of the industry as being present serious injury or threat of serious injury, such a choice is not necessary to comply with Article 5.1.

2. At para. 184 of its first written submission, the US asserts that "the only limit on the volume of imports free from the 19 per cent supplemental duty is the number of WTO Members who choose to take advantage of the 9000 ton exemption". Would this mean that there is a limit on the volume of imports subject to the lower tariff, and that the limit will be reached if all WTO Members choose to take advantage of the 9000 short ton exemption?

Response

12. On further reflection, it would be more correct to say that the only limit is the number of customs territories that take advantage of the 9000 ton exemption. For example, China and Russia, which are not WTO Members, are still eligible for the 9000 ton exemption. On the other hand, not all countries have line pipe production facilities, so the practical limit would be less than if all customs territories took advantage of the exemption.

3. GATT Article XIII.2(a) provides that quotas representing the total amount of permitted imports shall be fixed "wherever practicable". GATT Article XIII.5 states that Article XIII.2(a) shall apply to tariff quota. Would this suggest that there may be situations in which it may not be "practicable", in the context of a tariff quota, to fix a quota representing the total amount of permitted imports? If not, why not? If yes, would this also suggest that a measure may constitute a tariff quota even if there is no "overall limit on eligibility" (para. 185, US first written submission)?

Response

13. Yes. Article XIII:2(a), read together with Article XIII:5, applies to situations in which a Member considering the application of a tariff quota cannot fix a quota representing the total quantity of special-duty imports. However, the resulting measure would not constitute a tariff quota because it would not meet the ordinary meaning of tariff quota – the "[a]pplication of a higher tariff rate to imported goods after a *specified quantity* of the item has entered the country at a lower prevailing

rate."[6] Using the terminology of Article XIII, such a measure would be an "import restriction," but without a specific name.

14. The text of Article XIII supports this conclusion. Paragraph 2(a) states that "[w]herever practicable, quotas representing the total amount of permitted imports ... shall be fixed." If a quota is not "practicable," the logical implication is that any measure that *is* practicable is not a quota. Paragraph 2(b) confirms this conclusion in stating that "[i]n cases in which quotas are not practicable, the restrictions may be applied by means of import licenses or permits *without a quota*."[7] Thus, any measure that is not "practicable" under Article XIII:2(a) is not a quota and, pursuant to Article XIII:5, is not a tariff quota.

4. In Section F.2.b of its first written submission, the US argues that the rules in Article 5 of the Safeguards Agreement for quantitative restrictions and quotas do not apply because the Line Pipe measure is not a quantitative restriction. Does the US consider that the terms "quantitative restriction" and "quota" (in Article 5 of the Safeguards Agreement) are synonymous? Please explain. In particular, and considering the US argument that a measure is only a TRQ if it includes an overall limit on eligibility, why should the term "quota" (Article 5.2) not refer to the quota element of a TRQ?

Response

15. "Quantitative restriction" and "quota," as used in Article 5 and elsewhere in the WTO Agreement, are not synonymous. "Quantitative restriction" is a general term covering any measure that restricts the quantity of imports into or exports from a country. "Quota" is a form of quantitative restriction that specifies the maximum quantity of imports into or exports from a country. In contrast, a TRQ is in essence a tariff. It does not restrict the quantity of imports as such because, as long as someone is willing to pay the requisite tariff, there is no limit to the quantity that they can import.

16. The use of these terms in the GATT 1994 supports this conclusion. Article XI is entitled "General Elimination of Quantitative Restrictions," and its first paragraph states:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses, or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party ...

Thus, this paragraph provides a definition for the type of measure – a quantitative restriction – that is eliminated by Article XI. It specifies that quotas and import licenses that prohibit or restrict imports are forms of quantitative restrictions, and that both are prohibited.

17. Since the signature of GATT 1947, Article XI has never been understood to ban TRQs. In fact, when faced with the obligation under Article 4.2 of the WTO Agreement on Agriculture to convert quantitative import restrictions into "ordinary customs duties," many Members complied by transforming quotas into TRQs. Moreover, a number of Members (including Korea) apply TRQs, "Gen858ng quotHesup& Co. Tc 0.-40 Tc 0- Tc 0 95 .146(convert11porooniiInc.is c6j T(empdertitaddedj T(Ex impo

18. The established view that TRQs are not prohibited by Article XI has two important implications. First, neither a TRQ itself nor the quota element of a TRQ is a "quota" for purposes of Article XI. If they were, they would be prohibited. Second, since Article XI permits only import restrictions in the form of duties, taxes, and "other charges" (and certain types of quotas not relevant in this dispute), a TRQ must be a duty, tax or other charge for purposes of Article XI. As we explained in paragraphs 192-94 of our first written submission, Article XIII reflects the same understanding. Although the disciplines specifically reference "quantitative restrictions" and "quotas," Article XIII:5 adds that "[t]he provisions of this Article shall apply to any tariff quota." That addition would be unnecessary if a TRQ, or the "quota element" of a TRQ, were in fact a quota.

19. It also makes sense to view a TRQ as a duty, tax or other charge. A TRQ is nothing but a stepped tariff, with the cumulative volume of imports determining the level of tariff. It does not actually limit the quantity of imports as such.

20. This understanding extends to Article 5. The Safeguards Agreement contains nothing to suggest that longstanding GATT terms like "quota" and "quantitative restriction" as used in the Safeguards Agreement have meanings different than they do under GATT 1994. The appearance of the Article XIII:2(d) text in Article 5.2(a) suggests that it has the same meaning in the Safeguards Agreement and, thus, excludes TRQs because the Safeguards Agreement contains no equivalent to Article XIII:5.

5. In Korea – Dairy, the Appellate Body stated that it does "not see anything in Article 5.1 that establishes such an obligation [to justify the necessity of a safeguard measure] for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years". Could the Appellate Body have inferred that there is no obligation on a Member to explain that its safeguard measure is "necessary" (within the meaning of Article 5.1) unless that safeguard measure is a quantitative restriction which reduces the level of imports below the average level of the last three representative years? Please explain.

Response

21. The Appellate Body did not *infer* that there is no "justification" requirement for safeguard measures other than quantitative restrictions that reduce the quantity of imports below the average of imports in the last three representative years. Rather, the ordinary meaning of the terms in Article 5.1 *compels* such a conclusion.

22. In *Korea – Dairy*, the Appellate Body rejected a panel's broad finding that Members that apply safeguard measures are required to explain in their recommendations or determinations how they considered the facts before them and why they concluded that the measure was necessary to remedy serious injury and facilitate adjustment.[8] The Appellate Body found that Article 5.1 imposes a justification requirement *only* for safeguard measures that take the form of quantitative restrictions that reduce the quantity of imports below the average of imports in the last three representative years.[9] Since the US safeguard measure did not take such a form, the United States was under no obligation to justify the measure. Instead, the burden is on Korea to demonstrate that the US safeguard measure was *not* applied "only to the extent necessary to remedy or prevent serious injury and to facilitate adjustment."

[8] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999, para. 100 ("*Korea – Dairy (AB)*").

[9] *Ibid*., para. 99.

27. There are several reasons that such documents are presumptively protected from release under domestic law. First, such memoranda typically provide various reasons for and against a particular outcome, which the decisionmaker might – or might not – adopt in the final decision. As such, they are part of the decision-making process, akin to rough drafts of the decision. The release of such materials could create confusion as to the actual basis for a decision, and place the decisionmaker in the position of addressing grounds for decision that he or she actually rejected as invali ws reason 375 1gu3 -0.375 843

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8. Commissioner Crawford found that the Lone Star's allocation of extraordinary charges had a "marked impact on SG&A for the company and for the industry as a whole, reducing the level of operating income to $10.8 million in 1998". Did the remaining Commissioners address this specific finding by Commissioner Crawford? If so, how? What would the level of operating income have been absent the allocation of this extraordinary charge?

Response

33. It is not the practice of USITC Commissioners to address factual findings made by other Commissioners. Moreover, the separate views of any dissenting Commissioner are not part of the determination of the competent authorities for purposes of either Article 3 or Article 4 of the Safeguards Agreement. Accordingly, the United States submits that such dissenting views are of no legal consequence and, therefore, irrelevant to the Panel's consideration of whether the determination of the competent authorities is consistent with the US obligations under the WTO Agreement.

34.

10. Under the US system for imposing safeguard measures, what are the "competent authorities" within the meaning of Article 3.1 of the Safeguards Agreement? Do they include the President of the United States? If not, why not? In the present case, please specify precisely where the "reasoned conclusions" – within the meaning of Article 3.1 – are to be found. Do they include conclusions of the President of the United States?

Response

37. Pursuant to Article 4.2(a) of the Safeguards Agreement, the determination of serious injury is to be made by the competent authorities. Under US law, the only competent authority for making serious injury determinations is the USITC.[20] Therefore, the US President is not the competent authority for purposes of either Article 3 or Article 4 of the Safeguards Agreement.[21] Accordingly, the President's decision concerning the measure is not part of the report to be prepared by the competent authorities pursuant to Article 3.1 of the Safeguards Agreement.

38. The last sentence of Article 3.1 provides that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions ... ." This provision highlights that the competent authorities' published report must include only the findings and conclusions reached by the competent authorities (in US cases, the USITC), and not any findings or conclusions reached by the Member (in US cases, the President). The language of the last paragraph of Article 4.2(c) likewise supports this view. It provides that:

> The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

The "reasoned conclusions" of the USITC on "all pertinent issues of fact and law" in the line pipe safeguards investigation are found in the portions of the USITC Report labelled *Views on Injury of Chairman Lynn M. Bragg, Vice Chairman Marcia E. Miller, and Commissioners Jennifer A. Hillman, Stephen Koplan, and Thelma J. Askey* and *Separate Views on Injury of Chairman Lynn M. Bragg and Commissioner Thelma J. Askey*. These Views, which explain the USITC's findings, reasoning and conclusions appear on pages I-7 through I-54 of *Circular Welded Carbon Quality Line Pipe*, Investigation No. TA-201-70, USITC Publication 3261 (December 1999). Neither these Views nor any other part of the USITC Report include the conclusions of the President of the United States.

11. With regard to note 21 of the US first written submission, what is the relevance of the US statement that "capacity and capital expenditures are not among the factors listed in Article 4.2(a) of the Safeguards Agreement ..." Does the US consider that the Panel is precluded from making any findings regarding the ITC's treatment of capacity and capital expenditure, simply because they are not mentioned in Article 4.2(a)?

Response

39. As the United States explained in the argument section of its first written submission,[22] the USITC met its obligations under SGA Article 4.2(a) to evaluate *all* relevant factors of an objective

[20] By comparison, US law provides for two "investigating authorities" – the USITC and the US Department of Commerce – within the context of the Antidumping and SCM Agreements.

[21] *See* Section 202(b)(1)(A) of the Trade Act of 1974, which states that the USITC shall conduct

and quantifiable nature having a bearing on the situation of the industry. The USITC evaluated not only the enumerated factors, but various other factors, including capacity and capital expenditures.

because distributors do not typically know how the pipe that is sold will be used, and even when they might be able to infer the nature of the use by the identity of the purchaser, such information is not routinely recorded.

45. It might be helpful for the Panel to understand the context in which the issue of dual-stencilled line pipe from Korea arose. The issue was first raised by the Korean and Japanese respondents in their prehearing brief in the injury investigation before the USITC. These respondents claimed that most imports of dual stencilled line pipe imported from Korea into the West Coast of the United States were sold for standard pipe applications. They based this claim in large part on an affidavit from a former executive with several West Coast distributors, who estimated that 70-80 per cent of imports of dual-stencilled line pipe imported from Korea into the West Coast were sold for standard pipe applications. These respondents also claimed that selected questionnaire responses of domestic producers and distributors supported their theory.[26]

46. The executive who provided the affidavit testified at the USITC's injury hearing. The exchange between the USITC Commissioner and the witness on this point was as follows:[27]

> COMMISSIONER KOPLAN: Thank you, Let me ask you this, Mr. Smith. Your estimate of 70 to 80 per cent; is it possible that it could have been 60 to 70 per cent?
>
> MR. SMITH: Absolutely.
>
> COMMISSIONER KOPLAN: Okay. Is it possible that it could have been, possible now, that it could have been 50 to 60 per cent?
>
> MR. SMITH: Well, there is no way of actually knowing without tabulating every sale.
>
> COMMISSIONER KOPLAN: Right.
>
> MR. SMITH: Most distributors don't keep track of where their material goes, and unless you're an on-hands manager reviewing the invoices daily, on a daily basis, and knowing who the customer is, where it's going, and if you have some interest, knowing what kind of a projects it's going to, can you build this type of information.
>
> COMMISSIONER KOPLAN: And I appreciate your candour on that. What I'm hearing you say is that the figure could be substantially off the mark.
>
> MR. SMITH: Absolutely.

47. As this exchange makes clear, there was no practical way of knowing what proportion of Korean dual-stencilled line pipe was actually sold for standard pipe applications. Such information could have been gathered only if all distributors had kept records of the intended application of the line pipe involved in each sale, and this is information which the distributors did not keep.

48. In their posthearing brief in the injury investigation before the USITC, the petitioners contested the claim that large amounts of Korean dual-stencilled line pipe were sold in the standard pipe market. They pointed out that certain questionnaire responses contradicted this claim. They also stressed that the witness for the Korean respondents had admitted at the hearing that his estimates

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[26] Prehearing Brief of Japanese and Korean Respondents (24 Sept. 1999), pp. 66-70. Exhibit USA-23.
[27] Transcript of USITC Injury Hearing (30 September 1999), p. 216, Exhibit USA-24.

were not based on any concrete or quantifiable data and might well not be accurate. The petitioners also claimed that this witness was not reliable because he had no experience in the line pipe business; his experience was limited to the standard pipe market.[28]

49. Finally, the record reflects that the greatest absolute and percentage increases in the volume of imports from Korea occurred in shipments to the Gulf Coast area of the United States, which comprises the largest US geographic market for line pipe. Shipments of Korean pipe to the Gulf

export limits, in the case of Russia). The scope of the antidumping duty order on imports from Japan and of the suspension agreements affecting imports from Brazil and Russia was as follows:

> certain hot-rolled flat-rolled carbon-quality steel products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not successively superimposed layers) regardless of thickness, and in straight lengths, of a thickness less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (i.e., flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm and of a thickness of not less than 4 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of these investigations.
>
> Specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free ("IF")) steels, high strength low alloy ("HSLA") steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.
>
> Steel products to be included in the scope of this investigation, regardless of HTSUS definitions, are products in which: 1) iron predominates, by weight, over each of the other contained elements, 2) the carbon content is 2 per cent or less, by weight, and 3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:
>
> 1.80 per cent of manganese, or
> 1.50 per cent of silicon, or
> 1.00 per cent of copper, or
> 0.50 per cent of aluminum, or
> 1.25 per cent of chromium, or
> 0.30 per cent of cobalt, or
> 0.40 per cent of lead, or
> 1.25 per cent of nickel, or
> 0.30 per cent of tungsten, or
> 0.012 per cent of boron, or
> 0.10 per cent of molybdenum, or
> 0.10 per cent of niobium, or
> 0.41 per cent of titanium, or
> 0.15 per cent of vanadium, or
> 0.15 per cent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this investigation unless otherwise excluded. The following products, by way of example, are outside and/or specifically excluded from the scope of this investigation:

- Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including e.g., ASTM specifications A543, A387, A514, A517, and A506).

- SAE/AISI grades of series 2300 and higher.

- Ball bearing steels, as defined in the HTSUS.

- Tools steels, as defined in the HTSUS.

- Silico-manganese (as defined in the HTSUS) or silicon electrical steel with a silicon level exceeding 1.50 per cent.

- ASTM specifications A710 and A736.

- USS abrasion-resistant steels (USS AR 400, USS AR 500).

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications: C, 0.10-0.14%; Mn, 0.90% max; P, 0.025% max; S, 0.005% max; Si, 0.30-0.50%; Cr, 0.50-0.70%; Cu, 0.20-0.40%; Ni, 0.20% max; Width = 44.80 inches maximum; Thickness = 0.063-0.198 inches; Yield Strength = 50,000 ksi minimum; Tensile Strength = 70,000-88,000 psi.

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications: C, 0.10-0.16%; Mn, 0.70-0.90%; P, 0.025% max; S, 0.006% max; Si, 0.30-0.50%; Cr, 0.50-0.70%; Cu, 0.25% max; Ni, 0.20% max; Mo, 0.21% max; Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications: C, 0.10-0.14%; Mn, 1.30-1.80%; P, 0.025% max; S, 0.005% max; Si, 0.30-0.50%; Cr, 0.50-0.70%; Cu, 0.20-0.40%; Ni, 0.20% max; V (wt.), 0.10% max; Cb, 0.08% max; Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications: C, 0.15% max; Mn, 1.40% max; P, 0.025% max; S, 0.010% max; Si, 0.50% max; Cr, 1.00% max; Cu, 0.50% max; Ni, 0.20% max; Nb, 0.005% min; Ca, Treated; Al, 0.01-0.07%; Width = 39.37 inches; Thickness = 0.181 inches maximum; Yield Strength = 70,000 psi minimum for thicknesses = 0.148 inches and 65,000 psi minimum for thicknesses > 0.148 inches; Tensile Strength = 80,000 psi minimum.

- Hot-rolled dual phase steel, phase-hardened, primarily with a ferritic-martensitic microstructure, containing 0.9% up to and including 1.5% silicon by weight, further characterized by either (i) tensile strength between 540 N/mm² and 640 N/mm² and an elongation percentage =26% for thicknesses of 2 mm and above, or (ii) a tensile strength between 590 N/mm² and 690 N/mm² and an elongation percentage of =25% for thicknesses of 2mm and above.

- Hot-rolled bearing quality steel, SAE grade 1050, in coils, with an inclusion rating of 1.0 maximum per ASTM E 45, Method A, with excellent surface quality and chemistry restrictions as follows: 0.012% maximum phosphorus, 0.015% maximum sulphur, and 0.20% maximum residuals including 0.15 per cent maximum chromium.

- Grade ASTM A570-50 hot-rolled steel sheet in coils or cut lengths, width of 74 inches (nominal, within ASTM tolerances), thickness of 11 gauge (0.119 inch nominal), mill edge and skin passed, with a minimum copper content of 0.20%.[40]

Were there other suppliers of hot-rolled steel that were not affected by the anti-dumping measures?

Response

63. As indicated above, no. All suppliers of hot-rolled steel were affected by the anti-dumping measures regardless of whether such imports were subject to the measures themselves. The USITC's

Response

66. The degree to which FTA partners must eliminate safeguard measures among themselves depends on the overall package of trade liberalization that accompanies the formation of the FTA. If that package meets the requirements of Article XXIV:8(b) without the elimination of safeguard measures, the FTA partners have the option of eliminating safeguard measures, but are not required to do so. However, if the elimination of safeguard measures is necessary to meet the requirements of Article XXIV:8(b), the FTA partners *must* do so. In this regard, the authority to apply safeguard measures to FTA partners is no different from any other restrictive regulation of commerce that applies on an MFN basis.

67. To create an FTA consistent with Article XXIV, the parties must satisfy the Article XXIV:8(b) definition of an FTA as:

> a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

This text does not require the elimination of *all* duties and other restrictive regulations of commerce. Some restrictive regulations, if they fall within the enumerated exceptions, may be applied "where necessary." The remaining restrictive regulations must be eliminated on *substantially* all trade. As the Appellate Body explained in *Turkey – Textiles*,

> Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term "substantially" in this provision. It is clear, though, that "substantially all the trade" is not the same as *all* the trade, and also that "substantially all the trade" is something considerably more than merely *some* of the trade.[43]

68. Therefore, the package of trade liberalizing measures that accompanies formation of an FTA need not eliminate all duties and restrictive regulations of trade. If FTA parties, while retaining some duties and restrictive regulations of commerce, can still achieve the Article XXIV:8 threshold (covering "substantially all trade"), they may retain those regulations. If the elimination of other restrictive regulations covers substantially all trade, the parties *may* also eliminate safeguard measures. This is by far the most likely scenario. We included the possibility that safeguard measures "must" be eliminated to cover all eventualities. For example, if the elimination of duties and other restrictive regulations that the FTA parties accept does not cover substantially all trade, they *must* eliminate restrictive regulations that they had intended to retain, which could include safeguard measures. However, this is not a likely scenario.

18. Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions? Please explain.

Response

69. A treaty, and especially a multilateral agreement, reflects a series of compromises and trade-offs. No one signatory's "logic" will necessarily prevail in this process. Under customary rules of

[43] *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, para. 48 (22 October 1999).

interpretation of international law, the text of the treaty determines the rights and obligations of the signatories. Whether a later interpreter can derive an underlying "logic" from the text does not change the explicit rights and obligations. In this case, the text of Article XXIV:8 differentiates between Article XI measures and Article XIX measures, thereby authorizing differential treatment of the two.

70. It is always speculative to attempt to reconstruct the logic of the negotiators of a treaty. In this case, we can conclude that the difference in treatment is logical because Articles XI and XIX permit the imposition of quantitative restrictions for different reasons. Article XI permits three types of quantitative restriction: temporary export prohibitions to prevent critical shortages of food or other products; import or export prohibitions necessary for classification, grading, or marketing of commodities in international trade; and import restrictions on agricultural and fisheries products necessary to enforce dom Tj th.14c,ols on the production of agricultural and fisheries products. And of these, som are no longer permitted as a result of the Agreement on Agriculture. Article XIX allows the suspension of obligations (whichh.1uld include imposition of a quantitative restriction otherwise inconsistent with Article XI) to the extent necessary to remedy serious injury caused by increased imports. Accordingly, the drafters agreed that FTA partners .1uld retain the quantitative restrictions permitted under Article XI where those measures were necessary, but did not make the same provision for quantitative restrictions permitted under Article XIX.

71. One logical conclusion is that the basis for a quantitative restriction affects its permissibility in the .14cext of an FTA. FTA parties have an unqualified right to apply those quantitative restrictions permitted under Article XI among themselves where necessary. One might view the GATT 1994 as allowing the application among FTA partners of measures permitted under Article XI because they may be necessary for implementation of particularly important national policies or programmes. In .14c,ast, an FTA party's authority to include FTA partners in quantitative restrictions under Article XIX must be balanced against other restrictive measures of trade in meeting the Article XXIV:8 threshold. Presumably, this treatment evinces the importance of achieving the elimination of restrictive regulations on substantially all trade.

72. We note that there is nothing unusual in this treatment. Articles XI and XIX both permit the maintenance of quantitative restrictions that w1uld otherwise be prohibited, but under different conditions. Article XXIV:8 follows the same approach, placing different prerequisites on application of an Article XI quantitative restriction in the .14cext of an FTA than on application of an Article XIX quantitative restriction.

19. In Turkey – Textiles (WT/DS34), the Appellate Body stated that a GATT Article XXIV defence may be available in the .14cext of a customs union if two conditions are met: (1) the measure at issue is i4c,oduced upon the formation of the .ustoms union, and (2) "the formation of [the] customs union w1uld be prevented if it were not allowed to i4c,oduce the measure at issue".[44]

(a) In this regard, please explain how the formation of the NAFTA w1uld have been prevented if the NAFTA parties had not been allowed to i4c,oduce the safeguards exemption provided for in section 311(a) of the NAFTA Implementation Act.

[44] This question consists of two related, but distinct questions. For clarity, we have divided the question and our response into two subsections.

restrictive regulation. Thus, compliance with Article XXIV:8(b) is determined with reference to the entire package of the duties and restrictive regulations of commerce that are eliminated.

78. In light of this definition, the parties will be prevented from forming a free trade area if they cannot accept the elimination of the group of duties and restrictive regulations of commerce on substantially all trade that they have agreed upon. This would occur if they were not allowed to accept the elimination of any one of the duties or regulations.

79. The NAFTA parties conceived of the various types of duties and restrictive regulations of commerce that they would eliminate as a group and negotiated over them at the same time. At no point did the parties indicate that failure to accept any particular obligation would prevent the formation of the free trade area. As part of the package of trade liberalization, they agreed to NAFTA Article 802, which eliminated each party's authority to apply safeguard measures on imports from the other party that did not contribute importantly to serious injury. Section 311 of the NAFTA Implementation Act effectuated this obligation as a matter of US law.

80. If the GATT 1994 were interpreted to prohibit the Article 802 safeguard exemption, it would unravel the package of trade liberalizing rights and obligations agreed upon by the NAFTA parties. Therefore, Article XXIV permits the exclusion of Canada and Mexico from the line pipe safeguard notwithstanding Article II.

(b) If the formation of NAFTA would have been prevented but for the safeguards exemption, why are NAFTA members not automatically excluded from safeguard measures imposed by other NAFTA members?

81. Under the NAFTA, the Article 802 conditional exemption from safeguards measures formed

> 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."[49]

It reached this conclusion in response to a panel's analysis based on the *first* and *third* sentences of footnote 1.[50] At no point did either the panel or the Appellate Body address the fourth (and last) sentence of the footnote, or how that sentence might affect the meaning of the entire footnote. Consequently, the Appellate Body's finding does not provide any guidance for the Panel's interpretation of the last sentence.

21. If footnote 1 to the Safeguards Agreement was relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Response

84. The fact that footnote 1 appears in Article 2.1 is relevant in that it establishes a context for the footnote. However, Korea was wrong in asserting that the footnote is applicable to Article 2.1 alone. By its terms, the footnote says that "Nothing in this *Agreement* ..." (emphasis added). If the footnote applied only to Article 2.1, it would have said "Nothing in this paragraph ..." Therefore, the insertion of footnote 1 into Article 2.1 instead of Article 2.2 has no effect on the interpretation of the relevant text – the last sentence of footnote 1. In fact, it is equally relevant that paragraph 2.1 forms part of Article 2, which includes Article 2.2. Thus, any relevance ascribed to the location of footnote 1 would suggest that it applies equally to all of Article 2, and not just the paragraph within which it appears.

85. Under the customary rules of interpretation of international law, "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 light of its object and purpose."[51] Thus, the ordinary meaning of the terms is the primary basis for interpreting a treaty, with context and object and purpose informing the application of the ordinary meaning. The location of a provision within a particular paragraph (such as paragraph 1 of Article 2) may be relevant in providing context, but the article in which the provision is located and other articles in the agreement and other agreements may also provide context for the provision.[52]

86. Paragraphs 221-225 of the US first written submission discuss the ordinary meaning of the last sentence of footnote 1 – that nothing in the Safeguards Agreement affects a WTO Member's right to exclude FTA partners from safeguard measures. The location of the footnote 1 in Article 2.1, which specifies the prerequisites for a Member to apply a safeguard measure, does not change that meaning. Specifically, footnote 1 is appended to the word "Member," suggesting that it amplifies the meaning of that word. The first three sentences of footnote 1 serve this role, defining the terms in which a customs union, acting as a WTO Member, may take a safeguard measure on its own behalf or on behalf of a member of the customs union.

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87. However, the text of the last sentence of footnote 1 indicates that it has a broader reach than the first three sentences. It opens with the phrase "[n]othing in this Agreement," thus setting out an interpretation applicable to every other provision in the Agreement, and not just the word "Member" in Article 2.1. Where each of the first three sentences address "customs unions" and "member states" specifically, the last sentence does not mention them at all. Instead, it cites to a provision – paragraph 8 of Article XXIV – covering both customs unions and FTAs. Thus, the text of footnote 1, last sentence, indicates that it applies beyond the limited purpose of clarifying the meaning of the term "Member." Having dealt with one particular aspect concerning customs unions, it made sense to speak to the overall issue of the effect of the Safeguards Agreement on customs unions and the clearly related issue of FTAs. The last sentence is a clarification that neither the preceding sentence nor any other language in the Safeguards Agreement disturbs the relationship between safeguard measures and customs unions or FTAs that is set out in GATT 1994. This was a controversial subject that the negotiators never sought to resolve in the Safeguards Agreement.[53]

88. The location of footnote 1 within Article 2.1 is not the sole context for its terms. Articles 2.1 and 2.2 together form Article 2, which is entitled "Conditions." Article 2.2 states that "[s]afeguard measures shall be applied to a product being imported irrespective of its source." This text establishes that Article 2 addresses not just the identity of the Member applying a safeguard measure and the conditions for doing so, but also the identity of the Members *subject* to the measure. This context reinforces the conclusion that footnote 1, like the Article in which it appears, provides the basis for determining what Members are subject to a safeguard measure.

89. In short, it is relevant that footnote 1 is inserted into Article 2.1. It is also relevant that Article 2.1 is paired with Artic le 2.2 in a single article addressing the conditions for application of a safeguard measure. The ordinary meaning of the text of the footnote is dispositive. For the reasons discussed above and in the US first written submission, these interpretative guides together establish that nothing in the Safeguards Agreement affects a Member's ability to exclude FTA partners from safeguard measures.

22. At para. 230 of its first written submission, the US asserts that the collapse in oil prices was not expected. At what point in time is the US referring to in making this statement? In other p4ticle

(v) Causal link

23. Did the ITC demonstrate that the oil and gas crisis was not a more important cause of injury than increased imports, as it claimed, or did the ITC simply demonstrate that the oil and gas crisis did not account for the totality of the injury suffered by the domestic industry? In other words, did the US simply demonstrate that the industry would still have suffered injury, irrespective of the crisis in the oil and gas industry? If so, is this sufficient to distinguish the injurious effects of the increased imports from the injurious effects of the oil and gas crisis? Please explain.

Response

91. In its Report, the USITC provided a detailed and meaningful explanation of its finding that the oil and gas crisis was not a more important cause than increased imports.[56] In its causation analysis, the USITC first undertook a thorough analysis of the relationship between the increased imports and the factors bearing on the situation of the industry.[57] As explained in the United States first and second written submissions, the USITC found that imports had significant adverse price effects on the domestic industry. In turn, these adverse price effects resulted in a significant loss of sales, market share and revenue on the part of the domestic industry, as well as a decline in other key indicators of the industry's health, such as capacity utililization and employment.[58] The USITC concluded that imports were an important cause of injury, *i.e.*, that there was a causal link between the imports and the serious injury.

92. As a second step in its causation analysis, the USITC examined other possible causes for the purposes of addressing the "substantial cause" requirements of the US statute. It conducted its examination of the effects of other possible causes, including mainly the oil and gas crisis, against the background of its finding in the first instance of a causal link between the increased imports and the serious injury the domestic industry was suffering. The USITC did not merely determine that there was at least some injury being caused to the industry by factors other than the oil and gas crisis. Rather, the USITC compared the effects of the changes in demand caused by the oil and gas crisis to the effects caused by the imports. It found that, of the two principal factors affecting the industry, the increased imports were more responsible for the serious injury. In so doing, the USITC assured itself that any effects caused by the changes in demand did not sever the causal link between the increased imports and the serious injury.

93. Accordingly, the USITC examined the effects of reductions in oil and gas drilling on line pipe demand and compared such effects to those of the increased imports.[59] As an initial matter, the USITC found that it was not clear that line pipe demand was as closely tied to oil and gas drilling activities as respondents had contended.[60]

94. To the extent line pipe demand was tied to drilling activities, the USITC found that the trends in apparent consumption (which reflects demand), unlike the import trends, did not track the financial experience of the domestic industry.[61] Consumption in interim 1999, when the industry was at a financial low point, was comparable to consumption in the period 1994 through 1996, when the industry's financial performance was healthy. The USITC explained that the most significant

[56] USITC Report, pp. I-27-30.
[57] USITC Report, pp. 23-26.
[58] USITC Report, p. I-26.
[59] The United States has already set out some of the quantitative details of this comparison in our response to the Panel's question number 14.
[60] USITC Report, p. I-27.
[61] USITC Report, p. I-28.

difference in market conditions between interim 1999 and the 1994 through 1996 period was the import market presence and in particular the doubling of import market share.

95. Further, the USITC explained that the substantial price declines in 1998 and interim 1999, which correlated to increases in imports, could not be attributed to declines in oil and gas drilling and production activities.[62] The USITC noted that the decrease in line pipe prices that occurred during the post-1998 period was across the board.[63] It was not limited to those line pipe grades used for drilling, as would be expected if the industry slowdown had been caused by a reduction in demand from the oil and gas industry.[64] The USITC further found that the questionnaire responses supported the conclusion that imports, and not reduction in demand, played the major role in the decline in domestic line pipe prices in 1998 and interim 1999.[65] Thus, the USITC found that as the imports played as or more important a role in the domestic industry's poor performance than the reduced oil and gas drilling. As such, the oil and gas crisis did not sever the causal link between the increased imports and the serious injury.

24. Is a determination that the crisis in the oil and gas industry could not have accounted for the totality of the serious injury experienced by the domestic industry sufficient to demonstrate a genuine and substantial relationship of cause and effect between the increased imports and the serious injury suffered by the domestic industry? Does such a determination ensure that none of the injurious effects caused by the crisis in the oil and gas industry have been attributed to increased imports? Please explain.

Response

96. As discussed above, the USITC did not merely find that the crisis in the oil and gas industry could not have accounted for the totality of the serious injury experienced by the domestic industry. Rather, the USITC found that there was a direct, *i.e.* "genuine and substantial," causal link between the significant increase in imports, the prevalent price depression that followed this increase, and the consequent deterioration in the industry's financial condition. In confirming this causal relationship, it found that of the two principal factors affecting the industry, the increased imports played a larger role.

97. Since the USITC did not base its causation conclusion on a finding that the injury field was not completely occupied by the oil and gas crisis, the US response must consider this question to be a hypothetical one. Under SGA Article 4.2(b), a competent authority would always have to find, as an affirmative matter, that there was a causal link between increased imports and serious injury. Merely eliminating other possible causes without independently confirming this causal relationship would not appear to be sufficient to meet this requirement. Assuming that this link is established, there could be some factual circumstances, such as where there is only one possible cause of injury other than the imports, in which a finding that the alternative cause was not responsible for all injury would be sufficient to meet the SGA's causation requirements. In other circumstances, this approach might not suffice.

[62] USITC Report, pp. I-29-30.

[63] USITC Report, p. I-29. Domestic producers were steadily losing market share for all types of line pipe products to foreign producers.

[64] USITC Report, p. I-29.

[65] USITC Report, p. I-30 and n. 186.

102. The USITC 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.[70] Addressing competition among domestic producers, the USITC 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 USITC further found that although the addition of two new facilities in 1998 added to capacity, the 8 per cent increase in capacity was reasonable and moderate in comparison to the 23 per cent growth in consumption from 1994 through 1998.

103. The USITC also examined the effects of changes in the oil country tubular goods ("OCTG") market that caused domestic producers to shift production out of OCTG to line pipe. The USITC found that this factor was actually another form of increased intra-industry competition because its effect would be to increase production, and therefore supply, of line pipe.[71] As noted, the USITC found that domestic competition had always been a factor but had not caused prices depression and shipment declines such as those caused by the imports. Furthermore, the USITC found that any switch from OCTG to line pipe would have been in relatively small quantities.

104. The USITC 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 USITC found, the impact of the increased imports dwarfed the decline in exports.[72]

105. Thus, the USITC 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 USITC's thorough explanation of this analysis in its Report demonstrates that the USITC 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.

26. Does the Line Pipe measure "appl[y]" (within the meaning of Article 9.1 of the Safeguards Agreement) to developing countries?

Response

106. The line pipe safeguard does not apply to any developing country Members that account for less than three per cent of total imports. Article 9.1 of the Safeguards Agreement states that safeguard measures shall not "be applied" against imports from a developing country Member under the circumstances set forth in that article. The ordinary meaning of the terms provides no guidance on how a Member may meet the Article 9.1 requirement, thus leaving the decision to the Member. In the present case, the United States met the requirements of Article 9.1 by permitting the first 9,000 short tons from any supplier country to enter the United States free of additional duty. Since the US measure permits the first 9,000 short tons of imports from each supplier country to enter free of additional duty, the measure is not "applied" against any developing country Member's imports unless and until the 19 per cent additional tariff takes effect. This would occur only if imports from a particular developing country Member exceeded 9,000 short tons in a given remedy year.

107. When the United States constructed its remedy, historical import patterns indicated that permitting each supplier country to enter 9,000 short tons of line pipe free of additional duty would ensure that the remedy would not apply to any developing country Member with a 3 per cent or lower

[70] *See* USITC Report, p. I-30.
[71] USITC Report, pp. I-30-31 & n.190.
[72] USITC Report, p. I-31.

representative base period."[76] Thus, any appreciable increase in imports of Mexican or Canadian line pipe could subject those imports to inclusion in the US safeguard measure.

(vii) Increased imports

28. In Argentina – Footwear, the Appellate Body found that the increase in imports must be inter alia "recent enough." How "recent" should the increase in imports be, relative to the date of the competent authority's decision to impose a safeguard measure? What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports? In the present case, could the US line pipe industry have filed a petition before it did? Please explain. Could the ITC have reached its determination before it did? Please explain.

Response

How "recent" should the increase in imports be, relative to the date of the competent authority's decision to impose a safeguard measure?

112. The United States submits that this question cannot be answered in the abstract as the answer may depend on the industry involved, including any relevant business cycle, as well as other considerations peculiar to the circumstances of a particular safeguard investigation. Accordingly, the United States will address this question in the context of the current dispute.

113. As earlier indicated, an increase in the absolute volume of imports as well as an increase in the volume of imports relative to domestic production occurred in 1998, the last full year of the five year investigatory period established by the USITC in its line pipe safeguard investigation. Indeed, the annual increase in both the absolute volume of imports as well as the increase relative to domestic production was the greatest in 1998. A comparison of data for interim 1999 with those for the comparable period of 1998 indicates a continuation of the increase in imports relative to domestic production. Since the increase in import volume occurred in the last full year of the investigatory period as well as (in the case of relative import levels) in the last partial year for which the USITC had data prior to its determination of serious injury, there can be no question that the increase in imports was sufficiently recent to satisfy the requirements of the Safeguards Agreement.

What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports?

114. The Safeguards Agreement does not contain any requirements for the timing of a petition. The amount of time that a domestic industry might reasonably need to file a petition following a sudden increase in imports could vary greatly, depending upon factors such as the resources of the domestic industry and the complexity of the potential case. An industry that is faced with a sudden increase in imports might also decide to wait to see whether the situation improves. In light of the many variables involved in the timing of the filing of a petition, we do not believe it would be appropriate to provide a generalized answer as to the minimum period of time that an industry would need to file a petition.

In the present case, could the US line pipe industry have filed a petition before it did?

115. We are not in a position to speculate regarding the circumstances surrounding the domestic line pipe industry's decision to file its petition, and the preparation of its petition.

[76] 19 U.S.C. § 3372(c)(3).

Could the ITC have reached its determination before it did?

116. By statute, the USITC makes its injury determination within 120 days after a safeguards investigation has been initiated. This time is required for: the collection of data from industry participants, the analysis of this data by the USITC staff, the submission of briefs by parties, a hearing, and the evaluation of the case by the USITC Commissioners.

29. The US argues in para. 66 of its first submission that a comparison of "mismatched" interim period could create distortions because of seasonal changes in market conditions. Does the US therefore, believe that line pipe is a seasonal product? If line pipe is not a seasonal

II. US RESPONSES TO ADDITIONAL ORAL QUESTIONS POSED BY THE PANEL

Is it possible to find serious injury and threat of serious injury at the same time?

124. Under US law each USITC Commissioner who makes an affirmative determination must base that determination on either serious injury or threat thereof. An affirmative determination of the USITC (*i.e.*, of the competent authority) may be based on serious injury or threat thereof and there certainly are circumstances in which it would be possible to reach a conclusion either that the industry was either currently seriously injured or threatened by serious injury. Since a finding of threat of serious injury requires that the injury be imminent, the temporal difference between current serious injury and threat of serious injury is not likely to be substantial.

III. RESPONSES TO QUESTIONS FROM KOREA

1. The United States argues that the Agreement on Safeguards ("SA") contains no requirement for a Member to use economic analysis to determine the level of a safeguard measure (US Submission at para. 178). The United States also argues that import volume after the safeguard measure is inadmissible in the panel proceedings (Id. at para. 176). If neither ex ante nor ex post analysis is allowed as the United States argues, then, in the US view, how could a Panel analyse a Member's compliance with its obligations under Article 5.1 of the SA?

Response

125. As the Appellate Body explained in *Korea – Dairy*, except in the limited circumstances described in Article 5.1, the Safeguards Agreement does not require a Member to adopt a justification for a safeguard measure at the time it takes the measure.[82] By the same token, it is not precluded from providing a justification of the measure at that time. If the measure becomes subject to dispute under the DSU, the Member may issue a justification in those proceedings or elaborate upon an earlier justification. In short, the Safeguards Agreement is silent as to *when* a Member needs to justify its safeguard measure. In this regard, safeguard measures are like any other measure taken by a Member in that there is no need to explain consistency with the WTO Agreement unless another Member presents a *prima facie* case that the measure is inconsistent.

126. As we explain above, the Safeguards Agreement does require that the measure be based on *information* available at the time of the decision to take the measure. Therefore, regardless of when a Member justifies a measure, it must rely on the body of information available at the time of the decision to take the measure. Similarly, a Member claiming that the decision is inconsistent with GATT 1994 and the Safeguards Agreement must base its claim on that body of information, as must a Panel evaluating the measure in the context of a dispute.

127. The United States also notes that Korea's question distorts the US position. The US observation that the Article 5 does not *require* an economic analysis does imply that an *ex ante* analysis is "not allowed." The Safeguards Agreement does not require an explanation of the basis for a safeguard measure in general, or the use of economic analysis in that explanation. Therefore, a Member retains the discretion to explain a safeguard measure whenever it considers appropriate, using whatever type of analysis it considers appropriate.

128. By the same token, the US view that the Panel may not consider post-decision *evidence* in evaluating the decision to take a safeguard measure does not imply that *ex post* analysis is "not allowed." As we have stated in response to this question, the Panel may not consider after-the-fact

2. Did NAFTA "eliminate" safeguard measures among its Members or is this a decision to be reached on a case-by-case, product-by-product basis?

Response

129. The NAFTA requires parties to exclude each other from safeguard measures under certain conditions. Parties may include each other in safeguard measures only under the conditions specified in Article 802 of the NAFTA. The United States also wishes to call Korea's attention to its response to question 17 from the Panel.

3. Is it the position of the United States that the provisions of Article XXIV of the GATT 1994 apply to its exemption of Mexico and Canada from the safeguard measure on line pipe independently of whether Footnote 1 of the SA applies to US safeguards actions under NAFTA?

Response

	1994	1995	1996	1997	1998	Interim 1998	Interim 1999
US production (absolute data)[84]	635,815	770,011	694,663	881,946	669,876	412,872	282,247
US production (indexed data)[85]	100.0	121.1	109.3	138.7	105.4	100.0	68.4
Total imports (indexed data)[86]	100.0						

140.

threat thereof (Id. at para. 57) Does the United States argue here that the SA does not establish the different conditions and the different legal effect for serious injury on the one hand and the threat thereof on the other hand? For example, could the United States have applied the provisions of Article 5.2(b) of the SA on the basis of a "serious injury or threat of serious injury" finding?

Response

143. The United States has addressed the first question in its response to the oral questions posed by the Panel at the first substantive meeting. As to the second question, the United States has not taken action pursuant to Article 5.2(b), and therefore the question is not relevant to this dispute.

(Causation)

12. The ITC record shows that it was fully aware that the situation in the oil and gas

Response

146. As an initial point, the United States notes that the consistency of the US statute with the Safeguards Agreement is not within the terms of reference in this dispute. Accordingly, insofar as Korea is asking this question to challenge the standards set by US law, the question is not relevant to this dispute.

147. What is relevant to this dispute is that the United States has shown that the USITC's *Line Pipe* causation analysis meets the requirements of the Safeguards Agreement. Both in its written submissions and in its responses to Panel questions numbers 23 and 25, the United States has explained how the USITC's causation analysis assured that there was a substantial and genuine causal relationship between the increased imports of line pipe and the serious injury, and that the effects of other factors were not attributed to the imports and did not sever the causal link. The United States has also shown in its written submissions and responses to Panel questions that it meaningfully explained this analysis in its Report.

148. As demonstrated in this case, the USITC conducted a multi-step causation analysis. First, it determined that the increased imports were an important cause of serious injury, *i.e.*, that there was a definite causal link between the imports and the injury. Only after having found this causal link in the first instance did it proceed to test the genuineness and substantiality of this causal relationship and in doing so ensured that it was not attributing the effects of other causes to the imports. It makes no difference under the Safeguards Agreement whether the USITC examined one other possible cause or numerous other possible causes, so long as it found that the causal relationship between the increased imports and the serious injury remained intact (or, in terms of the US statute was a substantial cause) when evaluated against any other cause.

149. The Appellate Body has twice held that Article 4.2(a) of the Safeguards Agreement does not require that increased imports "alone", "in and of themselves", or "per se" must be capable of causing injury.[98] Rather, the Appellate Body has recognized that other factors may be contributing "at the same time" to the situation of the domestic industry.[99] Further, "where there are several causal factors," the competent authority meets the causation requirements and assures non-attribution by separating and identifying the effects of the different factors.[100] As described above and in our response to Panel questions 23-25, the USITC met these requirements. The Safeguards Agreement requires no more, and any suggestion by Korea to the contrary is not supported by the Agreement or by the Appellate Body reports interpreting the safeguards causation standard. Indeed, the Appellate Body has emphasized that the method and approach Members use to carry out the process of separating out the effects of other causal factors is not specified by the Agreement.[101]

14. In paragraphs 238-239, Korea characterized Commissioner Crawford's views concerning the impact of Lone Star on the performance of the industry in 1998 as follows:

> **238. In the case of Lone Star Steel, Commissioner Crawford observed that the company allocated to line pipe certain production-specific costs for items which appear to have been unrelated to the production and sales of line pipe. The description of these items is treated confidentially by the ITC so their exact nature or overall effect is not known to Korea.**

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[98] *US – Lamb Meat (AB)*, paras. 169-171; *Wheat Gluten (AB)*, para. 79.
[99] *US – Lamb Meat (AB)*, para. 166; *US – Wheat Gluten (AB)*, para. 67, n.19..
[100] *US – Lamb Meat (AB)*, paras. 183-184.
[101] *US – Lamb Meat (AB)*, para. 181.

> **239. Commissioner Crawford, however, concludes that this misallocation resulted in a substantial reduction in the level of operating income in the industry as a whole, particularly for the second half of 1998, and for reasons wholly unrelated to the conditions of competition in the pipe industry, much less imports of line pipe.**

At paragraph 101, the United States claims that Korea "Misquotes" Commissioner Crawford. According to the United States:

> **In connection with charges incurred by Lone Star Steel, Commissioner Crawford stated that the domestic industry's operating income "may be somewhat misleading." Commissioner Crawford did not conclude that Lone Star had "misallocated" charges, or that this resulted in "a substantial reduction in the level of operating income in the industry as a whole," as Korea claims.**

What Commissioner Crawford actually said, in full, was as follows:

> **I note that the 1998 operating income on the record may be somewhat misleading. In 1998, Lone Star allocated *** of charges for *** (primarily a reduction in operating its *** in favour of ***). The results of this decision appear to have been felt most keenly in the second half of 1998. This decision had a marked impact on SG&A for the company and for the industry as a whole, reducing the industry's level of operating income to $10.8 million in 1998. ITC Determination at I-13 (emphasis added).**

With specific reference to paragraphs 238 and 239 of Korea's written submission, please indicate where Korea "misquoted" Commissioner Crawford. Secondly, since Commissioner Crawford appears to suggest that these charges should not have been allocated to line pipe, and that the result of the allocation was to lower the operating income of both Lone Star and the industry as a whole for reasons having nothing to do with imported line pipe, please provide the confidential version of her statement or explain how paragraphs 238 and 239 of Korea's written submission are not accurate representation of her statement.

Response

150. The United States used the term *misquoted* to avoid using the more accurate term *misrepresented.* Korea did so in two ways in paragraph 239 of its first written submission. First, Commissioner Crawford nowhere concluded that Lone Star had "misallocated" charges, as Korea asserts. Second, Commissioner Crawford nowhere concluded that this resulted in "a substantial reduction in the level of operating income in the industry as a whole," as Korea asserts.

151. In its response to Panel question number 8, the United States has explained that adding the Lone Star charge at issue would not increase the industry's 1998 aggregate operating income of $10.8 million by more than 20 per cent, or increase the ratio of operating income to net sales for 1998 of 2.9 per cent by more than one percentage point. Thus, contrary to Korea's assertion in paragraph 239 of its first written submission, the Lone Star charge did not result in a "substantial reduction in the level of operating income in the industry as a whole." This can be seen by comparing the industry operating income in 1997 to what it would have been in 1998 if the Lone Star charge were reversed to the full extent of the parameters identified above:

Table X-1

Welded line pipe: Weighted-average f.o.b. prices and quantities of

Table X-2

Welded line pipe: Weighted-average f.o.b. prices and quantities of
domestic and imported products 3-4, by quarters, January 1994 – June 1999

Table X-3

Welded line pipe: Weighted-average f.o.b. prices and quantities of

ANNEX B-3

CANADA'S ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

(7 May 2001)

I. QUESTIONS TO CANADA

(i) Exclusion of Canada and Mexico

Q1. [CANADA ONLY] Canada argues (para. 9) that "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". If that is the case, why does the NAFTA allow for the imposition of safeguard measures between NAFTA members if certain

Reply

3. NAFTA reflects a complex balancing of many elements, including its safeguards provisions, which were part of NAFTA at the time of its entry into force, that make up the substantive obligations that are found in the final text of the agreement. As noted above, Article 802 provides, as the general rule, that safeguard measures are not to be taken against another NAFTA party. However, consistent with Article XXIV:8(b), Article 802 allows for such measures in limited circumstances.

Q4. [ALL] Please comment on the US argument that the absence of any reference to GATT

Reply

6. With respect to the last sentence of Footnote 1, Canada notes that by its wording this sentence applies to the whole of the *Agreement on Safeguards*. Thus its placement has no bearing on the its interpretation and the fact that it is meant to inform the interpretation of the whole of the Agreement.

7. Canada's submissions in this matter addressed the issue of Canada's exclusion from the safeguard measure in question. Therefore Canada has no comment at this time with respect to questions 7-13 posed by the Panel.

II. QUESTION FOR MEXICO AND CANADA FROM KOREA

Q14. Did NAFTA "eliminate" safeguard measures among its Members or is this a decision to be reached on a case-by-case, product-by-product basis?

Reply

8. As indicated in Canada's answers to the Panel's first three questions above, consistent with NAFTA Member's WTO obligations, NAFTA Article 802 provides, as a general rule, safeguard measures are not to be taken against another NAFTA party. The extent to which safeguard measures can be taken against another NAFTA Party is limited to the circumstances set out in Article 802 of NAFTA, which are determined on a case-by-case basis.

ANNEX B-4

EUROPEAN COMMUNITIES' ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

(7 May 2001)

General remarks

2. The EC would reiterate what it has already submitted to the Panel in its Oral Statement, i.e. that it is not necessary for the Panel to decide in this proceeding about the relationship between Article XXIV and Article XIX of *GATT 1994*.[1] The point in dispute in these proceedings is whether in the Line Pipe investigation the ITC exclusion of imports from Canada and Mexico from the scope of the safeguard measure was correct. The EC would also urge the Panel not to decide in general terms on the relationship between Article XXIV and Article XIX because the question raises complex issues that cannot be fully debated in the course of these proceedings.

3. The Panel's decision on this point does not however require a decision on the issue of principle of whether an FTA member may or must, under Article XXIV of GATT, legitimately

violated). In the EC's view, since the US safeguard action against line pipe imports is WTO incompatible in different respects, such an analysis is clearly not allowed in the present case.[6]

13. Even assuming, *arguendo*, that the US safeguard measure on Line Pipe were otherwise WTO-compatible, and thus the US argument were relevant, the second flaw in such argument is that it is both unsupported and not compatible with the general purpose and design of the relevant provisions of *GATT 1994.*

14. Perhaps the most appropriate approach to the issue is to start by addressing the definition of FTAs in *GATT 1994*. That definition is found in para. 8 (b) of Article XXIV, pursuant to which:

> "(*b*) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories." [emphasis added]

15. One could recall what the Appellate Body observed in *Turkey – Textiles*:[7]

> "Sub-paragraph 8(a)(i) of Article XXIV establishes the standard for the *internal trade* between constituent members in order to satisfy the definition of a "customs union". It requires the constituent members of a customs union to eliminate "duties and other restrictive regulations of commerce" with respect to "substantially all the trade" between them."

Similarly, Article XXIV:8(b) lays down the standard for internal trade between members of an FTA and requires that an FTA (a) eliminate restrictive trade regulations and (b) that elimination covers substantially all trade between members.

16. One can further refer to what the Appellate Body observed in respect of the "substantially all the trade" clause when appearing in Article XXIV:8(a):

> "Neither the GATT COcb Tj T*/r-4 when p8IEShes therkey – Textilesaevminate -236 efinition oa)Tw (16439 s) Tj T*87 ch

"liberalization of substantially all the trade", the remaining trade which is not liberalized may arguably remain so as a result of the application of safeguard measures.

18. This conclusion is further corroborated, under the circumstances of the present case, by the fact that the contracting parties to NAFTA themselves have not made the mutual exclusion from safeguard measures an absolute obligation. Instead, in Sec. 802(1) of the NAFTA Agreement they have provided for the possibility of inclusion in certain circumstances.[9] If there were an absolute obligation to exclude partners (*quod non*), then whenever this provision is applied NAFTA partners would themselves violate Article XXIV.[10]

19. Likewise, if the US argument was taken literally and all safeguards were to be eliminated between FTA partners as a condition for the establishment of the FTA, then also bilateral safeguard clauses, such as that laid down in Sec. 801 of the NAFTA Agreement, would be prohibited.

20. There are further reasons why the US argument that safeguard measures must not be applied between FTA partners because Article XIX of *GATT 1994* is not expressly mentioned in Article XXIV:8 is unconvincing.

21. In the first place, Article XIX is not the only provision allowing trade restrictive measures that is not referred to in Article XXIV:8(b). If the US reasoning was correct, then also measures under e.g. Article VI of *GATT 1994* (as supplemented, clarified and modified by the *Anti-Dumping Agreement* and the *SCM Agreement*), could never be imposed against FTA partners. Perhaps even more obviously, the omission of any reference to Article XXI of *GATT 1994* (security exceptions) in Article XXIV:8(b), in stark contrast with the reference to Article XX (general exceptions), can hardly be understood to mean that FTA partners would be precluded from relying upon such provision in case of a situation calling for national security protection involving *inter alia* FTA partners.

22. Another unreasonable result of espousing the US interpretation is hinted to in Panel's question 2. The EC's view in that respect is that, given the fact that safeguard measures adopted consistently with Article XIX may take the form of quantitative restrictions covered by Article XI of GATT 1994, it is not logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are.

23. If quantitative restrictions can be maintained on a permanent basis (such as when they are based on Article XI:2) *a fortiori* it must be possible to apply them on "emergency" grounds.

24. The same can be said for, at the very least, all the measures based on the GATT provisions listed in Article XXIV:8(b), as well as for those which take the form of increased duties: whether or not adopted on safeguard grounds, there should be no obligation to exclude FTA partners.

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[9] Section 802(1) of the NAFTA Agreement reads, in pertinent part:

"Any party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless (1) (a) imports from a Party, considered individually, account for a substantial share of total imports; and (b) imports from a party considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports."

[10] This is even more the case because, if the two conditions in Sec. 802(1) are met, a NAFTA Party is entitled to include its partners' imports irrespective of whether this result in reducing liberalization below the "substantially all trade" threshold. It is not plausible that the NAFTA partners would have agreed on such a text if they were convinced that there is an absolute obligation in Article XXIV to exclude FTA partners from safeguard measures.

32. The fact that the last sentence of footnote 1 refers in general terms to the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994, which remains unaffected, has to be related to the rest of the text of the footnote, and is not modifying the general scope of the footnote.

33. This is confirmed i.a. by the Appellate Body's finding in para. 106 of *Argentina – Footwear*, which is unqualified and applies to the whole content of footnote 1. That paragraph, along with the passage of the Panel Report that the Appellate Body criticized in the previous paragraph, is worth being quoted in full:

> "105. Finally, the Panel concluded as follows:
>
> > in the light of Article 2 of the Safeguards Agreement and Article XXIV of GATT, we conclude that in the case of a customs union the imposition of a safeguard measure only on third-country sources of supply cannot be justified on the basis of a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources of supply from within and outside a customs union. [94]
>
> ———————
>
> "[94] Panel Report, para. 8.102."
>
> 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". [95] On the facts of this case, Argentina applied the safeguard measures at issue after an investigation by Argentine authorities of the effects of imports from all sources on the Argentine domestic industry." [emphasis added]
>
> ———————
>
> "[95] We also note that footnote 1 relates to the word "Member" in Article 2.1, which is commonly understood to mean a Member of the WTO."

34. Thus, in paragraph 106 of its Report the Appellate Body understood the first sentence of footnote 1 to determine the scope of the whole footnote and drew from that first sentence a conclusion in respect of the whole footnote.

Specifically, the Appellate Body identified the subject matter of the footnote as being safeguard actions taken by customs unions (as opposed to action taken by one of their constituent members).

35. The Appellate Body's conclusion was that the whole footnote was irrelevant to the case under review, which was concerned with whether Argentina, rather than the customs union of which it is a member, could rely on the last sentence of the footnote to justify exclusion of its customs union partners from the application of the measure.

The Appellate Body considered that the fact that the safeguard action under review was not attributable to a customs union was sufficient to exclude the relevance of the footnote.

36. The issue before the Panel in the present proceedings mirrors the one before the Appellate Body in *Argentina – Footwear* and addressed in para. 106 of the Appellate Body report. As recalled, in that case, at issue was the possibility for Argentina, as a customs union member, of relying on footnote 1, to exclude a customs union partner from the reach of a safeguard measure. Similarly, in the present case the issue is whether a member of an FTA, rather than the FTA itself, can rely on the last sentence of the footnote to exclude its partners from the application of its safeguard measure.

37. If the footnote, even if referring to customs unions, was held by the Appellate Body not to be relevant to actions taken by members of customs unions, a fortiori it cannot be relevant to actions taken by members of FTAs, which are not even mentioned in that footnote.[13]

38. Furthermore, if the last sentence of footnote 1 had the general scope and meaning that the US suggests, then it would have allowed the Appellate Body to apply it to the case at issue in *Argentina – Footwear* as well.

39. That footnote 1 is not relevant to decide the matter before the Panel is further confirmed by the fact that it has been inserted in Article 2.1 of the *Agreement on Safeguards*, rather than Article 2.2, as recalled in the text of question 6.

40. The text of the footnote is, moreover, attached to a specific term in Article 2.1, notably the word "Member", as also pointed out by the Appellate Body in *Argentina – Footwear*.[14] The footnote is thus aimed at regulating a specific instance, which can only concern actions taken by some of the

Is it necessary to choose between a finding of present serious injury and a finding of threat of serious injury in order to comply with the necessity requirement contained in the first sentence of Article 5.1? Please explain.

Reply

different and less restrictive measure from that recommended by the commissioners who had found serious injury.[17]

51. The fact that the level and type of remedy is likely to be different in the case of serious injury and of threat of serious injury does not, however, entail that the measure changes in nature, as explained above.

8. [ALL] GATT Article XIII.2(a) provides that quotas representing the total amount of permitted imports shall be fixed "wherever practicable". GATT Article XIII.5 states that Article XIII.2(a) shall apply to tariff quota. Would this suggest that there may be situations in which it may not be "practicable", in the context of a tariff quota, to fix a quota representing the total amount of permitted imports?

Reply

52. Yes.

If not, why not? If yes, would this also suggest that a measure may constitute a tariff quota even if there is no "overall limit on eligibility" (para. 185, US first written submission)?

Reply

53. Yes, the very presence of this clause ("wherever practicable") suggests the *a contrario* inference that in the case of a tariff quota fixing a quota representing the total amount of permitted imports may not always be "practicable". This is however without prejudice to the question of whether in the present case fixing such a total amount was or was not "practicable".

9. [ALL] In Section F.2.b of its first written submission, the US argues that the rules in Article 5 of the Safeguards Agreement for quantitative restrictions and quotas do not apply because the Line Pipe measure is not a quantitative restriction. Does your delegation consider that the terms "quantitative restriction" and "quota" (in Article 5 of the Safeguards Agreement) are synonymous? Please explain. In particular, and considering the US argument that a measure is only a TRQ if it includes an overall limit on eligibility, why should the term "quota" (Article 5.2) not refer to the quota element of a TRQ?

Reply

54. The EC does not consider that the terms "quantitative restriction" and "quota" are synonymous. This seems to be consistent with use of those two terms elsewhere in the legal texts resulting from the Uruguay Round.

55. For example, the two terms already appear in GATT Article XI. That provision, while prohibiting any form of quantitative restriction, specifies that quotas are but one of the possible ways to effect such restrictions.

56. Furthermore, Article XIII of GATT 1994 makes clear in para. 5 that "quotas" can also be "tariff quotas", as it states that Article XIII provisions also cover tariff quotas.

57. Since tariff quotas are also covered, the reference in e.g. Article XIII:2(d) to the allocation of a "quota" must be a reference to the allocation of the "quota" part of a TRQ.

[17] ITC Report, pp. I-75 and I-87 respectively.

appropriately reported in the domestic measure, and to the reasoning concerning the details (including level, type, duration) of the measure.

62. Most recently in *US – Lamb*, the Appellate Body confirmed that fulfilment of the requirements of the *Agreement on Safeguards* must be reviewed by looking at the domestic measure in the following terms:

> "we observe that Article 3.1 requires competent authorities to set forth findings and reasoned conclusions on "all pertinent issues of fact and law" in their published report. As Article XIX:1(a) of the GATT 1994 requires that "unforeseen developments" must be demonstrated, as a matter of fact, for a safeguard measure to be applied, the existence of "unforeseen developments" is, in our view, a "pertinent issue[] of fact and law", under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a "finding" or "reasoned conclusion" on "unforeseen developments"." [emphasis added] [22]

63. Since this conclusion is based on the general language of Article 3.1 of the *Agreement on Safeguards*, it logically applies to all the "pertinent issues of fact and law", including compliance with the obligation in the first sentence of Article 5.1.

(iii) Serious injury

11. [ALL] Leaving aside the factual circumstances of the present case, does your delegation consider, as a matter of principle, that improvements in domestic industry performance at the end of the relevant period of investigation would be inconsistent with a finding of present serious injury?

Reply

64. No, they would not be always and per se inconsistent. However, they are particularly relevant in safeguard investigations, in view of the emergency nature of safeguard action.

(iv) Increased imports

12. [ALL] In Argentina – Footwear, the Appellate Body found that the increase in imports must be inter alia "recent enough". How "recent" should the increase in imports be, relative to the date of the competent authority's decision to impose a safeguard measure? What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports? In the present case, could the US line pipe industry have filed a petition before it did? Please explain. Could the ITC have reached its determination before it did? Please explain.

Reply

65. There is not a predetermined benchmark for deciding if imports are recent enough, but in view of the emergency nature of safeguard measures the exceptional situation justifying safeguard action must be as close as possible to the decision of such action.

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[22] Appellate Body Report, *US – Lamb*, para. 76. Still in *Korea – Dairy Products* the Appellate Body upheld the Panel's finding of a violation of Article 4 of the *Agreement on Safeguards* which was based on examination of whether certain "relevant factors" in Article 4.2(a) had or had not been reviewed in the OAI Report (Appellate Body Report, *Korea – Dairy Products*, paras. 138, 141).

66. Likewise, there is no minimum predetermined period to wait before a petition for safeguard relief may be filed with the competent authorities.

(v) Developing country exemption

13. [ALL] At para. 181, Korea asserts that "the United States did not even attempt to determine which countries qualified for this exemption". Does the Safeguards Agreement require Members imposing safeguard measures to determine in advance which developing countries should be excluded from those safeguard measures under Article 9.1?

Reply

67. In the EC's view Members imposing safeguard measures are required to determine in advance which developing countries should be excluded by reason of Article 9.1. In fact before imposing a measure they are required to assess import trends and to conduct a full investigation. This also applies to imports from developing countries, so that data concerning their individual and aggregate share in the trade in the investigated product also need to be available and be reviewed before the adoption of a measure.

5. The US argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that "issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles" (para. 220, US first written submission). In this regard, please comment on the Appellate Body's finding in Argentina – Footwear (para. 106) that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'". Does the Appellate Body's finding apply to the last sentence of footnote 1? Please explain.

Answer to Question 5

No, it does not. In *Argentina – Footwear*, the Appellate Body was concerned only with issues in the context of customs unions. The Appellate Body

they concluded, at the time of the decision, that the measure to be applied was necessary to remedy serious injury and facilitate the adjustment within the meaning of Article 5.1.

(ii) Serious injury

11. Leaving aside the factual circumstances of the present case, does your delegation consider, as a matter of principle, that improvements in domestic industry performance at the end of the relevant period of investigation would be inconsistent with a finding of present serious injury?

Answer to Question 11

In general, improvements at the end of a period of investigation would detract from a finding of current injury. However, one must consider the characteristics of the market, such as seasonal ups and downs, and elasticity of demand relative to price. Therefore, the determination must account for all relevant product-specific variables.

(iii) Increased imports

12. In Argentina – Footwear, the Appellate Body found that the increase in imports must be inter alia "recent enough". How "recent" should the increase in imports be, relative to the date of the competent authority's decision to impose a safeguard measure? What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports? In the present case, could the US line pipe industry have filed a petition before it did? Please explain. Could the ITC have reached its determination before it did? Please explain.

Answer to Question 12

In *Argentina – Footwear*, the Appellate Body held that "the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury,'" taking into account the many characteristics of each industry.[4] Thus, a case-by-case analysis is required to evaluate whether or not an increase in imports is "recent enough." But, although as this analysis suggests, it may be difficult to set a period that in all cases is "recent enough," in *Argentina – Footwear*, the Appellate Body found that a period of several years was not sufficiently recent.[5]

(iv) Developing country exemption

13. At para. 181, Korea asserts that "the United States did not even attempt to determine which countries qualified for this exemption". Does the Safeguards Agreement require Members imposing safeguard measures to determine in advance which developing countries should be excluded from those safeguard measures under Article 9.1?

[4] Argentina – Safeguard Measures on Imports of Footwear, *WT/DS121/AB/R (14 December 1999) at para. 131*.

[5] Id. *at para. 130*.

Answer to Question 13

Article

ANNEX B-6

MEXICO'S ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

(7 May 2001)

Before replying to the panel's questions, Mexico respectfully points out that, since our arguments refer exclusively to the right to exclude free-trade area partners from the application of the safeguard measure, our replies will deal exclusively with this issue.

Q2. [ALL] Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures

Q3. [CANADA AND MEXICO] In *Turkey – Textiles* (WT/DS34), the Appellate Body stated that a GATT Article XXIV defence may be available in the context of a customs union if two conditions are met: (1) the measure at issue is introduced upon the formation of the customs

As stated in the reply to question 2, the partners in a free-trade area are free to decide how they will attain the objective of facilitating trade amongst themselves. Thus, Article XXIV should be interpreted in the light of the objective of "trade facilitation". In the case under consideration, the NAFTA partners agreed that they would ensure access to their markets and established very clear provisions governing the limited circumstances in which such market access could not be guaranteed.

Q5. [ALL] The US argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that "issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles" (para. 220, US first written submission). In this regard, please comment on the Appellate Body's finding in *Argentina – Footwear* (para. 106) that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'". Does the Appellate Body's finding apply to the last sentence of footnote 1? Please explain.

Reply

Reply

NAFTA contains the general principle that the NAFTA partners will not apply safeguard measures to each other. This general principle, and the exceptions to it, are laid down in Article 802 of the NAFTA.

Reply

8. Paragraph 3 of the terms of reference in Korea's Panel Request objects to the failure of the United States to justify the measure under Article 5 of the SA. Yes, Korea submits that it has maintained that Article 5 claims are integrally linked to Articles 3.1 and 4.2(c).[2] Paragraph 9 of Korea's Panel Request states specifically that Articles 3 and 4 of the SA have been violated because "critical confidential information" relied on in the decision-making of the United States has not been provided (*inter alia*, the basis for the President's decision-making documents or any information at all with respect to the justification of the safeguard measure). The obligation to sufficiently explain why the measure was "necessary" by reference to the evidence that existed at the time that the Presidential decision was taken is a "pertinent issue of fact and law." It also relates to the serious injury finding and the "detailed analysis of the case" required by Article 4. (As the United States noted in its response to the Panel, the Article 3 and Article 4 claims with respect to the ITC proceeding were made in Paragraph 1.)

9. Therefore, as demonstrated, Korea has properly set out its "claims" by referencing Article 3 and Article 4 of the SA.[3] Korea also elaborated that critical information, which the United States claimed was of a confidential nature, had not been provided in violation of Article 3 and Article 4 requirements.

10. Furthermore, we note that the United States has not made any claims of prejudice prior to the Panel's question, and the United States has fully responded to Korea's claims regarding Article 3.1 as they related to Article 5 since the First Substantive Meeting with the Panel.

11. As the Appellate Body held in *Thailand – Antidumping Duties on Angles*, the question of whether the claims were adequately made is in essence a requirement of due process. The question is whether the party "suffer[ed] any prejudice on account of any lack of clarity in the panel request".[4] None has been shown.

II. KOREA

A. EXCLUSION OF CANADA AND MEXICO

Q1. At note 21 of its first oral statement, Korea states that "NAFTA is not in compliance with Article XXIV:8 of the GATT 1994". Please explain precisely why, in Korea's view, NAFTA is not "in compliance with" GATT Article XXIV:8.

Reply

12. Korea's position that NAFTA has not been demonstrated to be in compliance with Article XXIV:8 is based on the preliminary analysis of the Committee on Regional Trade Agreements

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[2] *See United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Request for the Establishment of a Panel by Korea, WT/DS202/4 (15 September 2000) ("Korea's Panel Request") at paras. 3, 9.

[3] *See Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R (14 December 1999) ("*Korea – Dairy (AB)*") at para. 123; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R (9 September 1997) at para. 141-43 ("Article 6.2 of the DSU requires that *claims*, but not the *arguments*, must all be specified sufficiently . . . in order to allow the defending party . . . to know the legal basis of the complaint.")

[4] *Thailand – Antidumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Report of the Appellate Body, WT/DS122/AB/R (12 March 2001) at para. 95.

which is still considering the question and has not yet issued a final decision on the matter. As the Panel observed, the United States has not presented any evidence that NAFTA qualifies as an FTA under Article XXIV:8(b).

13. Regardless of the Panel's conclusion as to whether Article XXIV could hypothetically apply to NAFTA, Korea maintains that this issue is not relevant to the legal issue before the Panel because the United States cannot invoke the applicability of Article XXIV to NAFTA without Footnote 1 of the SA. As discussed extensively throughout this proceeding, Footnote 1 does not apply to the US safeguard action.[5]

B. INCREASED IMPORTS

Q2.

16. We recall that the United States argued in the Second Substantive Meeting with the Parties ("Second Substantive Meeting") that all references to the condition of the US industry beginning in the second half of 1998--in both the Majority and Separate Views--were solely in response to arguments made by Respondents. As Korea noted in its reply, it is difficult to reconcile this interpretation with the fact that the Majority specifically included this analysis in their "findings" on causation. Furthermore, the basis of the threat finding was conditions beginning in the second half of 1998.

17. Again, we sincerely apologize for any inconvenience that we may have caused the Panel, and we thank the Panel for the opportunity to make corrections.

Q3. During the ITC's investigation, did the Korean respondents ask the ITC to compare the volume of imports in the first half of 1999 against the volume of imports in the second half of 1998?

Reply

18. First of all, Korean respondents argued throughout the ITC proceeding that the most recent period demonstrated a decline in imports.[6] However, until the Japanese arctic-grade imports were excluded in the final decision of the ITC, the import trends did not show an absolute decline commencing in the last half of 1998 (only in the first half of 1999). (This is the reason that public and confidential data trends do not match.) Therefore, this issue arose late in the proceeding. Nonetheless, the Respondents did argue that imports declined at the end of the period and Respondents argued for the exclusion of arctic pipe.

19. Second, the US legal standard for increased imports would not take into account a decline in the latter half of 1998 since under the US legal standard, a "simple increase" over the 5-year investigation period is sufficient. Moreover, as the United States repeatedly states, the ITC does not

Reply

22. No. First of all, the United States did not consider this data in the increased imports analysis it conducted.[9] The only US analysis of May and June imports trends occurs at page I-29 of the ITC Determination and relates to causation and whether imports were responding to demand conditions in the oil and gas sector. Therefore, this data was not used to show increased imports. There also was no method to demonstrate that "such" increased quantities as to cause serious injury under Article 2.1, since clearly there was no injury during the period in question. As Commissioner Crawford observed, domestic shipments increased sharply between the months of May and August 1999.[10]

23. Finally, Korea notes that the United States never cites to the source of its conclusion that Japan did not export any arctic-grade material during 1999. Korea questions why this data is not confidential, and if it is not, why isn't all the data on arctic-grade imports non-confidential as well? At the Second Substantive Meeting, the United States explained that the fact that "no imports" of arctic-grade material entered in the first half of 1999 is contained in a confidential letter which, apparently, cannot be provided to the Panel or Korea and for which no public summary was ever provided to the ITC.

24. The only party involved in this proceeding which has complete access to the confidential record--and has the ability to pick and choose between what data to provide this Panel and how it can be provided--is the United States. Put simply, if the United States is unwilling to put all data concerning imports of arctic-grade line pipe on the record, then the selective reference to import levels in one period of the investigation should be rejected.

25. Korea reiterates its concern that the disclosure of, or rather the refusal to disclose, confidential record information can be a tactical decision by a party to limit the scope and nature of the Panel's findings regarding errors. It is for this reason that Korea believes that the United States should resolve its chronic "systemic issue" concerning the treatment of confidential information. The United States has yet to satisfactorily explain why WTO Panels should be treated differently from US courts or NAFTA Panels with respect to access to confidential information. The full and complete record should be reviewable by WTO Panels just as it is reviewable by these other bodies.

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[9] *Circular Welded Carbon-Quality Line Pipe*, USITC Pub. 3261, Inv. No. TA-201-70 (December 1999) ("*ITC Determination*") at I-1-6 (KOR-6); *ITC Determination, Views on Injury of Chairman Lynn M. Bragg, Vice Chairman Marcia E. Miller, and Commissioners Jennifer A. Hillman, Stephen Koplan, and Thelma J. Askey* at I-7-15 (KOR-6).

[10] *ITC Determination, Crawford Dissenting Views on Injury and Addendum* at I-65, n. 44 (KOR-6).

ANNEX B-8

UNITED STATES ANSWERS TO QUESTIONS FROM THE PANEL AT THE SECOND MEETING WITH THE PARTIES

(15 June 2001)

I.

What, in your opinion, is the basis for the distinction between (1) "apply[ing] the "provisions" of Article XIII to tariff quotas, and (2) "extend[ing]" the "principles" of Article XIII to export restrictions?

Reply

3. The distinction arises from the nature of the provisions in question. Paragraphs 2, 3, and 4 of Article XIII address "import restrictions" and "import licences . . . issued in connection with import restrictions." Since a TRQ is a form of import restriction, those provisions can "apply" directly to TRQs by, for example, determining how to fix the overall amount subject to a lower tariff rate and allocating that amount among supplying countries.

4. However, since paragraphs 2, 3, and 4 by their terms refer to "import restrictions" or "import licences," they cannot "apply" directly to "export restrictions," which fall into an entirely different class of measures. In addition, the provisions of paragraph 2(d) dealing with Members who have a substantial interest in *supplying* the product to the imposing Member could not "apply" to an export restriction. Therefore, only the "principles" of these paragraphs, and not their literal obligations, can be "extended" to export restrictions, and then only so far as "applicable" – for example, if the restriction took the form of an export quota allocated among *consuming* Members.

(b) Does the fact that Article XIII:5 does not state that the provisions of Article XIII "shall apply" to "export restrictions" suggest that such provisions already apply to "export restrictions"?

Reply

5. No, just the contrary. The fact that Article XIII:5 states that only the "principles" of Article XIII shall be extended "so far as applicable" indicates that, except as specifically provided, all of the provisions of Article XIII do *not* apply directly to export restrictions. Article XIII:1 is one such specific provision. It explicitly refers to export restrictions and, therefore, applies to them. Article XIII:5 does not change this conclusion. In contrast, as we noted above, the paragraphs 2, 3, and 4 of Article XIII "apply" only to *import* restrictions and, therefore, not to export restrictions. Furthermore, if these provisions could somehow be interpreted to "apply" directly to export restrictions, their "principles" would already "extend" to export restrictions, and the export restriction language in Article XIII:5 would become superfluous. In accordance with the principle of effectiveness in treaty interpretation, the Panel should accordingly avoid the interpretation suggested in this segment of the question.[3]

Q3. Are all quantitative restrictions quotas? If not, what is the difference between a quantitative restriction and a quota? Please explain. Are all tariff quotas quotas? Please explain.

Reply

6. No. Article XI:1 indicates that quantitative restrictions may take the form of import licensing or "other measures". "Quantitative restriction" is a general term covering any measure that restricts the quantity of imports into or exports from a country. "Quota" is a subset of the class of quantitative restrictions, one that specifies the maximum quantity of imports into or exports from a country.

[3] *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, 14 December 1999, para. 88, n. 76 ("An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility").

7.

That is exactly the point. Whatever obligations arise under Articles 3.1 and 4.2(c), they are independent of Article 5 and, therefore, a claim under Article 5 in a party's panel request does not equate with a claim under Articles 3.1 or 4.2(c).[6]

11. On a related matter, questions arose at the second panel meeting as to whether Article 5.1 imposes an ongoing requirement for a Member to ensure that a measure was not applied beyond the extent necessary. The United States explained why this is not a valid interpretation of the Agreement. We would note further that Korea phrased both of its claims under Article 5 in the past tense, and addressed only the terms under which the United States imposed the measure. Therefore, any claim that actions or events subsequent to the imposition of the safeguard measure demonstrate an inconsistency with the WTO Agreement is outside the Panel's terms of reference.

II. KOREA

A. EXCLUSION OF CANADA AND MEXICO

Q1. At note 21 of its first oral statement, Korea states that "NAFTA is not in compliance with Article XXIV:8 of the GATT 1994". Please explain precisely why, in Korea's view, NAFTA is not "in compliance with" GATT Article XXIV:8.

Reply

12. The United States addresses this issue in its response to question 2 of section III.

B. INCREASED IMPORTS

Q2. At para. 62 of its rebuttal submission, Korea asserts that "the ITC itself looked at 1998 as two six-month periods with very distinct trends for purposes of its injury decision". In support, Korea cites (in note 69) certain parts of the ITC Determination, Majority Views on Injury. Please indicate precisely, by quoting the relevant text, which parts of the ITC Determination Korea is referring to.

Reply

13. At the second panel meeting Korea corrected the citations in footnote 69 of its rebuttal submission, and stated that the USITC looked at 1998 as two six month periods at three points in its opinion: at pages I-19, I-22 and I-28.

14. The United States notes that the USITC was not examining 1998 as two six-month periods (as Korea asserts) at any of these three points in its opinion. Korea has merely identified the only three times in the determination that the Commissioners finding serious injury referred to either of those six-month periods for any purpose whatsoever. On page I-19 of the USITC Report, the USITC was

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[6] We note that Korea took this same position in *Korea – Dairy*:

> Article 4.2(c) states that the competent authority must publish, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation, as well as a demonstration of the relevance of the factors examine. Article 5, however, contains no similar provision. The drafters must have intended to exclude the requirement to give a reasoned explanation, and such intention must be given effect.

Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R, 14 December 1999, para. 20.

explaining why the financial performance of the domestic industry was much stronger in interim 1998 than in full year 1998 – that is, because the financial performance declined sharply in the second half of 1998. On page I-22 the USITC was responding to arguments raised by respondents, which were couched in terms of developments in the second half of 1998. On page I-28 the USITC merely referred to "the second half of 1998 and the first half of 1999" to pinpoint when the financial performance of the domestic industry declined; the USITC was not analyzing 1998 in two separate six-month periods. The USITC Commissioners who found serious injury were not comparing the second half of 1998 with either the first half of 1998 or the first half of 1999, as Korea repeatedly asserts. Rather, these Commissioners were discussing a continuous period beginning in mid -1998, during which the condition of the domestic industry was in decline.

15. The Commissioners finding threat of serious injury also were not comparing the second half of 1998 with either the first half of 1998 or the first half of 1999. Rather, the references cited by Korea at the second Panel meeting[7] show that these Commissioners also examined a continuous period from 1994 through mid-1999, and, based on this examination, found dramatic increases in imports and a precipitous worsening of the industry's financial condition beginning in mid-1998 and extending through interim 1999.

16. The USITC, following its standard procedure, collected and examined data on the basis of full years and comparable interim periods – and not for the first and second halves of 1998. This is clear from a review of the overall discussion of the serious injury factors in the USITC Report, and from an examination of virtually every table with numerical data in the entire USITC Report.

Q3. During the ITC's investigation, did the Korean respondents ask the ITC to compare the volume of imports in the first half of 1999 against the volume of imports in the second half of 1998?

Reply

17. Korea conceded at the second panel meeting that it did not ask the ITC to compare the volume of imports in the first half of 1999 against the volume of imports in the second half of 1998. The United States notes that the Korean respondents compared imports in interim 1999 with imports in interim 1998 when they discussed the issue of increased imports in their briefs to the USITC.[8]

Q4. Regarding para. 73 of Korea's rebuttal submission, would Korea accept that there was an absolute increase in imports for the purpose of Article 2.1 if the "monthly import data" regarding the end of interim 1999 did relate to subject merchandise? Please explain.

Reply

18. The United States has no comment on this question.

[7] USITC Report, pp. I-38-41, I-43-44, and I-46.

[8] *E.g.*, Prehearing Brief of the Japanese and Korean Respondents, p. 8 (attached as US Exhibit 31).

III. UNITED STATES

A. ARTICLE 5

Q1. Please explain exactly how the United States ensured, at the time of application, that the Line Pipe measure would be commensurate with the goals of preventing or remedying serious

Article XXIV creates a limited exception" (para, 217, US first written submission). What are the conditions governing the application of the alleged "limited exception"? Please explain how the United States complied with those conditions in respect of the Line Pipe measure.

Reply

24. The conditions are those laid out in Article XXIV:

(1) The party applying the exception and the party subject to exception must be parties to an FTA that satisfies the Article XXIV:8 definition of an FTA, and

(2) The exclusion from safeguard measures must have been implemented as part of the elimination of duties and restrictive regulations of trade among the FTA parties.

The United States complied with these conditions in this case by entering into an FTA with Canada and Mexico that satisfies the definition under of Article XXIV:8. As part of the package of trade liberalizing measures under the North American Free Trade Agreement ("NAFTA"), the United States undertook the obligation to exclude Canada and Mexico from safeguard measures under certain pre-specified conditions. Since these conditions existed with regard to the line pipe safeguard, the United States excluded Canada and Mexico.

25. The Panel also asked that the United States indicate the basis for its belief that NAFTA complies with the requirements of Article XXIV. NAFTA provided for the elimination within ten years of all duties on 97 per cent of the Parties' tariff lines, representing more than 99 per cent of the trade among them in terms of volume. This is the basis for our belief that, wherever the threshold established under Article XXIV:8 for elimination of duties on substantially all trade, NAFTA exceeds that threshold.

26. With regard to eliminating other restrictive regulations of commerce, NAFTA applies the principles of national treatment, transparency, and a variety of other market access rules to trade among the Parties. The NAFTA Parties also eliminated the application of global safeguard measures yc06 se

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33. "Collective operating leverage" refers to the combined pattern of change in profitability reported by US line pipe producers. It is "collective" in that it reflects the operating leverages of all of the line pipe facilities that comprise the US line pipe industry. The statement on page II-26 of the Report was based solely on the observation that line pipe profitability in 1997 increased at a faster rate than the increase in sales of line pipe. The Report also noted that in 1998, line pipe profitability declined at a faster rate than the decline in sales revenues; that is, operating leverage works in both directions. The term "collective" was chosen because, while costs structures are unique to each company, when combined the financial results indicate that operating leverage was present. Using the term "collective" also was intended to indicate to the reader that, individually, the level of operating leverage would differ from company to company.

34. The Panel asks why the relevant section of the Report begins with the observation (on p. II-25 of the Report) that line pipe producers make other pipe products (in the same facilities where line pipe is produced). This observation that companies generally produced other products was intended to provide additional background. The subsequent narrative and financial tables referred exclusively to line pipe. The statement regarding collective operating leverage (at the end of the section) was referring specifically to line pipe, not to line pipe and other products produced in the same facilities. This is clear if one considers the text of the Report on p. II-26 that immediately follows the reference to "collective operating leverage." The remainder of that paragraph gives examples of collective operating leverage, which are taken *exclusively* from the financial data in Table 9 on p. II-27, which is limited to the results of operations on welded line pipe.

35. With regard to the last part of the Panel's question, the statement regarding "collective operating leverage" was based on the observation that line pipe profitability increased and decreased more than proportionately as compared to changes in revenue. The presence of operating leverage is clearly demonstrated by this pattern and is not contingent, or even related to, the initial observation that other products are produced in the same facilities.

Q6. Why did the ITC "specifically address[] Korea's arguments that low production quantities and sales of OCTG distorted the profitability data on the line pipe industry" by checking allocation methodologies, if "Korea's argument with respect to the domestic industry's profitability data rests entirely on a faulty premise"? Why didn't the ITC specifically address Korea's arguments by pointing out this faulty premise, rather than referring to allocation methodologies?

Reply

36. The discussion of allocation methodologies in the USITC Report and the observation in the US written submission that Korea relied on a faulty premise were responses to two different, albeit related, assertions. In paragraph 95 of our first written submission, we were addressing the USITC's consideration of arguments raised by the Korean respondents to the *USITC during the injury investigation.* Those respondents had argued that "factory overhead and SG&A were allocated based on declining production for all products, including OCTG and seamless," and that "these increased allocated costs have reduced the profits for the welded pipe industry". Respondents cautioned that "the difficulties resulting from declining production of other products, however, must not be attributed to the declines in welded pipe production".[13] The USITC considered this argument and explained that it was not misattributing difficulties resulting from production of other products, since the increases in per-unit allocated overhead and SG&A resulting from declines in the production of other products were not mistakenly or disproportionately attributed to line pipe.[14]

[13] Japanese and Korean respondents' prehearing brief, dated September 24, 1999, at 49 (US Exhibit 31).

[14] USITC Report, p. I-31.

37. In paragraph 96 of our first written submission, we were addressing a related argument made by Korea raised *in this dispute*. That is, Korea has argued to the Panel that OTGC shipments fell disproportionately to shipments of line pipe and therefore that a disproportionate share of fixed costs were attributed to line pipe. In support of this statement, Korea relied solely on a statement by Commissioner Crawford in her dissenting views, which, as we demonstrated in our written submission, misread AISI data presented in USITC staff memorandum INV-W-247 (US Exhibit -3). In fact, those data showed the line pipe and OCTG shipments declined at similar times and to similar degrees. Therefore, Korea's argument that a disportionate share of costs was attributed to line pipe was based on the faulty premise that OCTG shipments fell disproportionately to line pipe shipments.

Q7. Were Geneva Steel's line pipe production facilities also used to produce non-pipe products? Please explain.

Reply

38. There is no information on the record which directly addresses this question. However, the record suggests that most, if not all, of Geneva's line pipe production facilities were not used to produce non-pipe products.

39. A Geneva Steel executive testified at the USITC injury hearing that the company has three main finished products: cut-to-length plate, hot-rolled sheet, and line pipe. Geneva does not produce any tubular products other than line pipe. The USITC Report (at p. II-7) describes the manufacturing process for welded line pipe. Most of the manufacturing equipment described (the tube mill, welding equipment, a tool to remove the outside flash resulting from the pressure during welding, and sizing rolls to shape the tube to accurate diameters) would appear to be used only for line pipe production. The only equipment which might *theoretically* have been used by Geneva to produce its other products are the cutting tools and heat treatment machinery.

Q8. What impact did the charge booked for the closure of Geneva Steel's blast furnace have on industry operating income, both in absolute terms and relative to net sal0wn its otherabspute products ar pipe-r pipe products.Q8.-

Reply

41. We note that the Geneva executive, like all witnesses at USITC hearing, testified under oath. US law provides for criminal penalties for those who testify untruthfully in these circumstances, and witnesses before the ITC are made aware of these penalties. We are not aware that the Geneva executive provided documentation to support his testimony. Witnesses are not required to do so; as we have noted they testify to the ITC under oath. Information on how much of Geneva Steel's hot-rolled steel production was used to make line pipe is not in the record.

D. UNFORESEEN DEVELOPMENTS

Q10. In US - Lamb Meat, the Appellate Body found that "as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, 'in order for a safeguard measure to be applied' consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made before the safeguard measure is applied." Please indicate where the United States made the required demonstration of unforeseen developments. Please provide any supporting documentation, and give specific references.

Reply

42. As the United States pointed out in its first written statement, Korea has conceded that certain conditions leading up to the increase in imports were unexpected. (para. 230) Therefore, it has not made a *prima facie* case of action inconsistent with the unforeseen developments text in Article XIX. Under *Japan – Varietals*, a panel is not permitted to construct a claim that Korea has failed to make.[15]

E. THE NATURE OF THE MEASURE /GATT ARTICLE XIII

Q11. With reference to para. 204 of the United States' first written submission, does the United States consider that GATT Article XIII does not "relate to" the application of safeguard measures? Please explain.

Reply

43. The question refers to the US quotation of language from *Argentina – Footwear*, in which the Appellate Body found that Article XIX "relate[s] to the same thing" as the Safeguards Agreement, "namely application by Members of safeguard measures". The Appellate Body based this conclusion on the numerous references to Article XIX in the Safeguards Agreement. There are no such references to Article XIII. Moreover, as we have pointed out, the Safeguards Agreement adopts certain provisions of Article XIII, but not the others. Therefore, the remaining provisions of Article XIII do not "relate to" application of a safeguard measure in the sense used by the Appellate Body in

> allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

This sentence was not incorporated into Article 5.2(a) of the Safeguards Agreement, even though the preceding two sentences of Article XIII:2(d) were incorporated verbatim.

45. In accordance with our analysis of the other provisions of Article XIII, the fact that the Safeguards Agreement incorporates the first two sentences of Article XIII:2(d), but not the last sentence, indicates that the last sentence does not apply to safeguard measures. However, the omission of that sentence does not leave Members free to prevent other Members from fully using their share of a safeguard quota. If a Member imposes a safeguard quota and applies it at a level necessary to prevent or remedy serious injury and to facilitate adjustment, any additional conditions or formalities it applies to limit the use of the quota would likely result in application of the measure beyond the extent necessary. Therefore, a measure prohibited by the last sentence of Article XIII:2(d) would likely also be prohibited by Article 5.1.

46. Although it is always hazardous to attempt to ascertain the intent of the negotiators from the written text, this analysis suggests that the last sentence of Article XIII:2(d) may have been excluded from Article 5.2(a) because it was redundant. With Article 5.1 already prohibiting application of a safeguard measure beyond the extent necessary, there is no need for an additional prohibition on the application of conditions or formalities that would prevent full use of the quota.

Q12. At para. 193 of its first written submission, the United States submits that "[i]f TRQs were by their very nature 'quantitative restrictions' or 'quotas,' the tariff quota language in Article XIII would be superfluous". Does the United States consider that "export restrictions" within the meaning of GATT Article XIII:5 are "prohibition[s] or restriction[s] ¼ on the exportation of any product" within the meaning of Article XIII:1? Please explain. If they are, is the reference to "export restrictions" in Article XIII:5 superfluous? Please explain.

Reply

47. Yes, export restrictions are prohibitions or restrictions on the exportation of a product within the meaning of Art. XIII:1. However, the reference to “export restrictions” in Article XIII:5 is not superfluous. Article XIII contains other provisions in addition to paragraph 1. Paragraphs 2, 3, and 4 by their terms apply only to import restrictions. Thus, the reference in paragraph 5 to “export restrictions” was necessary if the “principles” of these additional paragraphs were to “extend” to export restrictions. We refer the Panel to our answers to questions 2 (a) and (b) for further discussion of this issue.

IV. ADDITIONAL QUESTIONS POSED ORALLY BY THE PANEL AT THE SECOND SUBSTANTIVE MEETING

The Panel asked for confirmation of whether the Japanese respondents indicated that there were no exports of Arctic-grade line pipe to the United States in interim 1999.

48. As explained at the Panel’s second meeting, the Japanese respondents were asked to provide information concerning exports of Arctic-grade and alloy line pipe during the USITC’s period of investigation. These respondents provided information on exports of alloy line pipe in 1999, but did not provide information on exports of Arctic-grade line pipe. From this, it can be inferred that there were tten submission, the United States su1rom ATj 0 y alsase ep Tw (48.)rt restTING

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additional data of the type collected in questionnaire responses. Thus, a public version of the letter was not filed with the USITC.

The Panel asked how the USITC instructed US line pipe producers to report their production capacity.

49. A blank copy of the USITC's questionnaire to US line pipe producers is attached as US Exhibit - 32. The producers were asked (on p. 6, Question II-10) to report their "average production capability" for each full year of the period investigated and for the two interim periods. "Average production capability" is defined (on p. 6 of the General Information section of the questionnaire). The producers were asked (on p. 4, Question II-4) whether they produced other products using the same equipment and machinery used to produce line pipe; and, if so, to explain their basis for allocating capacity data.

The Panel asked whether the USITC questionnaires were sent to purchasers of line pipe before the issue of the extent to which dual-stenciled line pipe from Korea was sold for standard pipe applications was raised. The Panel also asked how the USITC identified purchasers who were to receive questionnaires. Finally, the Panel asked whether these purchasers were distributors or end-users of line pipe.

50. It is correct that the USITC sent questionnaires to purchasers of line pipe well before the "dual-stenciled" issue was raised. The petition leading to the USITC's investigation was filed on 30 June 1999. Questionnaires were sent to purchasers on 2 August 1999, with a request that responses be submitted by 19 August 1999. The "dual-stenciled" issue appears first to have been raised by Korean respondents on 24 September 1999, in their pre-hearing brief to the USITC.

51. Prior to sending out questionnaires, the USITC staff contacted petitioners and all known importers. The USITC requested that petitioners collectively identify (through counsel) their top 25 customers and that each known importer identify its top ten customers. The USITC sent purchaser questionnaires to each purchaser as identified. As is standard in most investigations, the producer and importer questionnaires also asked these firms to identify their top customers. In this investigation, USITC staff reviewed the responses to those questions to confirm its previous identification of the main purchasers.

52. The USITC received responses from 40 identified purchasers of line pipe, 31 of whichne pipe.

54. Korea originally raised these three arguments in reference only to the findings of the Commissioners who found serious injury.[17] In its second oral statement, the United States refuted Korea's arguments as originally raised. However, the US statement on these issues applies equally to the findings of the Commissioners who found threat.

55. With respect to the two new producers, our reference to information contained in the USITC staff report would have been considered by all Commissioners. The threat Commissioners as well as the serious injury Commissioners found that capital investments in the line pipe industry involve long-lead times. (Serious injury: Report at I-20, n.122; threat Commissioners at I-42.) Also, the threat Commissioners recognized the added industrywide production capacity that resulted from the addition of these producers; but they found that there was a significant decline in capacity utilization irrespective of the added capacity.[18]

56. As to the price increase announcements, the threat Commissioners specifically noted that any such price increases were to have taken effect contemporaneously with the imposition of antidumping duties or effective dates of suspension agreements covering hot-rolled steel. They stated that they were persuaded that, to the extent any such announced price increases may have "stuck" in the marketplace, they are attributable in significant part to anticipated increases in raw material costs.[19]

It is not clear whether the United States considers the competent authorities' determination to be one finding serious injury or one finding "serious injury or threat".

57. As the United States explained in its first written submission (paragraphs 53, 56, 57), the findings and conclusions of the five Commissioners who reached affirmative determination constitute the determination of the competent authority under Article 4 that "increased imports have caused or are threatening to cause serious injury to a domestic industry." The determination is an affirmative determination for the purposes of both US law and the WTO Safeguards Agreement. We previously advised the Panel that the SGA only distinguishes between threat and present injury for a single narrow definitional purpose, that is not relevant here. There is no requirement under either SGA (or US law) to characterize the determination as primarily present serious injury or primarily threat of serious injury, as long as the Commissioners reaching an affirmative determination properly evaluated the relevant Article 4.2 factors and explained their findings and reasoned conclusions in accordance with Articles 3.1 and Articles 4.2(c).

The Panel asked for an explanation of how US law distinguishes between the "determination of the Commission" and "separate views".

58. 58.

59.

Thus, in referring to *separate* views, subparagraph (e)(6) cross-references to subparagraph (f)(2)(C). These are the only two references in the statute to *separate* views. This suggests that *separate* views as used in subparagraph (f)(2)(C) refers to *views* on remedy.

62. While the two commissioners who reached their affirmative determination in *Line Pipe* on the basis of threat of serious injury labeled their explanation as *Separate Views*, those views form part of the basis for the USITC's affirmative determination.[22] They are not "separate views" as that term is used in Section 202(f)(2)(C). In fact, other related statutory provisions further demonstrate that the findings and conclusions contained in the Views of Chairman Bragg and Commissioner Askey form part of the basis for the USITC's affirmative determination on the question of serious injury or threat thereof.

63. Section 330 (d)(1) of the Tariff Act of 1930, as amended, provides that, if the commissioners voting on the serious injury question in a safeguards investigation "are *equally divided* with respect to that determination, then the determination agreed upon by *either*86he basiypeairmanation on thesy 27ermi22s affi6 T